

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

**by**

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## 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.**

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**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.

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## 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.

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*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

## CHAPTER 1

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## 1.1 Introduction

Over the past years, Africa has increasingly been in the international news, be it in relation to poverty, incessant outbreak of wars, ineptitude of its leaders, corruption, or failure to develop in spite of the vast natural resources and manpower with which the continent is endowed. These different issues have become serious challenges on the continent, and they are directly related to the absence of good governance or even failure of adequate governance in Africa. This failure has been brought about by many factors including the imposition of foreign systems through colonisation; poor capacities in governance; diverse and arbitrary divisions across the continent, including ethnic and religious divisions; inequitable wealth distribution and colonially demarcated borders, to name but a few. These realities are further exacerbated by the weakness of the law its lack of authenticity as a tool to order, guide and encourage development; the absence of effective and democratic institutions; and the lack of vision to produce an environment conducive for growth and nation building. The failure of the law in Africa is thus very germane to the various challenges enumerated above.

There have been many ‘attempts’ to bring the continent out of the spiral of current problems. These are evidenced in the various developmental programs that have been designed and launched since the eighties. Some of these have failed outright, while others have achieved less than was projected. One of the factors identified by this thesis for the continued challenges in Africa is the difficulty in establishing the rule of law on the continent. This can be linked to a number of factors, including the fact that in many instances, the law that is established and being enforced is foreign to Africa, resulting in poor understanding and low credibility.

The rule of law is very important in understanding and solving Africa’s problems, however it currently holds a very tenuous position in Africa. This thesis seeks to explore the factors that have affected and contributed to the current state of the rule of law in Africa. This exploration will be carried out in respect of two countries on the continent, Nigeria and South Africa, with special attention paid to the development of the constitutions of these countries. This is in recognition of the fact that the constitution is the foundation of the law in any country. Issues

relating to the entrenchment (or otherwise) of the rule of law, and existing problems will thus be addressed.

## 1.2 Rule of Law: Meaning and Interpretation

The phrase ‘rule of law’ originated as a theoretical concept developed and debated by philosophers and legal theorists. At the same time, the phrase is a legal concept used by lawyers and judges. The meaning of this concept should be informed by both moral and legal theorists who investigate the abstract moral and political aspirations embodied in the ‘rule of law’, and by legal practitioners who transform these aspirations into legal reality. However, as many theorists discussing the rule of law have realised, the rule of law is not simply a set of mechanical rules to be followed. It is rather a set of loose, vague and indeterminate principles, which require interpretation in light of the values which the rule of law is designed to realise. Lon Fuller in his book, *The Morality of Law*, has imaginatively articulated this point by stating that the rule of law “is condemned to remain largely a morality of aspiration and not of duty”.<sup>1</sup> It is hoped that this aspiration will be something that will be embraced and achieved by Africa, African countries and Africans in general.

The phrase ‘rule of law’ has been interpreted generally to mean many things to many people.<sup>2</sup> Regrettably, the extent of these varied definitions has often resulted

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<sup>1</sup> Fuller LL (1964) *The Morality of Law* 41. In this work, Fuller identified eight elements which are necessary for a society aspiring to institute the rule of law. These are: laws must exist and should be obeyed by all including government officials; laws must be published; laws must be prospective in nature; laws should be written with reasonable clarity; laws must avoid contradictions; laws must not command the impossible; laws must stay constant through time, and official action should be consistent with the declared rule of law.

<sup>2</sup> See, Peerenboom R ‘The Future of Rule of Law: Challenges and Prospects for the Field’ (2009) 1 *HJRL* 5-14 at 7, who explains that as the field has expanded, so have the definitions of rule of law expanded. He points out that many definitions, in circular fashion build into rule of law the ends which it is meant to achieve, such as the protection of property rights, law crime rates, and even democracy and civil and political rights. Other commentaries on the meaning of rule of law include; Kairys D ‘Searching for the Rule of Law’ (2003) 36(2) *Suffolk U. L. Rev.* 307, wherein the author refers to a huge range of formulations and meanings for the rule of law in legal, historical, academic and popular usages; Fukuyama F ‘Transitions to the Rule of Law’ (2010) 21(1) *Journal of Democracy* 33-44; Skaaning Sven-Erik ‘Measuring the Rule of Law’ (2009) *Political Research Quarterly* 449- 460 at 451-453; Bedner A ‘An Elementary Approach to the Rule of Law’ (2010)2 *HJRL* 48-74.

in a situation where it becomes stripped of all meaning.<sup>3</sup> Whilst this is the case, the generality of the term is seen as one of the main reasons why it has lasted through the decades. Law in itself has been said to be ‘a body of rules of justice that bind a community together’,<sup>4</sup> whilst the term ‘rule of law’ has been described as a ‘rare and protean principle of our political tradition, which has withstood the ravages of constitutional time and remains a contemporary clarion-call to political justice’.<sup>5</sup> There were originally two meanings attributed to the term, one by Aristotle and the other centuries later by Montesquieu. Aristotle saw the rule of law as referring to the rule of reason, covering an entire way of life, while for Montesquieu, the term referred to the institutional restraints that prevented governmental agents from oppressing the rest of the society.<sup>6</sup>

What can be described as the most influential restatement and the *locus classicus* of the interpretation of the phrase ‘rule of law’ is found in Andrew Venn Dicey’s *Introduction to the Study of the Law of the Constitution*, published in 1885.<sup>7</sup> Dicey describes the rule of law as a ‘feature’ of the political institutions of England. He does not exactly define the phrase, but formulates it based on four major tenets.

- 1) The first of these tenets is ‘that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land’. The ‘rule of law’ means, in this case, that one cannot be punished except, as the laws prescribe, not according to the whims and caprices of those in power.
- 2) The second tenet of ‘rule of law’ according to Dicey is that ‘everyman, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’. Our rulers and

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<sup>3</sup> Kairys (2003) 36(2) *Suffolk U. L. Rev.* 307 at 318-319.

<sup>4</sup> Fukuyama (2010) 21(1) *Journal of Democracy* 33 at 34.

<sup>5</sup> Hutchinson AC & Monahan P (1987) *The Rule of Law: Ideal or Ideology* ix.

<sup>6</sup> See Shklar JN ‘Political Theory and The Rule of Law’ in Hutchinson & Monahan 1-2, for a brief explanation of what these two different meanings entail.

<sup>7</sup> Dicey AV (1996) (8<sup>th</sup> ed) *Introduction to the Study of the Law of the Constitution*. This book has been reprinted many times over the years. In this book, Dicey considered three principles which pervade the constitution of England. It aimed to provide a manual for understanding the constitutional law of England. His principles, in particular on the *Rule of Law*, have now been used world-wide to enunciate what is meant by the term.

bettors in other words, are just as liable to the same punishments, for the same offences, as we are.

- 3) The third tenet is that of the ‘subjection of all classes to one law’.
- 4) The fourth tenet he espoused is that ‘the constitution is the result of the ordinary law of the land’.<sup>8</sup>

Thus, according to Dicey, our rights derive from everyday legal decisions of ordinary criminal and civil law, not from some ringing declaration of rights enshrined in a central constitutional document, which is regarded as founding the ordinary law of the land.<sup>9</sup> Though there have been many criticisms of Dicey’s formulation, it however still represents some of the fundamental principles of the rule of law.

The term ‘rule of law’ also refers to a diversity of practices. From these, two functions have been enunciated for the term. First, in its most basic form, it refers to rule by law rather than force. Agents of the state must act according to law. The contrast with force leads to a second definition, which focuses on the obedience of subjects to the law, or the suppression of lawlessness; it acts as a protection of citizens from infringements or assaults by fellow citizens.<sup>10</sup> This ‘law and order’ definition is often used to justify absolute obedience to the state and the limitless authority of the state to eliminate disobedience.

At their most basic, the terms; ‘rule of law’, ‘due process’, ‘procedural justice’, ‘legal formality’, ‘procedural rationality’, and ‘justice as regularity’ all refer to the idea that law should meet certain procedural requirements so that the individual is enabled to obey it.<sup>11</sup> It is trite that where law is faithfully observed, the rule of law exists, and societies that live under the rule of law enjoy great benefits by comparison with those that do not. The rule of law is a possible condition to be achieved under human governments, and it is important to note that its achievement adds values to the society. Perhaps the most important among the numerous values that it can secure are: legal certainty, security of legal

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Bedner (2010) 2 *HJRL* 48 at 50-51.

<sup>11</sup> ‘Law and Ideology’, Stanford Encyclopedia of Philosophy, accessed at <http://www.illc.uva.nl/~seop/entries/law-ideology/> (accessed 30 October 2010).

expectations and safety of the citizen from arbitrary interference by governments and government agents.

It is said that

‘Where the rule of law exists, people can have reasonable certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions. They can have reasonable security in their expectations of the conduct of others, and in particular of those holding official positions under law. They can challenge governmental actions that affect their interest by demanding a clear legal warrant for official action, or nullification of unwarrantable acts through review by an independent judiciary. This is possible, it is often said, provided there is a legal system composed principally of quite clearly enunciated rules that normally operate only in a prospective manner. These rules must be expressed in terms of general categories, not particular commands to individuals or small groups singled out for special attention. The rules should set realistically achievable requirements for conduct, and should form some coherent pattern, not chaos of arbitrarily conflicting demands’.<sup>12</sup>

Various classifications have been provided to the rule of law in order to aid understanding. One such classification is the distinction between ‘formal and ‘substantive’ conceptions of the rule of law.<sup>13</sup> The ‘formal’ conception of the rule of law is used to refer to the law seen in its formal terms, that is the law as it exists, the way in which the law was passed, promulgated (by properly authorised persons in a properly authorised manner), clarity of the ensuing norm, and its ability to order the conduct of individuals (within the state, society... as the case may be), in order to give certainty (this is necessary in order to remove the possibility of notorious or reprehensible laws meeting the requirements).<sup>14</sup> Matshiqi explains formal definitions of the rule of law as dealing with specific observable criteria of

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<sup>12</sup> McCormick N ‘Rhetoric and the Rule of Law’ in Dyzenhaus D (1999) *Recrafting the Rule of Law: The Limits of Legal Order* 163 at 165.

<sup>13</sup> Craig P ‘Formal and Substantive Conceptions of the Rule of Law’ (1997) *Public Law* 467.

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



the law or the legal system.<sup>15</sup> According to him, common criteria would include traditional, independent and impartial judiciary; laws that are public; absence of retroactive laws and provisions for the judicial review of government action.<sup>16</sup>

The ‘substantive’ conception of the rule of law on the other hand takes this definition further by applying it to notions of justice, fairness, democracy, equality (before the law and otherwise), human rights of any kind or respect for persons or for the dignity of man. Within this conception, the phrase also extends to the existence of an independent, vibrant and bold judiciary and other legal, law and order structures aimed at protecting the rights of individuals.<sup>17</sup>

A different definition sees formal conceptions as being concerned with law as an instrument and a basis of government, but being silent on what the law should regulate, while the substantive conceptions set the standards to the contents of a norm which should be morally justified.<sup>18</sup> Yet another classification divides the rule of law definitions to ‘thin’ (restricted) and ‘thick’ (elaborate) definitions.<sup>19</sup>

### 1.2.1 Context of the use of ‘rule of law’

In the light of all the many varying definitions of the term, it is important to explain what is inferred by the rule of law in this thesis. Kairys, investigating the applications or uses of the rule of law, distinguishes from these applications a series of characteristics or criteria that may be regarded as requirements of the rule of law.<sup>20</sup> These are seen to go from the least to the most significant. Two of the

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<sup>15</sup> Matshiqi A (2007) *Undamaged Reputations? Implications for the South African Criminal Justice System of the Allegations Against and Prosecution of Jacob Zuma* Criminal Justice Program of the Centre for the Study of Violence and Reconciliation (CSVVR). Matshiqi refers to a brief prepared for the World Bank by Matthew Stephenson of the Harvard University Dept of Government and Law School, in which Stephenson divided the dimensions of the rule of law into formal and substantive.

<sup>16</sup> *Ibid.*

<sup>17</sup> Craig (1997) *Public Law* 467.

<sup>18</sup> Bedner (2010) 2 *HJRL* 48 at 54.

<sup>19</sup> *Ibid.*, 54-55 for a brief summary of thin and thick definitions of rule of law; see also the explanation given on these definitions in Hutchinson A ‘The Rule of Law Revisited: Democracy and Courts’ in Dyzenhaus (ed) (1999) *Recrafting the Rule of Law: The Limits of Legal Order* 198-201.

<sup>20</sup> Kairys (2003) 36(2) *Suffolk U. L. Rev.* 307 at 311, where he refers to the use of the phrase to denote justice, legitimacy of laws and the processes by which laws are arrived at, as democratic procedure for law-making.

more significant requirements he lists are that ‘the rules should be legitimately arrived at by an established process’, and ‘such process should be democratic’.<sup>21</sup>

In this work, as a point of departure, reference to the rule of law would imply the way and manner in which the law is made; the law-making process, how inclusive such a process is, and how the law is construed by the populace (does it reflect the values, norms and mores of the society?). These would give an indication of how legitimate the process is. Thus, the extent of genuine societal participation in law-making, the extent to which the outcome of the process of participation captures and reflects the input of the people, would indicate how legitimate the process is. Put in another way, participation by the people (society) would be reflected in the consent given to the laws that are made. By extension, such consent would translate into the weight given to the operation of the current laws in Africa. This position was stated by Claude early in the 1960’s when he stated that ‘popular consent’ is broadly acknowledged as the legitimising principle in contemporary political life.<sup>22</sup>

Given that the majority of African states currently adopt a constitutional form of government, this research would focus on the constitution as the embodiment of the law of in a country. The importance of the constitution to the rule of law in a country cannot be underestimated, as the constitution serves as the starting point, the foundation of law in any country. It ideally serves as a symbol or an epitome of a social consensus on rules of justice. The constitution-making process is therefore very critical to entrenching the rule of law in the country. This would be critically examined in order to unearth the legitimacy of the processes. This position echoes Shivute when he says,

‘Maintenance of the rule of law is extremely important because it is the bedrock on which democracy and democratic practice are anchored. Constitutionalism is said to be a sharp instrument for ensuring the maintenance of respect for the rule of law.’<sup>23</sup>

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<sup>21</sup> Kairys (2003) 36(2) *Suffolk U. L. Rev.* 307 at 312.

<sup>22</sup> Claude I ‘Collective Legitimation as a Political Function of the United Nations’ (1966) 20. *International Organisation* 367 at 369.

<sup>23</sup> Shivute P ‘The Rule of Law in Sub-Saharan Africa – An Overview’ in Horn N & Bosi A (eds) (2009) *Human Rights and the Rule of Law in Namibia* 215.

Saunders and Le Roy, while acknowledging that the rule of law is inextricably linked to constitutionalism, express the opinion that ‘the rule of law requires compliance with the Constitution and the Constitution itself protects democratic and human rights standards’.<sup>24</sup>

This thesis will not adopt the now common system of measuring the presence of the rule of law through the presence of structures of an independent and impartial judiciary, functioning law enforcement arm of government, and others. This is thought to be highly restrictive, as these institutions cannot exist by themselves; their survival and independence as the case may be, is based on the existence of a legitimate constitution, which the society see as an expression of their hopes and aspirations, and therefore as inherently binding on them, and to which they repose their allegiance.<sup>25</sup>

### **1.3 Rule of Law in Africa**

One of the issues that this thesis seeks to explore is the reason for the perennial difficulties that Africa has faced in its attempts at development. These difficulties are especially evident in the lawlessness that has characterised post-independent Africa. As indicated above, poverty, wars, unconstitutional changes in government, inter-ethnic and religious conflicts have been the bane of African countries since independence. The continent seems not to have been able to function on its own after the formal independence granted by the colonial powers. This is ironical because Africans existed and governed themselves prior to the advent of the colonial government (even if in their groups and settlements). A pertinent question that needs to be asked is what makes the situation in Africa the way it is? Is it really due to the influence of the colonialism as some have posited,<sup>26</sup> or is there a fundamental, structural (or otherwise) problem that can explain Africa’s false starts?

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<sup>24</sup> Saunders C & Le Roy K “Perspectives on the Rule of Law’ in Saunders & Le Roy (eds) (2003) *The Rule of Law* 10-11.

<sup>25</sup> By virtue of the process through which such constitutions were made.

<sup>26</sup> Collier P & Gunning JW ‘Why has Africa Grown Slowly?’ (1999) 13(3) *Journal of Economic Perspectives* 3-22. These authors indicate in their article the different possible explanations for the question of Africa’s slow growth rate. Amongst these, the impact of colonialism on trade,

Further questions to be asked are: why is it so difficult for the law to prevent and avoid these problems? Is the law efficacious? Can law really be seen as an instrument of order? What is the place of law and what is its binding nature? Is obedience to the law automatic or coerced? These can be extended to question why Africans behave the way they do. In this context, former Chief Justice of South Africa, Ismail Mahomed observes as follows:

‘... to survive meaningfully, the values of the constitution and the rule of law must be emotionally internalised within the psyche of citizens. The active participation of the organs of civil society outside of the constitution in the articulation and dissemination of these values is a logistical necessity for the survival and perpetuation of the rule of law. Without it, the law and the ruler become alienated from the ruled...’<sup>27</sup>

The conventional answer to this question has been that the law has an autonomous causal efficacy. People obey the law because it is the law; actions follow prior norms.<sup>28</sup> This view is now being contested by arguments that law cannot be treated as an exogenous constraint on actions.<sup>29</sup> This in fact means that for law to be law, it should emanate from something internal to the society, to the people. It should have elements of the values and norms of the society in order to be viewed and acknowledged by the society as having the effect of law on them. In some situations, the actions that individuals want and do undertake are stable and predictable even if they do not implement any antecedent laws.<sup>30</sup> The situation in Africa is that the law as it exists is an offshoot of foreign law. Africa as a continent is peculiar, having a set of values, norms and cultures, different to those of other continents. This interprets to the need for the law on the continent to meet and address the needs and issues of the peoples. People would obey the law when they feel that the law speaks to them in person. That is, when they feel that it takes cognisance of their values and norms and it is not foreign or imposed, but rather one that they can identify with. As stated by Fukuyama:

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economy, and growth are mentioned. Particularly, the way in which Africa was micro-divided into small states with very small economies is said to impact on growth and development.

<sup>27</sup> Mahomed Ismail at a conference on ‘The Rule of Law and its Constitutional Organs’ held in Windhoek on the 2<sup>nd</sup> of October 1994, quoted in Horn & Bosi, *supra*.

<sup>28</sup> Przeworski A & Maravall JM (eds) (2003) *Democracy and the Rule of Law* 1.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

‘One of the great problems with trying to import modern western legal systems into societies where they did not exist previously, in fact is the lack of correspondence between the imported law and the society’s existing social norms. ... if the gap between the law and lived values are too large, the rule of law itself will not take hold.’<sup>31</sup>

This view might be a possible explanation to the slow and sometime retrogressive pace of development on the continent.

The issue of Africa’s development has been a longstanding and much talked about issue. The continent has been subjected to slavery, slave trade, colonialism and neo-colonialism and oppression by forces from outside and within. Even after colonialism, Africa continued to struggle under the yoke of poverty, disease, wars, military dictatorship, lack of skilled labour and other ills. The continent has suffered decades of misguided development and political policies which have failed dismally. The failure of several development policies or strategies (whether due to the insincerity of the west, or the lack of commitment on the part of African leaders to their implementation), have helped push the continent into a state of crises and deadlock in terms of development and integration into the global community.

As a result of the low returns offered by exports of raw materials and cheap labour (Africa's main interaction with the global economy); the failed policies such as the Structural Adjustment Programs (SAPS); the ‘poverty trap’ created by the use of credit and development aid; poor governance and persistent conflicts, Africa now finds itself far behind the rest of the world in terms of development.<sup>32</sup> According to the UNDP report on Africa in 2002 about half of the continent’s population (about 350 million people), subsisted on less than \$1 a day.<sup>33</sup> Furthermore, Africa is technologically far behind the rest of the world. One example illustrates this

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<sup>31</sup> Fukuyama (2010) 21(1) *Journal of Democracy* 33.

<sup>32</sup> International Peace Academy (IPA) joint report delivered by the permanent missions of Algeria, Nigeria, Egypt, Senegal and South Africa, on 16 July 2002 in New York *NEPAD: African initiative, new partnership?*, at 5 [www.ipacademy.org/publications/publications.html](http://www.ipacademy.org/publications/publications.html) (first accessed on 16 August 2005).

<sup>33</sup> IPA Joint Report, *ibid*; see also UNDP Human Development Report (2002), *Deepening Democracy in a Fragmented World*, available at [http://hdr.undp.org/en/media/HDR\\_2002\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2002_EN_Complete.pdf) (accessed on 28 October 2010).

point: as at 2002, Africa had about 18 telephones per 1,000 people, whereas the rest of the world had 146 telephones per 1,000 people.<sup>34</sup>

Africa's situation has been further worsened since independence by the incessant outbreak of wars and conflicts, which have had the protracted effect of further impoverishing the continent. A lot of the wars have been fought over the control of natural resources (which seems to have become the bane of the society). As a result of this, the continent finds itself now far behind the rest of the world in terms of development in every area. Many African states also suffer from deteriorating political, social and economic conditions in varying degrees. However, in the midst of all of these, one would identify a few countries that have been able to raise above the effects of colonialism and that have begun to prosper.<sup>35</sup>

According to Paul Collier of the 'Crimes of War Project, 'the abundant natural resource with which the continent is endowed, constitutes one of the main problems of Africa', and 'to date natural resources have largely been bad news for Africa'.<sup>36</sup> Most of the conflicts that have broken out on the continent have been as a result of disputes or dissatisfaction with the way and manner the income from natural resources where been managed. The challenge for both Africa and the international community is to change the political and economic governance of such resources so the continent does not continue in this spiral of conflicts and underdevelopment.<sup>37</sup> This is evident even in the case of Nigeria and South Africa, which both have large deposits of natural resources. These two countries serve as contrasts to the extent in which natural resources has been managed and its impact on development and rule of law within them. In Nigeria, the inability of successive leaders to manage and distribute the wealth from crude oil has impacted negatively on the country. In South Africa, the leaders (both pre- and post-apartheid) have managed to use wealth from natural resource to develop the economy and parts of the country. The country has not and is not likely to have an outbreak of war over natural resources because the rule of law endures there to a

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<sup>34</sup> IPA report, *ibid*.

<sup>35</sup> Countries like Botswana, Ghana, to name a few.

<sup>36</sup> Collier P (2004) 'Natural Resources and Conflict in Africa', Crimes of War Project website, at [http://www.crimesofwar.org/africa-mag/afr\\_04\\_collier.html](http://www.crimesofwar.org/africa-mag/afr_04_collier.html) (accessed on 27 August 2007).

<sup>37</sup> *ibid*.

better degree. However, concerns are now being raised about recent calls by the ANC Youth League for the nationalisation of the mines.

Africa needs to have better scrutiny of government by the country's citizens.<sup>38</sup> This means that the citizens and the society need to go beyond being aware of governments' actions, but also need to monitor and question such actions. Scrutiny is a 'public good' that needs collective action – that is, if it is provided, the whole society benefits. Societies need 'collective action' to overcome the public goods problem, and because African societies are so highly diverse – more ethnically diverse than anywhere else in the world – they find it unusually difficult to supply public goods at the national level.<sup>39</sup> In an ethnically diverse society it is probably much easier to organise scrutiny at the local or regional level than at the national level. At the local level, ethnicity is likely to unite people in collective action, just as at the national level it is likely to divide them and frustrate collective action.<sup>40</sup>

For the fruits from natural resources to be transparently and fairly distributed to sub-national levels of government and ultimately to the people, serious public scrutiny needs to be in existence. Governments would have to be subjected to citizen scrutiny, in order to ensure accountability. The challenge is to get to the stage where rents from natural resources accruing at the national level are seen to be fairly distributed to the regions.<sup>41</sup> The first step to meeting this challenge is that the people must feel that they have a vested interest in the society, and must be ready to exercise that vested interest to ensure public scrutiny. In order to achieve this, there has to be a proper understanding, internalisation and compliance with the rule of law across the continent.

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> This is a possible suggestion but as will be seen in the case of Nigeria, even though there is a level of transparency in the distribution of wealth accruing from at national level amongst the states, this has not solved the problem.

### 1.3.1 Recent attempts to address Africa's problems

Many African states have been plagued by social, political and economic instability and deterioration in the past, and concrete steps are now being taken by a significant number of African leaders to change the situation. This indicates the growing political will amongst Africans and their leaders to bring about change. Specifically, the appearance of more democratic regimes in Africa since the 1990s has created political space for, and given voice to civil society groups and Africans in general to seek more effective policies from their leaders.<sup>42</sup>

Furthermore, the transformation of the Organisation of African Unity (OAU) to the African Union (AU) at its summit in Durban, South Africa, in July 2002, and the seeming determination of the new organisation to address instances of political instability, has the potential to re-ignite a new spirit of regional cooperation.<sup>43</sup> Africa's sub-regional organisations such as the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the Inter-governmental Authority on Development (IGAD), and the East African Community (EAC) are also attempting to strengthen their capacity to manage their own conflicts and to establish criteria for promoting 'good governance'.

Another concrete step is the New Partnership for Africa's Development (NEPAD).<sup>44</sup> This initiative builds on several existing regional and continental efforts. It is premised on the need for improved democratic, political, economic and corporate governance, and an end to conflict as preconditions for sustainable economic growth. Amongst the priority sectors of NEPAD is Governance and Capacity Development, which attempts to codify the core values that African leaders will observe, and to engender the necessary political will to adhere to such norms and values. The initiative sets out to empower African civil society groups to hold their governments accountable.<sup>45</sup> African governments will be expected to adhere to principles of constitutional democracy, the rule of law, the separation of

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<sup>42</sup> IPA joint report, *ibid*.

<sup>43</sup> *ibid*.

<sup>44</sup> Declaration 1 (XXXVII) of the 37<sup>th</sup> OAU Summit in Lusaka in 2001, formally adopted the NEPAD Strategic Framework as a program of the OAU. This was an initiative of five Heads of State, namely Algeria, Egypt, Nigeria, Senegal and South Africa.

<sup>45</sup> IPA joint report, *ibid*.



powers, and the independence of the judiciary. NEPAD promotes political representation and periodic democratic changes of leadership in line with the principle that leaders are subject to fixed terms in office. It promotes impartial, transparent, and credible electoral administration and oversight systems; it seeks to curb corruption and to ensure more efficient civil services.

An offshoot of the NEPAD initiative, which has developed and gained momentum on the continent, is the African Peer Review Mechanism (APRM). This is a voluntary self-monitoring review process whereby member states carry out a self-evaluation of their progress in terms of certain key areas.<sup>46</sup> This initiative will be discussed in subsequent chapters in this thesis.

However, in so far as there is much good in these initiatives, there has to be a commitment on the part of Africans in general, both leaders and others, to adhere to the guiding principles on which this initiative and any other developmental drive are built. What brings about this commitment? What makes it a goal of all Africans? This research will attempt to examine all of these issues in the context of the rule of law and how the rule of law or its lack, impact on Africans; not limiting it to the legalistic term ‘law’ as it is often perceived, but looking at the way and manner the law is perceived by the people, and what brings about compliance.

There seems to be something missing in the way Africans interact with the law. There seems to be a lack of a sense of ownership, an allegiance, a compulsion to obey and honour the sanctity of the law. This is seen generally, across the continent, from the ‘road-side repairman’ (who does not persist in hard work, but wants to get ‘rich’ quick through less legal means) to the ‘public office holder’ (who sees office as an opportunity to enrich himself, rather than service to the people). There seems to be a general nature of self-service, self-aggrandizement all across the continent (of course with exceptions).

This way of life is further encouraged by the fact that the law often is not worth the paper it is written on, as it lacks any inherent value and has little enforcement capabilities. The fact that the concept of law and compliance with law seems not

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<sup>46</sup> This initiative would be discussed in more detail in this thesis.

to be owned and entrenched by societies at large further undermines its credibility. As a result we see the society often encouraging non-compliant behaviour by the acknowledgement and reverence with which it treats people who have broken the law or defrauded the state,<sup>47</sup> instead of denouncing the negative behaviour and serving as an institution of scrutiny. Of course this exists in varying degrees all across the continent, but nevertheless remains a continental phenomenon.

#### **1.4 Purpose of the Research: Problem Statement**

The purpose of this thesis is to investigate the development and current state of the rule of law in Africa and how this development has impacted on the state of affairs on the continent. It seeks to draw a nexus between the state of the rule of law and the challenges faced in entrenching the law within the countries. In particular, the question that this thesis seeks to examine is what effect the content of the law and the law-making system or procedure have on the state of affairs within African countries. For this purpose, Nigeria and South Africa will be used as case studies.

The thesis also seeks to examine issues concerning the legitimacy of the law-making processes and how such ‘legitimacy’ or ‘illegitimacy’ affects the populace and their behaviour. Finally, recommendations will be suggested as to what steps should be taken by the two subjects of the case study to ensure that there is a progressive growth and development of law that is recognised and accepted by all, and that such laws link to the values and ethos of the people.

#### **1.5 Scope or Context of Research**

It is necessary to point out that the rule of law in this thesis is based on the premise that the ‘rule of law’ denotes a democratic environment. The definition of law referred to earlier talks about justice, and as will be seen in the body of this work, the premise for the existence of the rule of law is based on ‘consent’ of the people or society. As it is almost impossible for a people/society to consent to draconian,

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<sup>47</sup> This is common in Nigeria and now in South Africa. Those who have been known to commit illegalities are encouraged by their parties and organisations, and even put in prominent positions without being forced to face the consequences of their actions.

dictatorial laws that will be imposed on them, it is the basis of this thesis that the term ‘rule of law’ relates to and would include a democracy.

As noted earlier, the fact that there seems to have been a failure of sorts in the process of internalising the law and the norms that make up the law in Africa, is no secret.<sup>48</sup> Across the continent, it would appear that laws (and even the most basic ones) are generally adhered to when there are sanctions attached and when there is the possibility of those sanctions being enforced, either against an individual, or a group. This thesis adopts a case-study approach, which is generally a very useful way of shedding light on complex social, political and economic issues. By selecting the two countries of Nigeria and South Africa, this study attempts to identify the different factors that have prevented (or alternatively, aided) the entrenchment of the rule of law.

These two countries have been selected for the case study because of certain similarities and the positions they both hold on the African continent. Though they have very different histories, and although their development has taken different trajectories, there are similarities that make them both stand on common ground. In terms of economics, Nigeria and South Africa hold key positions as economic power houses of Africa. They both have abundant natural resources that make them countries to be reckoned with internationally. Nigeria’s crude oil reserves<sup>49</sup> and South Africa’s mineral reserves have ensured that the two countries’ earnings on the international market far surpass those of any other African country.<sup>50</sup>

Both countries also have a history of British colonialisation which resulted in the introduction of British laws, rules and regulations into these countries. The existing informal legal systems were jettisoned for English law, as the colonial masters

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<sup>48</sup> Internalisation of the law in this context is a situation where the law is part and parcel of the individual, and is adhered to as such, not just because of the possibility of sanctions in the case of failure to adhere.

<sup>49</sup> As at January 2010, the *Oil and Gas Journal* estimated Nigeria’s proven oil reserves at 37.2 billion barrels. In 2009, the country produced slightly over 2.2 million bbl/d, making it the largest oil producer in Africa. This figure, however, has dropped significantly to approximately 1.6 million bbl/d due to the unrest of the Niger Delta and the vandalism by the militants. Nigeria earns about an average of \$2.2 billion monthly from crude oil exports, which was reduced to about \$1 billion with the activities in the Niger Delta.

<sup>50</sup> South Africa ranks as one of the world’s largest producers of minerals. It is the leading producer of gold, diamonds, platinum, and many others, from which the country earns averagely about R254, 062 million per month. See StatsOnline at [www.statssa.gov.za/keyindicators/keyindicators.asp](http://www.statssa.gov.za/keyindicators/keyindicators.asp) (accessed on the 24 August 2010).

opted to impose their rules on the indigenous populations they met in Africa. This meant that English law became the law that was binding and in force in these countries.<sup>51</sup> In the case of South Africa, it is recognised that apart from British law, there was also the influence of the Roman-Dutch legal system. The shared colonial history and the attendant English law content of the legal systems in both countries is another reason for the selection of the countries. This makes for a feasible comparative study of the rule of law in the two countries.

Another reason for the selection of both countries is the common English language. It is said that language is a very important tool of political domination. As was experienced in South Africa during the apartheid era, the language of the ‘oppressor’ was used as a weapon of manipulation, discrimination and domination.<sup>52</sup> English language is common to both Nigeria and South Africa. In Nigeria, the constitution recognises English as one of the languages for communication.<sup>53</sup> In South Africa, even though it is recognised as one of the official languages, most professional and formal communications and interactions are carried out in English.<sup>54</sup> English is a language that has been inherited from the west. To some it is the language of the oppressor, and the fact that it became the language of liberation and of the freedom fighters further buttresses the argument of those talking about the new dispensation of neo-colonialism.

A further basis for the comparative analysis of both countries is the co-operation between the two countries at the regional and international levels. During the apartheid years in South Africa, Nigeria had been very much involved at the regional and sub-continent levels in various programs and activities designed to help other African countries in need. Of particular importance here is the Nigerian involvement with the ECOWAS regional peacekeeping force (then known as

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<sup>51</sup> Chapter two of this thesis delves into the way and manner that British rule came and thrived on the continent.

<sup>52</sup> Whereby schools adopted ‘Afrikaans’ as the language of instruction. This automatically disadvantaged the black majority, and their children. See Webb VN (2002) 14 ‘Language in South Africa: the role of language in national transformation, reconstruction and development’ *Impact: Studies in Language and Society* 16- 25.

<sup>53</sup> Sections 55, 97 and 318(1)(c)(iii) of the 1999 Constitution of the Federal Republic of Nigeria. English is recognised together with the other traditional languages like Igbo, Hausa and Yoruba.

<sup>54</sup> Section 6 of the Constitution of the Republic of South Africa, 1996 explicitly lists English, and s. 108 provides that ‘in the event of an inconsistency between different texts of the Constitution, the English text prevails’.

ECOMOG) in Liberia, Sierra Leone and some other African countries. When post-apartheid South Africa emerged on the continental stage, it established itself as a leader within the Southern African block, and within the continent. South Africa's position has been well solidified in its efforts in Zimbabwe, Madagascar, Zambia, and others. Together, the two countries shared the vision of the APRM and were part of the founding members thereof. They have also cooperated in a number of bi-lateral and multi-lateral agreements and programs.

These factors enumerated thus are the reasons why these two countries have been chosen as case studies or points of reference to explain the topic of this thesis.

## **1.6 Methodology**

The research methodology adopted for this research will primarily be a literature review of books, articles, reports, reports of organisations (NGO's) and other documents, such as government reports or data. These have been obtained primarily from desk, library and database research. The literature review included a review of both primary and secondary sources (in case of conference proceedings captured in journals and books, working papers, reports by non-governmental organisations and others). Other secondary sources consulted include the internet and some electronic databases.

In addition to these, a period of internship spent at the African Peer Review Mechanism (APRM) Secretariat in Midrand, South Africa, during the month of January 2006, provided an avenue for education on the work of the APRM, and on the challenges faced by African states in their drive towards enthrone functional democracies in their states.

On site visits were also made to the African Institute of South Africa early in 2009. This afforded the opportunity to access relevant documents and information on Africa's history, especially the period immediately following independence in Africa.

The information collected from all of these sources and libraries have been analysed and in a bid to provide a good understanding of the issues surrounding the

enthronement of the rule of law in the two countries in question, and the particular problems thereof.

## **1.7 Structure and Overview of Research**

This work is divided into six chapters. The different chapters deal with different sub-issues of the topic which are then tied together to make a coherent whole through their mini-conclusions. It will suffice to briefly outline the structure and major concerns of the chapters here.

For every work of research, an introduction is necessary to give prospective readers a short and concise background of the work that is being carried out. Chapter one sets out to do this, by giving an overview of the rule of law and the definitions attached to it, and how the term is applicable to Africa today. It provides an idea of the extent of the work carried out, and ultimately sets the tone of the research.

Before one can explore the dimensions of the rule of law in Africa and its implications on African nations, it is necessary to understand where Africa has come from in terms of law, how it has journeyed thus far, and the different influences that have been predominant on the continent that currently shape the law. This is what chapter two seeks to do. It is a historical chapter that focuses on the history of governance in Africa through the different phases of pre-colonialism, colonialism (the intrusion of the west) and post-colonialism that the continent has passed through. The chapter focuses on the impact of these factors on the ‘law’ that existed prior to the changes that were imposed on the continent. A chapter on the history of governance in Africa would be incomplete without looking at military dictatorships and how these affected many countries on the continent. This will also be addressed in chapter two.

The research in chapter three provides an overview of the theories and philosophies that deal with the concept of rule of law. It is of great import in order to understand the issues of legitimacy of the law in Africa, that the different factors required to establish legitimacy be explored. Key amongst these theories is the ‘social contract theory’, which revolves round the idea that ‘consent’ of a person

(or a group of people) to be bound by a law is necessary, before such a person can be said to be bound by such law. This and other theories are explored in this chapter. Chapter three also goes further to explore the concept of international law and how this plays a part in influencing the rule of law in Africa at present.

The need to apply and see the effect of what has been canvassed in terms of legitimacy as one of the requirements for rule of law, leads to the case study of Nigeria and South Africa in chapters four and five. This is done in order to compare the basis of the rule of law in the two countries, and how it is being entrenched despite the different challenges to it. The different challenges that the countries have faced and how these have impacted on the rule of law are identified and explored.

Chapter six consists of the conclusion, including a brief summary of the issues that have been identified in the previous chapters, as well as the recommendations of what African countries need to do in order to ensure that the rule of law is enthroned within Africa.

## 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> Ayttey G (1991) *Indigenous African Institutions* 71-72.

<sup>35</sup> Ayttey (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 colonialisation 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 colonialisation 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 colonialisation started. Different events occurred which marked the commencement of subtle colonialisation. 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; Englebert & 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> The 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.



## CHAPTER 3

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### 3.1 Introduction

Governance and law in Africa are two interrelated and mutually dependent concepts that are very much in issue on the continent. These concepts are also very germane to the continent in her attempts at development and democratisation, as African states have found it very challenging to cross the divide from situations of poverty, internal and external conflicts to situations of economic, social and political growth, stability and development. In recent times, there have been sprouts of stability and growth in certain states, with Africans waking up to the realisation that they have to take responsibility for their actions or inactions, and that they can do something about the state of the continent.

African states have very similar, almost uniform colonial histories that have shaped and moulded them, as discussed in the previous chapter. South Africa, with its history of apartheid, and perhaps Liberia, which was never colonised, are the exceptions. African states currently face problems that are very similar as a result of colonialism, as even apartheid had its foundation in, and had fundamental similarities with colonial rule. The two systems were based on foreign domination of the indigenes, either through law or through force.<sup>1</sup>

This chapter seeks to lay a theoretical basis for the exploration of the rule of law in Africa, with emphasis on the international law dimension. Theories that provide a foundation for democratic governance and the rule of law will be examined, in particular their relation to the requirements for constitutional legitimacy. Also to be examined is the way and manner in which the social contract and Kelsenian theories can be used to possibly provide an explanation for the weak state of the rule of law in Africa. The main purport of this exercise is to draw a direct nexus between these theories and principles and the practicalities on ground in Nigeria and South Africa. This will be used to explain the state of affairs in both countries, and to proffer possible solutions.

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<sup>1</sup> It is necessary to note that although 'apartheid' as a system was instituted by people born in South Africa (and therefore South Africans), and although it was not a system introduced or controlled from outside the country like colonial rule in other parts of the continent, it was still a system that was foreign to the indigenes of the continent. This is what qualifies the description of 'apartheid' as foreign rule.

This chapter will firstly critically examine the social contract theory, its main proponents, criticisms against it and its applicability to constitutional governance and the rule of law. In explaining the rule of law in Africa, the social contract theory will be used as one of the bases for the legitimacy of the constitutional democratic form of government that is practised in Africa today. Kelsen's theory of law will be examined briefly in the same light. Other issues that will be examined in this chapter are the issues that are deemed to have impacted on states in the area of attaining and maintaining the rule of law. Globalisation and democracy are issues that will be examined in this respect, with a view to distilling their impacts on African states. Finally, international law, as another branch of law having immense influence on the state and composition of the rule of law in Africa, will be examined in relation to how these influences have affected the rule of law in Africa. The question which sets the tone for this chapter is: can it be said that the form of governance on the continent now is explained by the different theories, phenomena, and legal principles that have been examined in this chapter?

### **3.2 What is 'Democratic Legitimacy'?**

It is first necessary to determine the meaning of 'legitimacy', 'constitutional legitimacy' or 'democratic legitimacy' in the context of governance and/or democracy. Legitimacy of modern constitutional systems has been explained as the process through which the systems are set up.<sup>2</sup> In most constitutional systems, it has been said that a norm is legitimate if it was set up in a democratic decision-making process and if it meets fundamental societal values, such as individual rights or collective goods.<sup>3</sup> Therefore, legitimacy in a system would only apply if the system was set up by a process which was democratic, and if such system meets fundamental societal values, such as the rights of individuals or the rights to collective goods.<sup>4</sup>

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<sup>2</sup> Krajewski M 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35(1) *Journal of World Trade* 167-186 at 169.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

Democratic legitimacy/legitimate governance is said to exist when there is public participation or consent in the law-making process. The author Ocheje<sup>5</sup> views legitimate governance as referring to three basic elements. Firstly, *constitutionality*, which means that governance must be based on the mandate of the governed, as well as on principles, rules and conventions, which form the core of state action. The second element, according to Ocheje, is *accountability*, which implies that those holding official positions do so on behalf of the governed, and must submit to measures aimed at transparency and integrity. The third element he posits is *participation*. This means that the governed must actively participate and not be excluded on any basis.<sup>6</sup>

The first and the last elements mark essential features of the theories that will be put forward in this thesis. They form the basis of the postulate in this research, and therefore need more exposition. Constitutionality, as discussed by Ocheje, speaks to legitimate governance being based on the mandate of the governed.<sup>7</sup> This means that the people must ‘agree’, ‘consent’ and ‘give their mandate’ to be governed by whoever they choose. The medium through which they ‘agree’, ‘consent’ or ‘give their mandate’ to be governed is captured in their participation in the constitution-making process. This leads us to participation.

Participation by the governed is another key element of democratic governance, without which there will be no legitimacy.<sup>8</sup> This was recently reiterated in the 2010 Ibrahim Index of African Governance Summary,<sup>9</sup> which stipulated that ‘the ability of citizens to participate in the political process is a vital gauge of the legitimacy of government ...’<sup>10</sup> Participation of the governed means the governed have a say and consent to whatever decisions are ultimately made. This means that the process is democratic, because such decisions would have been informed, shaped or moulded by the participation of the people. Ocheje mentions the importance of participation as lying principally, but not exclusively, in the

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<sup>5</sup> Ocheje P ‘Exploring the Legal Dimensions of Political Legitimacy: A Rights’ Approach to Governance in Africa’ in Quashigah EK & Obiora CO (eds) (1999) *Legitimate Governance in Africa: International and Domestic Legal Perspectives* 165-166.

<sup>6</sup> *Ibid.*

<sup>7</sup> Ocheje (1999) 166.

<sup>8</sup> Ocheje (1999) 188.

<sup>9</sup> Available at [http://www.moibrahimfoundation.org/en/media/get/20101108\\_eng-summary-iiag2010-rev-web-2.pdf](http://www.moibrahimfoundation.org/en/media/get/20101108_eng-summary-iiag2010-rev-web-2.pdf) (accessed on 1 October 2010).

<sup>10</sup> *Ibid* 21.

opportunity it creates for the generation and the sharing of knowledge regarding issues which people care about.<sup>11</sup> Thus by extension, participation leading to consent should in turn inform the structures of the government.

Another definition of legitimacy which furthers the consent basis is offered by Bellamy and Castiglione.<sup>12</sup> They define legitimacy as ‘the normatively conditioned and voluntary acceptance by the ruled of the government of their rulers’.<sup>13</sup> They feel that it possesses both internal and external dimensions. The internal is linked to the values of the political actors themselves (i.e the citizens), and the external is linked to the principles employed to evaluate a political system, and to assess its effects for outsiders and insiders.<sup>14</sup>

This requirement of consent as the basis of legitimacy, has been challenged by Barnett in his book, ‘Restoring the Lost Constitution’,<sup>15</sup> in which he doubts the attribution of consent as the basis of legitimacy. In what he titles as, ‘the fiction of *We the People*’, he questions the stage at which this ‘consent’ is given by the people, the evidence of such ‘consent’, and the way and manner in which this ‘consent’ is given. Against this background, he argues that the basis of legitimacy cannot be said to be consent,<sup>16</sup> as actual consent usually has the converse ability to ‘restrict freedom’. Thus, according to him, for a law to be legitimate, such should be scrutinized to see if it is necessary for the protection of others without improperly violating the rights of those whose freedom is being restricted.<sup>17</sup> Barnett then posits what he feels the basis of legitimacy should be. He says,

*‘in the absence of actual consent, a legitimate lawmaking process is one that provides adequate assurances that the laws it validates are just in this respect. If a lawmaking process provides these assurances, then it is*

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

<sup>12</sup> Bellamy R & Castiglione D ‘Legitimising the Euro-Polity and its Regime: The ‘Normative Turn’ in European Studies’ available at <http://www.iccr-international.org/europub/docs/ws1-castigbell.pdf> (accessed 3 August 2010).

<sup>13</sup> Bellamy 5.

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

<sup>15</sup> Barnett RE (2004) *Restoring the Lost Constitution: The Presumption of Liberty*.

<sup>16</sup> Barnett (2004) 11-21.

<sup>17</sup> Barnett (2004) 45.

“legitimate” and the commands it issues are entitled to a benefit of the doubt. They are binding in conscience unless shown to be unjust’.<sup>18</sup>

By this, he proposes a theory of legitimacy which links the process of determining legal validity to the requirement of justice. To him, a law is ‘just’ and therefore binding in conscience if its restrictions are (1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the pre-existing rights of the persons on whom they are imposed.<sup>19</sup>

In his book, Barnett limits legitimacy to notions of justice and the protection of rights only, but he does not explain how a government may legitimately have a monopoly on the use of force and the provisions of defence, law and justice. It is submitted that the author makes a fundamental assumption that law-making guided by notions of justice would be able to promote legitimacy. He does not justify his assumption that a government with the right ‘procedural assurances’ will be able to dispense justice accordingly. Thus, Barnett has not been able to dispense with the requirement of ‘agreement’, or ‘consent’ for legitimacy of government as postulated earlier. Participation as exercised in the context of a constitutional democracy is regarded as an essential requirement of legitimacy as dealt with in this chapter. Such consent is important in democratic governance and will be examined in this chapter. The discussion will start with an analysis of the social contract theory.

### 3.3 The Social Contract Theory

Amongst English-speaking (Commonwealth) African countries, the constitutional mode of government is prevalent. In Nigeria and South Africa, constitutions have been signed into law and are in force and form the basis of the legal systems in these countries. This legal system is referred to as a ‘Constitutional Democracy’.<sup>20</sup>

In view of the fact that African states (especially the English speaking ones) have

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<sup>18</sup> *Ibid* (own emphasis).

<sup>19</sup> Barnett (2004) 44.

<sup>20</sup> It is a bit curious that these countries have written constitutions, because the United Kingdom, which colonised these countries either fully, or at some point in history or the other, does not have a written constitution. What exists is an unwritten constitution to be found in different laws and conventions, which are strictly adhered to.

formal constitutions and are meant to be operating constitutional democracies, it is important to explore the theories concerning the formation of states in order to detect on what bases states operate. This will involve a brief analysis of the postulates as to how societies and states are formed and regulated, as well as what lays the foundation for the power of the leaders in these societies.

There are four main theories of state formation on which philosophers have based their thinking. These are the

- supernatural or divine right theory, denoting that there is a higher power at work in state formation, which divinely ordains states and leaders. This is also associated with the divine right of Kings;
- the natural right theory, which states that human beings have certain rights that are natural, and inherent in them as humans. States are thus established for the protection of these rights;
- the social contract theory, which postulates that the state is established by people who have willingly given their consent to be bound, in order to meet the needs of the collective.
- the conflict theory, which postulates that the state did not originate from any conscious decision, but as a result of violent conflict, wherein the people battled with each other for control of resources, and the winning side is the dominant side seen today.<sup>21</sup>

There are different philosophies that generally accommodate the wide spectrum of political views on state formation stemming from these theories. They are not mutually exclusive. The philosophies are: contractarianism, liberalism, Marxism, Conservatism, and anarchism.<sup>22</sup>

The contractarian philosophy is based on the social contract theory that will be discussed in greater detail below.<sup>23</sup> Liberalism is an offshoot of the contractarian theory, and thus a quite similar philosophy of state formation. It is based on the natural right theory, which sees all rights as existing naturally and not created by

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<sup>21</sup> Encyclopaedia II – State: Philosophies of the State, available at [http://www.experiencefestival.com/a/State\\_Philosophies\\_of\\_the\\_state/id/5157401](http://www.experiencefestival.com/a/State_Philosophies_of_the_state/id/5157401) (accessed on 9 November 2009).

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

<sup>23</sup> Amongst the proponents of this theory are John Rawls, Thomas Hobbes, John Locke and others.



the state. Thus, the powers of the state are restricted by natural rights that exist independently of the human mind and which overrule any social contract.<sup>24</sup>

Marxism as a philosophy is based on the idea of class conflict. The philosophy posits that the productive capacity of society forms the foundation of that society, and as such gives rise to different classes within society, constantly in struggle against each other. This, it is proposed, leads the society through definite stages such as the communism, slavery, feudalism, capitalism, and many others.<sup>25</sup>

Conservatism as a philosophy is based on the theory of the supernatural authority, and thus all the existing structure of traditions and hierarchies are seen as benefitting society overall. Anything the state does is seen as being for the good of the people, because of the divine right of the state. This philosophy is quite similar to that of liberalism, as they view everything as being created by God.<sup>26</sup>

The last philosophy to be mentioned here is that of the anarchists.<sup>27</sup> To the anarchists, the state is nothing but an unnecessary segment of society, and the power of the state ought to be removed. They believe that the restrictions, rules and regulations put in place by the state prevent people from learning how to work together peacefully, and stultify individual creativity. To them such restrictions and laws should be abolished to enable people to creatively find ways of sorting out their difficulties and issues. This would undoubtedly create a situation of anarchy as people would likely employ any and every means of sorting out their differences.

These are the different philosophies from which the different ideas of state formation have originated. The focus in this work would be on the social contract theory/contractarian due to its strong influence on nation states today. A close examination of the social contract theory, its emphasis on consent of “men” (the society) as forming the basis of political legitimacy and authority, would link this

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<sup>24</sup> *Supra*; amongst the modern proponents of liberalism are Dworkin, Ackerman.

<sup>25</sup> This philosophy is named after Karl Marx, the main proponent, closely followed by Friedrich Engels.

<sup>26</sup> This philosophy is carried through in the ideas and values of the Republican Party in the United States. Early proponents were Russell Kirk and William Buckley, among others.

<sup>27</sup> Proudhon Pierre-Joseph is referred to by some as the founder of modern anarchist theory, however, William Godwin developed what is referred to as the first expression of anarchist thought.

long existing theory to the constitutional democracy form of government that exists presently. Currently in Africa, about two-thirds of the states have adopted written constitutions, and thus the constitutional mode of government is being practiced by a large portion of African states.<sup>28</sup> This creates a need to explore what the social contract theory is about. In a nutshell, the social contract theory posits that due to the fact that men see the need, want and desire to be governed, they ‘agree’ to elect a leader, and willingly give up their power and authority to the said leader to lead them. This said leader is construed in the form of present day government.

The term ‘social contract’ refers broadly to a situation whereby legitimate state authority is derived from the consent of the governed. The governed (the people) decide to voluntarily give up the freedom of action that they have under the ‘natural state’ as humans, in order to obtain the benefits provided by the formation of social structures and broad class of philosophical theories, which have as their subject, the implied agreement by which people form nations and maintain a social order.<sup>29</sup> There are quite a number of postulates with certain differences to be found in this broad definition. The term ‘social contract’ is actually used to describe these broad classes of philosophical theories that have the implied agreement of people to form nations and maintain a social order as part of their essence. This generally means that the people give their right to a ‘government’ to a ‘sovereign will’ or a ‘sovereign authority’. The ‘sovereign will’ has been defined variously to be the King<sup>30</sup> (in the case of a monarchy), a Council (in the case of an oligarchy) or the Majority<sup>31</sup> (in the case of a democracy or republic). These differences in ideas as to who constitutes a sovereign will, coupled with the mode of formation of society, is what underpins the different theories of social contract.<sup>32</sup> Put differently, the social contract theory posits that political legitimacy, political authority, and political obligations are derived from the consent of those who create a government and who operate it through some form of quasi-consent, such

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<sup>28</sup> Information from the African Union website, available at <http://www.africa-union.org> (accessed on 29 November 2009).

<sup>29</sup> ‘The Social Contract Theory: Hobbes v Rousseau, An Analysis’, available at <http://www.scribd.com/doc/2910336/The-Social-Contract-Theory> (accessed on 2 October 2009).

<sup>30</sup> *Ibid.*

<sup>31</sup> Rousseau JJ & Cranston M (1972) *The Social Contract*.

<sup>32</sup> Hobbes, Hegel, Rousseau and the rest of the theorists differ on this.

as representation, majoritarianism, or tacit consent.<sup>33</sup> This implies that legitimacy and duty depend on consent, on a voluntary individual act, or rather on a collection of voluntary individual acts, and not on patriarchy, theocracy, divine right, custom, convenience, etc.<sup>34</sup>

The theory has also been said to generally refer to an agreement made by the members of a society, or between the governed and the government, defining and limiting the rights and duties of each. In the modern European context, the term generally refers to a collective agreement that regulates employment and wages and that is secured through bargaining among representatives of the state, labour and capital.<sup>35</sup>

Forsyth states that ‘a common element of this theory is that the foundation of the true or authentic body politic is held to be a pact or agreement made by all the individuals who are to compose it’.<sup>36</sup> It is not a pact between individuals, who are to compose the civil state, nor is it a pact between rulers and ruled, but a pact to establish rule, to make the transition from the ‘state of nature’ to the ‘civil state’.<sup>37</sup> Murray posits that the notion of the social contract is linked with the idea of the equality of human beings, which was greatly influenced by the Protestant Reformation (of which all social contract theorists were part, being Protestants themselves). This idea of equality embodied in the social contract theory, is the principle that all men are equally free,<sup>38</sup> meaning that each man, by right of nature, by right of human character, rather than through the mediation of other men, possesses the quality of freedom, and that all men are by nature equally free.<sup>39</sup> This idea of freedom and equality, he states, is agreed on by all the classical writers of the time, and even Hobbes, whose idea of equality was depicted in the sombre notion that all men were equally free to kill one another, also spoke of man’s

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<sup>33</sup> Riley P (1982) *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant and Hegel* 1.

<sup>34</sup> *Ibid.*

<sup>35</sup> MENA Development Report (2004), *Unlocking the Employment Potential in the Middle East and North Africa: Towards a New Social Contract* Washington, US: World Bank Publications 23.

<sup>36</sup> Forsyth M, ‘Hobbes’ contractarianism: A comparative analysis’ in Boucher D & Kelly P (eds) (1994) *The Social Contract From Hobbes to Rawls* 37.

<sup>37</sup> Boucher & Kelly (1994) 37.

<sup>38</sup> Boucher & Kelly (1994) 38.

<sup>39</sup> *Ibid.*

inherent right to ‘use his own power, as he will himself, for the preservation of his own nature’.<sup>40</sup>

This theory is in disagreement with the view that there must exist an inherent quality or attribute possessed by a person that would impose on others a duty to obey his commands; rather it views such types of rules which are conferred solely by right of birth, charisma, or divine right as illegitimate.<sup>41</sup> It is from this state of affairs that the social contract emanates. The theory expresses the idea that all just and legitimate rules are made or established by those who are in fact ruled.<sup>42</sup> The first stage in the establishment of rule, considering that all individuals are free and equal, can only take the form of a simultaneous agreement in which the wills of all the participants are expressed.<sup>43</sup> Forsyth feels that only such a foundation can create or constitute rule that binds or obliges those who are naturally free.<sup>44</sup>

One of the main features of the social contract theory is that it is a contract by men (the multitude) to transform themselves into an acting unity. Forsyth believes that it is not a succession of contracts that happen to overlap in terms of their participants and hence to create a purely external linkage between many people; it is one single contract that lasts and endures. It aims at creating a permanent union between the contractors themselves, a union that will continue to bind the successors of the original contractors, with or without their express consent. Thus he observes that the social contract is different and unique from other ordinary contracts.<sup>45</sup> Certain variations to the social contract theory exist, which can be seen in Hobbes’ theory of the ‘commonwealth by acquisition’ which provides for a second, consecutive form of contract; Locke with his doctrine of tacit consent and express consent of generations subsequent to the original contract, and Rousseau with his notion of tacit consent.<sup>46</sup>

Historically, the concepts of ‘consent’, ‘will’, and ‘voluntary agreement’, which form the basis of the social contract theory, have come to occupy a place in

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<sup>40</sup> Hobbes, *Leviathan* 1651, part 2 chapter XXI, 141, as quoted by Forsyth (1994) 38.

<sup>41</sup> Boucher & Kelly (1994) 38.

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

<sup>43</sup> This is explained in more detail subsequently.

<sup>44</sup> Boucher & Kelly (1994) 38.

<sup>45</sup> *Ibid.*

<sup>46</sup> Boucher & Kelly (1994) 38 – 39.

political philosophy in the seventeenth, eighteenth and even early nineteenth centuries.<sup>47</sup> These concepts, it seems, are the best way of understanding the theory. All of the members of the social contract school have in some form or the other alluded to these concepts as of great importance in the theory. However, there is some vagueness and ambiguities in the concept of ‘will’ itself. For some it is viewed as a moral cause, whereas for others, it is nothing but a mere appetite or desire.<sup>48</sup> This further contributes to the differences in the way theorists view and apply the theory. Voluntarism, political legitimacy through authorization by individual wills acting in concert, came about as a result of the influence of Christianity, and its ‘good acts’ model of politics.<sup>49</sup> This model of politics revolved around the idea that in the same way in which for one to do good acts, one needs to know about the good and have the will to do so, the requirement of moral assent (the involvement of the individual in politics through his own volition), is necessary in order for the politics to be legitimate. This leads to the idea of ‘legitimate government or state’, and after the seventeenth century, this legitimacy was often taken to rely on the notion of ‘willing’,<sup>50</sup> that the individual willingly agreed or gave consent to be governed by the representative.

This section has sought to give a basic understanding of the social contract theory. In the next section, a brief expose of the writings of some of the most eminent proponents of the social contract tradition from the seventeenth and eighteenth centuries, and from contemporary times, will be carried out in order to get a better understanding of the theory.

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<sup>47</sup> Riley (1982) 8.

<sup>48</sup> Riley (1982) viii.

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

<sup>50</sup> Riley (1982) 3. These notions of willingness, will, and voluntarism began to be subtly evident in the writings of the philosophers of the time. Going back much further, Aristotle’s *Ethics*, for example, treated the issue of legal responsibility in terms of whether a given action is voluntary or not. Also St. Augustine, in his writings, made voluntaristic moral claims in his talking about the ‘good will’ and the ‘bad will’, which influences everything done by man. He writes in *De Spiritu et Littera*, for instance, that ‘consent is necessarily an act of will’, thus linking consent to will, and giving the social contract theory a foothold. See Augustine, *De Spiritu et Littera* 54, cited in Riley (1982) 5. St Thomas Aquinas in his work, *Summa Theologica*, built on this in applying the idea of the voluntary will not only to law but also to sin and good acts. See Riley (1982) 5.

### 3.3.1 Theorists of the social contract theory

#### 3.3.1.1 Thomas Hobbes

Thomas Hobbes, an English philosopher, is one of those who contributed greatly to the social contract theory of the origin of state. He was mostly influenced by the English civil war of 1642, which he witnessed. His work, *Leviathan*<sup>51</sup> (1651), clearly shows the influence that the war had on him in formulating the basis of the theory. According to Hobbes, man lived in a 'state of nature' with each having unlimited natural freedoms. This meant that man had the 'right to all things', including the freedom to do as he pleased and to harm all those who threaten his self-preservation.<sup>52</sup> Anyone in the 'state of nature' could do as he pleased to anyone else, and the people had every right to defend themselves, by whatever means necessary in the absence of order. This, Hobbes believed, would eventually lead to what he termed 'a war of every man against every man', and thus make life 'solitary, poor, nasty, brutish and short'.<sup>53</sup> In this state of war men lived without any common power and every man was an enemy to every man.

Thereafter, men realised that their original freedom, which was directed towards the satisfaction of their individual passions, must be guided, not only by reason in the sense of self-concentrated calculation, but by right reason in the form of the laws of nature, if it was not to destroy itself. Their only security was in their strength compounded with the strength of others.<sup>54</sup> For this reason, Hobbes posits that men then gather together to compound their strength, and enter into an agreement or covenant, to surrender their rights and judgement to the will and judgments of a sovereign (one man or a body of men, represented by the government in today's parlance), which they all agree on, and appoint.<sup>55</sup>

For Hobbes, the laws of nature were the only objective morality. They were God-given and immutable; not made, or agreed upon, by men, but discovered by reason, under the pressure of passion, and furthermore 'agreeable to the reason of all

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<sup>51</sup> Hobbes T 'Leviathan (1651)' in Hyland P et al (eds) (2003) *The Enlightenment: A Sourcebook and Reader* 9.

<sup>52</sup> *Ibid.*

<sup>53</sup> See Part 1, chapter 13 of 'Leviathan', quoted in McClelland JS (1996) *A History of Western Political Thought* 194; see also Boucher & Kelly (1994) 43.

<sup>54</sup> Boucher & Kelly (1994) 43.

<sup>55</sup> McClelland (1996) 195.

men'.<sup>56</sup> Thereafter, he sees in the development of the state of nature, the impact that men later come to realise that it is not enough to rely on individual, conditional implementation of the laws of nature, but that there has to be a positive, collective 'act of creation', an act of 'state-building, by man himself, if God's laws are to become fully binding.<sup>57</sup>

Hobbes further believed that the state might be regarded as a great artificial man, composed of men, with a life that might be traced from its generation under pressure of human needs to its dissolution through civil strife proceeding from human passions. He demonstrated the necessity of a strong central authority to avoid the evil of discord and civil war, and sees the sovereign as having authority to assert power over matters of faith and doctrine, and if he doesn't do so, he then invites discord.<sup>58</sup> He presents a society ruled by a sovereign leader that is based on the laws of nature and the kingdom of God. According to Forsyth, Hobbes feels that at the root of the commonwealth is a social contract.<sup>59</sup>

### 3.3.1.2 John Locke

John Locke was a British philosopher, Oxford academic and medical researcher. He lived from 1632 – 1704. He was at some point involved in government as an official charged with collecting information about trade and colonies. His stint in government probably contributed to his perception of government as being authoritarian. Much of his work was thus characterised by opposition to authoritarianism, both at the level of the individual person, and on the level of institutions such as government and church.<sup>60</sup> Locke is credited to have written quite a number of works that cut across various aspects of the society, namely the *Two Treatises of Government*, the *First Treatise of Civil Government*, the *Letters Concerning Toleration*, the *Reasonableness of Christianity* and *Some Thoughts Concerning Education*.<sup>61</sup>

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<sup>56</sup> Boucher & Kelly (1994) 43.

<sup>57</sup> *Ibid.*

<sup>58</sup> Rousseau (1972).

<sup>59</sup> *Ibid.*

<sup>60</sup> 'John Locke', Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/locke/> (accessed on 17 October 2009).

<sup>61</sup> McClelland (1996) 232.

In the *Two Treatises of Government*, Locke gave a clearer view of the social contract theory, which led to his categorisation as a contractarian. He argued that ‘voluntary agreement gives - political power to governors for the benefit of their subjects’ and that ‘God having given man an understanding to direct his actions, has allowed him a freedom of will, and liberty of acting’.<sup>62</sup> In this, Locke appears to have taken up the social contract doctrine of Hobbes, without reducing the will that makes ‘voluntary agreement’ possible to a mere last appetite. A problem concerning Locke’s voluntarism and contractarianism is that there is really no consensus as to what extent he really was a contractarian. He is sometimes represented as a consent and social contract theorist, at other times as a theorist of natural law, as well as a theorist of natural rights (especially natural property rights).<sup>63</sup>

In another of his writings, the *Second Treatise*, Locke classifies the history of each territorial society into two distinguished eras.<sup>64</sup> In the first era, men live together as free and equal individuals, without any relations of political authority, governed only by the rules and principles of natural law. In this state, even though there is liberty, it is not a state of licence to do as man wishes.<sup>65</sup> In the second era (which Waldron refers to as the modern era), a framework of political institutions which articulate the natural rules and principles in a clear and determinate form of positive law is then set up.<sup>66</sup> These are institutions such as legislatures, courts, socially sanctioned property arrangements and others.<sup>67</sup> The connection between these two eras is enunciated by Locke as follows:

‘in a bid to respond to certain difficulties in the state of nature, men (free and equal members of natural society) meet together and agree to constitute a new community by joining their powers and deciding to act together and collectively to uphold their respective rights and liberties’.<sup>68</sup>

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<sup>62</sup> Laslett P (ed) (1967) *John Lock, Two Treatises of Government* 324, 401.

<sup>63</sup> Laslett (1967) 61.

<sup>64</sup> Waldron J, ‘John Locke: Social Contract versus Political Anthropology’ in Boucher & Kelly (1994) 52.

<sup>65</sup> *Two Treatises*, II Chap II, quoted in Hyland (2003) 155.

<sup>66</sup> See generally Hyland (2003) 157-159 for a summary of Locke’s theory on the beginnings of political society.

<sup>67</sup> *Ibid.*

<sup>68</sup> Locke, *Two Treatises*, II, 87-95 and 99-131, as quoted by Waldron (1994) 52.



Thereafter, as a second step of the process of formation of a social contract, the newly constituted community, by a decision of a majority, then gradually begin to set up specialist institutions to which the power of the community is entrusted for the purposes of legislation, execution of laws, promotion of the public good, and possible interaction with other groups.<sup>69</sup> This development thus ushers in the modern era of human history.

In the second step, Locke emphasises that progress is slow. He reflects that there is a gradual, indiscernible, and unnoticeable growth of modern political institutions, modern political problems and modern political consciousness out of the simple tribal group.<sup>70</sup> The tribal group had flourished under the ancient, since time immemorial, tradition of communities being at times under the authority of one man, who represented the father figure and/or patriarch. Such a person exercised authority informally to settle disputes that arose between members of the group and occasionally punished members for behaving in ways that affected the community negatively.<sup>71</sup> This type of authority was usually, more often than not, that of the role of a parent, an ‘indeterminate state’.

Locke argues that the main drive for the growth of political authority was economic and not military, and as such, the growth of the natural economy and the use of money invariably lead to more and more complexities in the interpersonal relations amongst the people. Antisocial behaviour and disputes increased, making the role of disputes settlement and punishment of greater importance within the social group.<sup>72</sup> This inadvertently resulted in authority becoming less informal and gradually more institutionalized so that there were recognizable procedures for resolution of disputes and for dealing with social infractions, and also for officials to operate such procedures.<sup>73</sup> According to Locke, this also led to more abuse and corruption as larger numbers of people became involved in the process, and as the communities grew and metamorphosed into societies. Locke’s theory through this reflection is that due to the gradual and indiscernible development of government,

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> This was the way authority was exercised in traditional African societies, discussed in chapter two.

<sup>72</sup> Boucher & Kelly (1994) 52; McClellan (1996) 234-235.

<sup>73</sup> Boucher & Kelly (1994) 53.

men were easily mystified and bewildered about its nature and justification. This also he explains as creating the ideology of the divine right of kings.<sup>74</sup>

Locke's thought processes as evinced in his social contract theory above, speaks to his normative theory of rights, his opposition to absolutism, representation and the separation of powers. Taking an example of his opposition to the theory of absolutism, he believes that in as much as government is based on individuals giving their consent to government,<sup>75</sup> such consent does not extend to a total control by the recipient of the consent over the individual. He believes that such a situation would be contrary to what a rational creature that is 'free and equal', and able to exercise freedom and equality would do. According to Locke, 'a rational creature cannot be supposed, when free, to put himself into subjection to another, for his own harm'.<sup>76</sup> Such he feels cannot be imagined to happen in a process where men consciously, and for the benefit of each other and all, organise deliberately and explicitly set out to cooperate with each other to form government under the conditions of freedom and equality, which exists in a state of nature. He criticises Hobbes and others who appear to advocate the theory that men give up all of their rights to a 'sovereign' (whether a divine one or one chosen by the people). He feels that such is not what rational men would ordinarily, intelligently subscribe to.

Locke's theory and argument have been examined in line with his second issue relating to the gradual progression of the human society, i.e. the anthropological development. It seems that on the face of it, his reasoning might run contradictory to the social contract theory in certain respects. In evaluating it, one is compelled to enquire that if modern government is supposed to have developed unconsciously and indiscernibly, and if the existence of 'authority' or the 'authority figure' is a fact of human life right from beginning, then it would not have been needful or necessary for men to deliberate on the need to or how to give their consent to be governed as his first narrative on the theory of rights depicts.<sup>77</sup>

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<sup>74</sup> McClelland (1996) 239.

<sup>75</sup> This he feels is within clear limits to what such individuals can give their consent to, as they cannot give away their natural rights, because these are inalienable.

<sup>76</sup> Locke, *Two Treatises*, II, 164 in Waldron (1994).

<sup>77</sup> Boucher & Kelly (1994) 54.

In evaluating Locke's theory, Waldron provides reasoning to the seeming conflict between the two stories. He does not see a disjuncture between Locke's two narratives, but that it rather provides a way of viewing and judging events in history and even presently as either good or bad.<sup>78</sup> Therefore, viewing events through the template of the social contract story does not mean that we must view every stage in the history of our political development as a legitimate contractual step. Rather, it simply means that we should view it using contractarian categories, treating each step either as though it involved elements of choice, consent and obligation or as though it were an incident of force, oppression and the persistence of a right to resist'.<sup>79</sup>

### 3.3.1.3 Jean-Jacques Rousseau

Jean-Jacques Rousseau was a Genevan philosopher whose political ideas influenced the French Revolution, the development of socialist theory, and the growth of nationalism. His ideas are contained in his books; *Discourse on the Origin and Foundations of Inequality among Men*, *On the Social Contract*, *Le Bonheur Public*, and others.<sup>80</sup> He saw 'man' as neither inherently good nor bad in the state of nature, but that the growth of society<sup>81</sup> had played a huge part in influencing man. To him, human beings are good because they are self-sufficient and not subject to the vices of political society. The 'state of nature' was a primitive condition without law or morality, which had been traded in by men for the benefits and necessity of cooperation in the society. The development of society (age of flourishing), which was encapsulated in the development of agriculture, metallurgy, private property and the division of labour, played a role in making men associate more closely with each other, and become increasingly self-aware and inter-dependent on the next person.<sup>82</sup> This laid double pressure on man and threatened his survival and freedom.<sup>83</sup> Accordingly, by joining together through the social contract and leaving their claims of natural rights, men can both preserve themselves and remain free, because submission to the 'general will' of

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<sup>78</sup> See generally Boucher & Kelly (1994) 70.

<sup>79</sup> *Ibid.*

<sup>80</sup> McClellan (1996) 250.

<sup>81</sup> He saw the growth of society as inimical to man.

<sup>82</sup> Rousseau JJ (1954) *The Social Contract* 25-27. (Translation of his original work in French in 1954, with and introduction by Willmoore Kendall).

<sup>83</sup> Rousseau (1954) 19.

the people as a whole guarantees individuals against being subordinated to the wills of others and also ensures that they obey themselves because they are, collectively, the authors of the law.<sup>84</sup>

He saw ‘man’ as being divided into two very distinct persons; the ‘natural’ man and the ‘political’ man, and any attempt to mix the two produces a lot of conflict and self division in the man. The natural man was man in the state of self-interest and groups in states of self-interest, or self-preservation. The ‘political’ man was the man controlled by the law, rights, rules and regulations. Such existence of the two states of man, to Rousseau was highly ‘unnatural, anti-natural and a complete change of the natural man’.<sup>85</sup> Such was prone to leaving man in an unhappy state, as man was happiest in his natural state.

Thus, Rousseau posited through the social contract theory that society must find ways of coping with man in his natural state of pursuing his self interest without disadvantaging his fellow men.<sup>86</sup> The problem with modern politics, in his view, is that it is insufficiently political, still compromising between the artificiality and communality of political life (in that it is set up artificially) and the naturalness of pre-political life (natural).

According to Rousseau, this problem is indicated by the challenges of modern men in the form of self-division; conflict between private will and the common good; a sense of being neither in one condition nor another, and others. It is this imperfect socialization of modern man, which ends up allowing materialism, profiteering, inequality and other vices in the modern political society, as men now cannot operate in full as moral, virtuous people, and neither can they operate as those with full and total allegiance to the state.<sup>87</sup>

Therefore, in order to prevent the divisions and conflicts occurring in man, in order to prevent human misery and to make man as happy as he can be, Rousseau posited to ‘give him entirely to the state, or leave him entirely to himself ... but if you divide his heart, you will rip him apart; and do not imagine that the state can

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<sup>84</sup> Rousseau (1954) 17-18.

<sup>85</sup> Riley (1982) 100.

<sup>86</sup> McClelland (1996) 259.

<sup>87</sup> Riley (1982) 101.

be happy, when all its members suffer'.<sup>88</sup> Rousseau in this was looking forward to a situation where the socialized men would be 'perfectly independent of everything else, and extremely dependent on the city,' because for him, only the power of the state and the generality of its laws 'constitutes the liberty of its members'.<sup>89</sup>

There are also modern theorists of the contractarian school who have postulated along the same lines, but in the context of the developments in the world as we know it today. These have in the recent past, revived the contractarian theories, and given them new impetus. These include Rawls, Nozick, Dworkin and Buchanan and others. We will take a brief look at the work of Rawls and Nozick below.

#### 3.3.1.4 John Rawls

John Rawls in his 1971 publication, *A Theory of Justice*, postulated that justice was the basis on which rational men would agree to social institutions, and that justice is the first virtue of social institutions.<sup>90</sup> For Rawls, justice is the foundation, and laws and institutions, no matter how efficient or well arranged, must be abolished if they are found to be unjust.<sup>91</sup> By this, Rawls sets 'justice' as the basis of his theory. For him, everyone possesses an inherent, intuitive virtue founded on justice, and everyone is able to make just decisions and to act justly if he/she is removed from other influences in the society.<sup>92</sup> He sees all men as self-interested, and therefore their views of what is just would likely be a reflection of considerations of personal advantage. Therefore, in order to truly ascertain what is just, one would need to determine what principles a rational man, under conditions removed from considerations of personal advantage and gain, would hold. To do this, he posits for a situation in which rational men are put together in a state of perfect equality, thereby removing all self-interest, or avenue for personal advantage.<sup>93</sup> This he refers to as the 'original position'.<sup>94</sup> The principles of justice held under such conditions of original position are the basic principles,

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<sup>88</sup> Riley (1982) 101, translating Rousseau in *Le Bonheur public*, 326.

<sup>89</sup> Riley (1982) 101, translating Rousseau in *Contrat social*, 58.

<sup>90</sup> Rawls (1971) *A Theory of Justice* 3.

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

<sup>92</sup> Rawls (1971) 4.

<sup>93</sup> See generally Rawls; Gordon S 'The New Contractarians' (1976) 84(3) *Journal of Political Economy* 573-590.

<sup>94</sup> Rawls (1971) 102.

consequences of the original position, which cannot be improved upon, they are set in perpetuity.<sup>95</sup>

With this Rawls lays ‘justice’ as an innate virtue within the rational man, and in the context of a society, it manifests as a public conception of justice which makes the secure association of the society possible.<sup>96</sup> As the basic structure of the society, these principles are such that free and rational persons concerned with furthering their own interests, would accept an initial position of equality as defining the fundamental terms of their association. Whilst acknowledging that there can be no society which is a scheme of cooperation which men enter voluntarily in a literal sense, he however views a society which satisfies principles of justice, such as fairness, as coming close to being a voluntary scheme. This is because it would meet the principles which free and equal persons would assent to under circumstances which are fair.<sup>97</sup>

#### 3.3.1.5 Robert Nozick

In *Anarchy, State and Utopia*,<sup>98</sup> Robert Nozick builds his theory of the state of nature in which individuals have natural rights which cannot be alienated, and in which they live in a state of conflict and anarchy (more moral than physical).<sup>99</sup> Man is basically an individualist, who recognises the rights of others, and does not have need for the any other person and or institution which would make demands on him. This provides an avenue for the anarchical state to evolve, thus raising the need for some level of protection of the individuals. The state arises out of this as an institution for social protection and justice. The progression of this theory refers to stages that have to be passed till the formation of the state, whereby the individuals agree that they need some form of institution for the protection of their rights.<sup>100</sup> Such state is formed solely due to the need to have an avenue for the

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<sup>95</sup> Gordon (1976) 84(3) *Journal of Political Economy* 576.

<sup>96</sup> Rawls (1971) 4.

<sup>97</sup> Rawls (1971) 11-13; see also Riley (1982) 14; see generally Rawls J ‘Justice as Fairness’ in Goodin RE & Pettit P (eds) (2006) *Contemporary Political Philosophy: An Anthology* 185–200.

<sup>98</sup> Nozick R (1974) *Anarchy, State and Utopia*; see also Nozick R ‘Distributive Justice’ in Goodin (2006) 201-224.

<sup>99</sup> See generally Nozick (1974); Gordon (1976) 578.

<sup>100</sup> *Ibid*; see also Wolff RP ‘Robert Nozick’s Derivation of the Minimal State’ (1977) 19 *ALR* 7-30 at 8; Lamson MA ‘Robert Nozick’s Anarchy, State and Utopia’ (1977) 19 *ALR* 2-6 at 3;

protection of the people. He notes that if such state attempts to do more than ‘protection of the individuals’, it runs the risk of becoming illegitimate.<sup>101</sup>

### 3.3.2 Criticisms of the contract theory

Different aspects of the variations of the social contract theory (contractarianism) have been criticised by some modern day philosophers.<sup>102</sup> To some, the legitimacy of the modern state and our obligation to it do not depend on the reality of our consent or voluntary submission, as ‘no society can ... be a scheme of cooperation which men enter voluntarily in a literal sense; each finds himself placed at birth in some particular position in some particular society.’<sup>103</sup>

Criticisms also relate to the issue of the truth of the existence of ‘any age-old contract’ (social contract) evidencing consent or agreement among men; also the issue as to whether the ‘contract’ in the social contract theory was a *once off* contracting event that happened ages ago in history and of which we are still experiencing the results in modern society, or if it is a *series of contracts* that are renewed with time (own emphasis). It is said that there is no evidence of the contractarian account of the evolution of modern society, rather evidence that shows that society evolved in a non-contractarian way.<sup>104</sup> Locke acknowledges this fact in his *Second Treatise*, when he tried to conceive of objections to the validity of the theory along these lines:

‘Tis often asked as a mighty objection, where are, or ever were, there any men in such a State of Nature? To this I find Objection made ... that there are no instances to be found in the Story of a Company of Men independent and equal one amongst another, that met together, and in this way began and set up a Government.’<sup>105</sup>

Parts of the criticisms have come from modern contractarians, who deny ideas like the ‘state of nature’ and the ‘original contract’. They regard the social contract

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<sup>101</sup> Nozick (1974).

<sup>102</sup> Rawls (1971) 13; Nozick (1974) 7-9; Boucher & Kelly (1994) 50.

<sup>103</sup> Rawls (1971) 13.

<sup>104</sup> Boucher & Kelly (1994) 55.

<sup>105</sup> Locke, II, at 15 and 100, as quoted in Boucher & Kelly (1994) 55.

theory as Nozick has put it, as ‘fact-defective’ characterizations.<sup>106</sup> They feel the social contract theory is a purely hypothetical construction, ‘an idea of reason’ that generates the basis of a normative standard for testing laws and social arrangements.<sup>107</sup> It is not regarded as a real historical event in the least. For these critics of the social contract theory, the basis of these criticisms is that the theory of contract or agreement is not always relevant to the social and political institutions affecting people. The thinking is that the legitimacy or otherwise of the modern state and man’s obligations to it, does not depend on his giving up his consent to be bound, or his voluntary submission to it, rather man really has no choice or say in which society he finds himself. Rawls says it concisely that ‘no society can ... be a scheme of cooperation which men enter voluntarily in a literal sense; each man rather finds himself placed at birth in a particular society’.<sup>108</sup>

Waldron is of the opinion that modern contractarians in their criticisms treat the social contract theory as a normative one, in order for them to be able to relate to the implausibility of its happening or having happened at all.<sup>109</sup> He feels it is a question of interpretation. In addressing the issue of the plausibility of whether the social contract was a once-off event or a series of small events, he feels that contractarianism does not necessarily mean that political institutions of governance were set up by human contrivance in a single dramatic event all at once, but rather that these institutions can be developed gradually over long periods of time or over a series of events by human activities. The fact of a system developing gradually (evolving) does not mean that it is not a natural system; evolution can be as a result of human activities that are put together over time. To this, Waldron says that,

‘a set of institutional arrangements may evolve by gradual steps over a period of time; but if each step involves elements of choice, deliberation and purpose, then the whole process takes on an intentional flavour, becomes susceptible to intentionalist categories, and may be evaluated in terms of human purposes in the way that contract theory requires.’<sup>110</sup>

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<sup>106</sup> Nozick (1974) 7-9.

<sup>107</sup> Kant I ‘On the Common Saying: “This May be True in Theory, But It Does Not Apply in Practise”’, in Reiss H (ed) (1970) *Kant’s Political Writings* 78.

<sup>108</sup> Rawls (1971) 13.

<sup>109</sup> Boucher & Kelly (1994) 51.

<sup>110</sup> Boucher & Kelly (1994) 69.



In examining Locke's theory, especially the linkage between the first social contract story, and the anthropological story, he sees no conflict, and rather sees Locke using his first story of the social contract to buttress his anthropological story.<sup>111</sup>

A modern day criticism of the social contract theory is found in the work of Barnett referred to earlier.<sup>112</sup> In an attempt to circumvent the problems and criticisms of the social contract theory, he proposed an alternative to 'consent' as the basis of legitimacy. He advocates that law-making can still be legitimate in the absence of consent if 'a law is *just* (and therefore binding in conscience).<sup>113</sup>

These different criticisms are valid to the extent that they test and give rise to further refining of the theory. In light of the many seeming inconsistencies with the social contract theory, the questions raised by critics are necessary in order to evaluate the weight and value to be attached to the different postulates of the theory. Waldron's contribution on the issue of the plausibility of the social contract as either a once off event or a series of events is particularly important in understanding the theory. It refines the theory and makes it more understandable. It is necessary to note that history is replete with cases of the gradual development and evolution of society. Scientifically, man is said to have also followed the process of evolution in evolving from primates and other life forms to present man. It is therefore necessary to understand the social contract theory against this foundation.

### **3.3.3 The social contract theory and the constitutional system of government**

The social contract theory is very important to and addresses the question of state formation, government and law. It is essential to understanding the basis on which the constitutional system of government operates. This system of government connotes that the people in a particular society ('state' as is now known) have agreed to give up their individual rights (that occurred in the state of nature), and to be bound by a collection of laws, for their own mutual benefit of living in harmony

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<sup>111</sup> *Ibid.*

<sup>112</sup> Barnett (2004) 44.

<sup>113</sup> *Ibid.*

together. This collection of laws becomes the basic law of the society, and is referred to as the constitution of the particular society. People thus willingly give up their rights and will, and agree to a collective ‘bindingness’ of the duties, liberties and responsibilities contained in the constitution on them all.

By this, the rights of the society is pooled together, and such is then exercised by delegating them to appointed persons from within the society to act as agents for the members of the society as a whole and to do so within a framework of structures and procedures that is a government.<sup>114</sup> Such government may not exercise any power not delegated to it, or do so in a way inconsistent with established procedures defined by the basic law, which is the constitution.

The social contract is evident in the constitution making process itself, by which representatives of the various communities forming a state are appointed by the community to represent them on a ‘constitutional drafting committee’ or whatever body is set up for such purpose as the case may be. If one looks at the different ways by which constitutions are made, one sees that the process is meant to be representative of the desires, hopes and aspirations of the people and of the intent of the people to give up their individual rights under the natural state, and to agree to be governed. Thus, the constitution making process resembles a social contract - although not the original one.

Social contract theory emphasises the consent of a particular population to be governed. The government is legitimate, not because it is inherently limited, but because the members of the society have agreed to be governed in a particular manner.<sup>115</sup> Thus the ‘contract’ that operates in constitutional democracies is that of the individuals, making up the collective, and the constitution, by providing a framework for such individuals to be acted upon by the constitution. This is further evidenced in the preamble of most constitutions that starts with ‘*We the people ....*’

Cleveland argues that ‘membership’ approaches in essence replace the concept of natural rights with a theory of positive rights emerging out of the contract between

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<sup>114</sup> Roland J (1994), *The Social Contract and Constitutional Republics* (accessed on 27 October 2009) at <http://www.constitution.org/soc/const.htm>.

<sup>115</sup> Cleveland SH ‘Powers Inherent in Sovereignty: Indians, Aliens, Territories and Nineteenth Century Origins of Plenary Power over Foreign Affairs’ (2002-2003) 81 *Texas L. Rev.* 1 at 20.

the government and the governed.<sup>116</sup> Thus membership of the society is what determines those to whom the social contract applies. They must be those categorised as ‘members’ by whatever criteria are applied by the particular society. That the criteria for membership differ, is the important factor that determines who is bound by the social contract. That criterion could either be ‘membership by birth’, ‘membership by affiliation’, or ‘membership by location’.

The social contract theory therefore has significant implications for individuals subject to government action, who are not ‘members’, and consequently not parties to the agreement. This is because only ‘members’ and beneficiaries of the social contract are able to make claims against the government, and are entitled to the contract’s protection. Government may then act outside of the contract’s constraints against individuals who are non-members. However, it should be noted that there are other bases on which certain contracts would apply to non-members.<sup>117</sup> For example, a visitor in a foreign country would be under an obligation to behave according to the laws of that land, and if found to have breached such laws, can be validly acted against by the officials of that land. Such visitor would be deemed to have consented to be bound by his/her action of going to a foreign country for whatever reason.

To buttress his point, Cleveland cites the preamble to the Constitution of the United States to illustrate the fact that constitutions signify the new ‘contracts’ of the theory.<sup>118</sup> The preamble reads as follows: ‘*We the people of the United States, in order to form a more perfect Union, establish justice ... do ordain and establish this Constitution for the United States of America*’.<sup>119</sup> He argues that the language suggests that the constitution applies only to the ‘people of the United States of America’ and possibly only when they are within the territory of the United States of America. This further promotes the membership vision, as only members of the constitutional compact would be entitled to its protections. However, this

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<sup>116</sup> Cleveland (2002-2003) 81 *Texas L. Rev.* 20.

<sup>117</sup> *Ibid*; or also those who are the subsequent generations of the ‘non-members’, who by virtue of their being born in and living within the society acquire some measure of membership.

<sup>118</sup> Cleveland (2002 – 2003) 81 *Texas L. Rev.* 21.

<sup>119</sup> Preamble to the Constitution of the United States of America, quoted in Cleveland (2002-2003) 81 *TLR* 21.

restrictive interpretation is also not compelled by the preamble, as it speaks of ‘the people’ and not ‘the citizens’, thus giving it a much wider definition.<sup>120</sup>

This same principle applies in the constitutional democracies of African countries. Taking the examples of South Africa and Nigeria, the same pattern emerges. The Constitution of the Republic of South Africa also starts with a preamble that signifies the social contract theory. It states as follows:

‘We, the people of South Africa, recognise the injustices of our past; ... believe that *South Africa belongs to all who live in it*, united in our diversity, we therefore, through our *freely* elected representatives, adopt this Constitution as the supreme law of the Republic so as to ...’<sup>121</sup>

This preamble encapsulates the contract theory. It signifies not only that the ‘people’ of South Africa have agreed to be bound, but also widens the membership approach to those to be bound, by including ‘all those who live in South Africa’, and then specifically indicates the play of will and freedom that comes with the act of passing the Constitution into law.

This same evidence of the social contract idea is found in the case of Nigeria. The Constitution of the Federal Republic of Nigeria 1999, in its preamble states as follows:

‘We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved . . . to provide for a constitution for the purpose of promoting the good government and welfare of *all persons in our country*. . . do hereby make, enact and give to ourselves the following constitution’<sup>122</sup>

This preamble also indicates the presumption of the collective; freely drafting, making, enacting and agreeing to be bound by the provisions of the constitution (contract). Most other constitutions also provide for the social contract idea of ‘we’ the people,<sup>123</sup> thus evidencing the idea of a people who agree freely to be

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<sup>120</sup> *Ibid*; thus as indicated above, the acquisition of membership could either be by birth, location, affiliation or any other bases that the constitution provides.

<sup>121</sup> Preamble to the Constitution of the Republic of South Africa, 1996 (own emphasis).

<sup>122</sup> Preamble to the 1999 Constitution of the Federal Republic of Nigeria (own emphasis).

<sup>123</sup> Some start as ‘We, the representatives of the people of ....’ See details on Constitution Finder website available at <http://confinder.richmond.edu/> (accessed on 18 July 2010).

bound by whatever laws and provisions are contained in the constitution; to be governed by the executive; for laws to be made by their appointed legislative representatives, and for the law to be interpreted and upheld by their appointed judicial representatives.

Against this background of ‘volition’ and ‘freedom’ to be bound by the rules contained in these constitutions, it is important to examine how true this is in African countries where, as a result of colonial rule (or apartheid in the case of South Africa), the legal systems of other societies have been transported, inherited, and imposed on the recipient countries. This is usually achieved without due regard to the indigenous legal systems that existed prior to the contact with the colonial regimes. Could the people of these recipient states be said to have voluntarily at some stage, given up their individual rights for the collective good of the society? Can the ‘constitutions’ of these countries be said to be a product of the free will of the people? Also in the case of the appointment of representatives, could one refer to all the officials of governments that exist now as valid representatives of the people?

This question is also pertinent in cases where the ‘so-called’ representatives have been imposed firstly by the colonial government and then subsequently, by African governments, who continue to impose on their own people through the rigging of elections or hijacking of the processes associated with constitution making or constitution amendments. For example, the various instances of constitution amendment in Nigeria have been fraught with irregularities and malpractices that end with the process not being genuine or true to the people or to the needs and aspirations of the people.

In South Africa, even though the 1996 Constitution has been hailed as one of the best and one of the most progressive constitutions in the world,<sup>124</sup> the question remains to be asked, ‘does it really reflect the hopes and aspirations of the people

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<sup>124</sup> See for example, Dugard J ‘Can Human Rights Transcend the Commercialisation of Water in South Africa? Soweto’s Legal Fight for an Equitable Water Policy (2010) 42(2) *RRPE* 175 at 179, in which the author evaluates the provisions of the socio-economic rights in the constitution, in particular, the right to access water; Crush J ‘The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa’ (2001) 38(6) *International Migration* 103-133; and Scribner D & Lambert PA ‘Constitutionalising Difference: A Case Study Analysis of Gender Provisions in Botswana and South Africa’ (2010) 6(1) *Politics & Gender* 37-61 at 46.

of South Africa?’ Do South Africans see it as their own? Does it really portray the ‘will’, ‘consent’ and ‘agreement’ on the part of the people to give up their individual rights in order to be bound by the constitution? This is the conundrum that one faces in explaining the rule of law, the legal systems and the laws in Africa, against the background of the social contract theory.

### **3.3.4 The social contract theory and the received laws of Africa**

In continuing the discussion of the social contract theory and Africa, this section will examine the possibility of drawing a nexus between the social contract theory as analysed above and the situation in Africa. Can one say that the social contract theory can be applied to Africa, the way it has operated in other parts of the world, especially in the United States of America that is regarded as the seat of democracy? In the US, the social contract theory forms the basis of the US Constitution and the US Declaration of Independence. There it is evident that the rights and duties provided for in the constitution are a result of the collective rights of the people that have been freely given up in order to form a legitimate political society.<sup>125</sup>

Quite the opposite can be said to be the case in Africa, with its history of colonial rule. Here on the continent, the effect of the incursion of the colonial powers can be seen in the legal systems adopted by almost every state. As discussed extensively in the previous chapter,<sup>126</sup> the legal systems adopted in Africa were imposed by the European colonialists and they were initially designed to meet the needs of those Europeans who came to the continent to build their colonial

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<sup>125</sup> Historically, what is now referred to as the United States of America was also a colonial product. Europeans (settlers) from Britain, France, Netherlands, Spain and other European countries had arrived and settled in America from the early sixteenth century till late eighteenth century. Ultimately, they were under British rule. A revolution by the settlers led to the proclamation of independence in 1776, after which the people within the territories fashioned out structures of governance for themselves. A Constitutional Convention in 1787 resulted in the Constitution of the United States in 1788.

<sup>126</sup> See section 2.4.3 in chapter two of this thesis.

empires. Ultimately these laws became part and parcel of the laws imposed by the Europeans on the indigenes of the land.<sup>127</sup>

There have been comments by some authors on this process whereby received laws become assimilated into the indigenous laws.<sup>128</sup> Notable amongst these is Ogwurike, who in his writings has discussed the social contract theory in relation to the received laws that exist in Africa. He is of the view that received laws did not emanate from one 'definite' contract, as we know a contract to be.<sup>129</sup> He argues that a contract implies an agreement between parties, with each having full control over what rights and liabilities it agrees to; or at least with each party realizing the common intention of the agreement, otherwise there can be no *consensus ad idem*.<sup>130</sup> In the situation of the received laws in Africa, the relationship between the colonialists and the indigenous Africans, and or their representatives could not qualify to be one of a contract, as indigenous Africans had no control over what rights and liabilities they agreed to; it was dictated to them instead.<sup>131</sup> There was no willingness, voluntary agreement or consent on the part of the indigenous people of Africa to give up their inherent rights for the purpose of being bound or for the purpose of creating a collective government using the British, French or any other legal system. Thus he sees any notion that the received laws resulted from any agreement between the Africans and the colonialists who conquered and invaded Africa as untenable.<sup>132</sup>

Ogwurike continues that for law to be legitimate there must be spontaneous obedience to it. It should automatically come through to the citizens to obey the law. This to him is the mainstay of the social order and coercion should not be used.<sup>133</sup> Coercion only comes in at the point where law itself has failed to command obedience. He questions what causes and what those phenomena in society are which command spontaneous obedience, and those that weaken it. These are different factors, and they are very relevant to the binding force of

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<sup>127</sup> Menski W (2005) *Comparative Law in a Global Context* 444; see also Ezetah CR 'Beyond the Failed State' in Quashigah (1999) 424;

<sup>128</sup> Ayittey G (1991) *Indigenous African Institutions* 397; Menski (2005) 444.

<sup>129</sup> Ogwurike C (1979) *Concept of Law in English Speaking Africa* 174.

<sup>130</sup> Ogwurike (1979) 174.

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

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

law.<sup>134</sup> It is very important for the law to command obedience to itself not by reliance on state forces to coerce obedience to it, but by the fact of its being the accepted popular venue for ushering in the popular goal, and bringing fulfilment and satisfaction to the wants and desires of the people.<sup>135</sup> This will be the case in a situation where there is a viable social contract in existence amongst the people. In the African scenario, the existence of such social contract is doubtful, due to the fact that the law is alien to the people and not a product of the will or agreement of the people.

The legal systems that exist in English speaking African countries (and even in other African countries) are not always entirely a set of rules acceptable to the members of the community as binding. The legal systems in these countries are usually of a pluralist nature, comprising mostly of the laws of the colonial masters, the indigenous laws of the people, and in some extreme cases the religious laws of the people. Due to this pluralist nature of the legal systems in these countries, the allegiance of the people to the legal system becomes divided. The legal system of these English speaking African countries recognise not only the written law (which is a product of English common law), but also the customary law that is meant to be indigenous to the people. Such customary law, however, as indicated in the previous chapter, lost their original character by reason of the attempts by the Europeans to obliterate the laws which signified African strength and pride.

The legal inheritance of English law has led to legal problems persisting, which has in turn slowed down and hindered social, economic and political advancement in most English speaking African states.<sup>136</sup> The view is often expressed that English speaking African countries ought to have decided at the point of independence, the laws which were applicable to their unique cultures and norms, and used those, instead of continuing with the laws that existed at the time of independence that had been imposed by the colonialists.<sup>137</sup>

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<sup>134</sup> Ogwurike (1979) 176.

<sup>135</sup> Ogwurike (1979) 176-177.

<sup>136</sup> These problems, such as the application of the norms and values of English law to local or traditional cases and people, have usually resulted in 'hardships' on the people, even as their practices and legal rules are at times struck down as being repugnant.

<sup>137</sup> Ogwurike (1979) 184. He suggests points that need to be considered in modernizing the law in Africa. These are the adoption of new constitutions that are indigenous to the states; removal of



Ogwurike argues that for any law to be legal and legitimate, it must have significance to the socio-economic life of the people. Without the interconnectedness between the people, their culture, their political and economic outlook and aspirations on the one hand; and law, order and legality on the other, legal obedience will not be a dutiful submission to authority.<sup>138</sup> This will mean that compulsion and force will continue to be a very strong and necessary feature of law, with resultant civil commotions and political instability. Law in Africa must be conceived of and evaluated in terms of its social purpose, function and the value system in which it is to be applied. He agrees with the postulate that the essence of law lives outside the law itself. It is to be found in the people, their ways of life, value systems and their common aspirations. The socio-economic and political life and outlook of the people should provide the base for the superstructure which is law.<sup>139</sup> Right now the law is not reaching, meeting and addressing the needs of the people as much as it should. It is presently foreign, esoteric, and even archaic, and sometimes the obscure terminology (the language) used in the administration of the law, makes it even more remote and sometimes beyond the comprehension of the populace.

The fact that greater percentages of the people feel a very minimal connection to the law (as seen in the lack of adherence to the law) means that use of the law in legal administration brings about a kind of mysticism, or apathy amongst the people which in turn hinders legal awareness. Thus no major changes can evidently be made or sustained in political and social arrangements to modernise Africa, and to promote rapid economic, political, social development without a framework answering to the yearnings of the people. As long as legal development remains based on the colonial and neo-colonial legal systems, development and progress in Africa will be stunted.<sup>140</sup> Ogwurike feels that much of the unrest in Africa is due to the legal, political and social arrangements which

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or tempering of the influence of British value systems in the law; radically changing the system, nature and hierarch of the courts, especially appeals to the Privy council (this change in the case of appeals has already been effected by all African states, as appeals no longer go to the courts in England as it did during colonial rule), and replacement of received English law by local enactments.

<sup>138</sup> Ogwurike (1979) 194. This is not a reference to customary law *per se*, but a reference to the totality of the person of an African.

<sup>139</sup> Ogwurike (1979) 195.

<sup>140</sup> Ogwurike (1979) 195.

do not reflect the wishes and desires of the people of Africa.<sup>141</sup> Laws in Africa should be expressive of the social purpose of the people. In the absence of this, the system, procedure and content of the law (particularly the received law as it now stands) call for radical change that will further the social purpose of the African people.

The question may be asked as to what the alternative is. Would it be feasible to propose a return to the traditional customary law which evolved more in line with the social contract theory, where the people of each society gave their consent to be bound by their own customs? To advocate a return to the traditional/indigenous customary system of law will be impracticable, as it could not cope with the exigencies of the present time; neither with the imperatives of quick social and economic changes. The development of new phenomenon like globalisation, democracy, capitalism and others that societies continue to experience, already radically changes the face of the societies.

Another theoretical analysis that impacts on the exploration of the rule of law in Africa is Kelsen's Pure Theory of Law. One of the issues which Kelsen dealt with was that of the 'basic norm' or 'Grundnorm' as he called it. He explained this as the fundamental norm of a society, which forms the backbone from which all other norms derive their validity. There is some degree of consensus as to the location of the grundnorm in the constitutions of societies/states,<sup>142</sup> which is subject of our research on the rule of law in Africa. It is therefore necessary to briefly expound on Kelsen's theory in this respect, in order to get a proper perspective on the analysis of the rule of law in Africa.

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<sup>141</sup> *Ibid.*

<sup>142</sup> Aguda A (1992) *The Judicial Process and the Third Republic*, chapter 5; Ojo A 'The Search for a Grundnorm in Nigeria: The Lakanmi Case' (1971) 20(1) *ICLQ* 117; see view of Sir Udoma in the Ugandan case of *Uganda v Commissioner of Prison, ex parte Matovu* (1966) EALR 514 at 538.

### 3.4 Kelsen's Pure Theory of Law and its Implications

Hans Kelsen,<sup>143</sup> one of the pre-eminent jurists of the analytical school of jurisprudence, advocated what he referred to as the 'Pure Theory of Law'.<sup>144</sup> By this he postulated that:

- 1) Law consists of a hierarchy of norms, an interwoven unit of norms in which every norm is dependent for its validity upon a superior norm.<sup>145</sup>
- 2) There is a backbone norm (basic norm) conferring validity on other norms that is the *Grundnorm*. (The determination of the validity of a particular norm is furthered by the citizen thinking that it exists and that there is a power behind it which obligates those whose behaviour it is meant to order).
- 3) The validity of each norm may be weighed on the scale of the basic norm.
- 4) The validity of the basic norm however cannot be justified by reference to another norm; it must derive its validity from the fact of recognition, acknowledgment and acceptance conferred on it by the members of the society.<sup>146</sup>

He saw the basic norm that he referred to as

'a norm not created in a legal procedure by a law-creating organ. It is not valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; because without this presupposition, no human act could be interpreted as a legal act.'<sup>147</sup>

It is thus a postulated ultimate rule from which other norms of a legal order are established. It is the 'last ground of validity within the normative system'.<sup>148</sup> All of this, however, according to Kelsen is limited by the legal order to which the basic norm belongs. These norms remain valid as long as they have not been

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<sup>143</sup> 1881-1975.

<sup>144</sup> He referred to it as the 'pure' theory because it allows no mixture of any foreign element. It is thus removed from the cognition of law, ethics, political, sociological and historical considerations.

<sup>145</sup> Kelsen H (1992) *Introduction to the Problems of Legal Theory* 29 (a translation of *Reine Rechtslehre*), 1<sup>st</sup> ed, (Pure Theory of Law).

<sup>146</sup> *Ibid*; see also Kelsen H (1961) *General Theory of Law and State*; Etudaiye ME 'The Pure Theory of Law and the Fragile New Democracies of the Developing World' (2007) 33(2) *CLB* 218.

<sup>147</sup> See generally Kelsen (1961) 115 – 118.

<sup>148</sup> *Ibid*.

invalidated in the way in which the legal order itself determines.<sup>149</sup> That means they are legitimate in the eyes of the legal order.

In considering Kelsen's theory, the question of what is considered to be the grundnorm in contemporary times is raised. This has elicited quite a number of views. Those of the constitutional school have posited that in the context of constitutional governments, the constitution is the basic law that Kelsen refers to as the grundnorm.<sup>150</sup> This they claim is because the constitution is the ultimate rule according to which other legal norms in the State are established, to receive or lose their validity. This view is supported by the late fifties case of *State v Dosso*,<sup>151</sup> in which the Pakistani supreme court was of the view that the grundnorm was the constitution.

Sir Udo Udoma, a learned Nigerian legal luminary, also followed this view in the Ugandan case of *Uganda v Commissioner of Prison, Ex Parte Matovu*.<sup>152</sup> This case was later affirmed by the Privy Council in London on appeal thereto.<sup>153</sup> Ogwurike also points out that 'the constitution is the basic law in Kelsen's *Grundnorm*. It is postulated to be the ultimate rule according to which other legal norms in the state are established, receive or lose their validity'.<sup>154</sup>

The implications of these theoretical postulates on the countries in question will be examined in the next chapters. The following sections will examine some of the recent phenomena and developments on the international plane that have impacted

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<sup>149</sup> *Ibid.*

<sup>150</sup> Aguda (1992) chapter 5; see also Ojo (1971) 20(1) *ICLQ* 117-136 at 136.

<sup>151</sup> (1958) PLD 530.

<sup>152</sup> (1966) EALR 514 at 538.

<sup>153</sup> Udoma (1994) 267. In this case, the President of Uganda and the Vice-President had been deprived of their authority and offices by the Prime Minister. Based on the further influence of the Prime Minister, the National Assembly also passed a resolution abolishing the 1962 Constitution of Uganda and replacing it with another one referred to as the 1966 Constitution of Uganda. Applying Kelsen's principles, the Constitutional Court of Uganda held *inter alia*, that the 1966 constitution of Uganda was a legally valid construction and supreme law of Uganda.

<sup>154</sup> Ogwurike (1979) 112. Admittedly, this view has been seriously contested by the likes of Hopton TC in 'Grundnorm and Constitution: The Legitimacy of Politics' (1978) 24 *McGill L. J.* 72-91 at 82. He opines that Kelsen's grundnorm is a presupposition of other laws that emanate from it. He emphasizes that the grundnorm lies outside of positive laws and their norms; outside of laws that are made. He further says, 'if it were otherwise, that is, if the grundnorm were merely another positive law, it would always be possible to ask why that prescription in turn was itself valid'. For further contested views see also; Eleftheriadis P 'Begging the Constitutional Question' (1998) 36 *JCMS* 255; Ibagere E 'The Mass Media, the Law and National Security: The Nigerian Perspective' (2010) 24(2) *J. Soc. Sci.* 121-128.

on Africa, and that have in the same vein called the theories above to question, especially as relates to Africa. Some of these are globalisation, democratisation and the development of international law.

### **3.5 Impact of Globalisation and Democracy on the Rule of Law in Africa**

#### **3.5.1 Globalisation and its influence on Africa**

##### **3.5.1.1 What is globalisation?**

Globalisation is a recent phenomenon in world history, which has been defined as the process of advancement or increasing interaction between and amongst countries, peoples and economies, facilitated by progressive technological change in locomotion, communication, political and military power, knowledge and skills, as well as interfacing of cultural value systems and practices.<sup>155</sup> It has been said to be a historical process, the result of human scientific innovation and technological progress.<sup>156</sup> It is also an international socio-politico-economic and cultural diffusion process facilitated by policies of governments, private corporations, international agencies and civil society organisations. The globalisation drive is usually aimed at enhancing and deploying a country's economic, political, technological, ideological and military power and influence for competitive domination in the world. It thus refers to an extension beyond national borders of the same market forces that have operated for many centuries at all levels of human economic activity.<sup>157</sup>

As a phenomenon, it developed in the 1980's, and is aimed at making a country, organisation or society competitive and relevant in the present times.<sup>158</sup> One author has described globalisation as a 'deeply differentiated phenomenon that embeds continuous processes and patterns of interaction in diverse areas of human activities – economic, social, political, cultural, military, environmental and

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<sup>155</sup> Nsibambi A, *The Effects of Globalization on the State in Africa: Harnessing the Benefits and Minimizing the Cost* UNGA Second Committee Panel Discussion on Globalization and the State, 2 Nov 2001.

<sup>156</sup> Okoye SE (2004) *Globalisation and the Political Future of Nigeria* Nigeriaworld Feature Article available at <http://nigeriaworld.com/articles/2004/oct/131.html> (accessed on 23 May 2009).

<sup>157</sup> Okoye (2004).

<sup>158</sup> Nsibambi (2001).

citizenship, and through these web of activities, nation-states, societies, international institutions, NGOs, multinational corporations are linked and networking together towards achieving their objectives.<sup>159</sup> It has both potentially positive and negative implications on a country.

Globalisation is seen as an extension of previously local influences beyond national borders. This means that in a 'global environment', whatever happens in country A (especially if market related), would have a consequential influence on country B and C and many other countries that are not necessarily connected to country A. The imagery of dropping a stone or piece of coin in still waters, and the ripple that that singular action causes in water, up to several meters away, can be used to depict how the effect of globalisation is felt all around the world. This can be seen as globalisation and the way it ripples all through the nations of the world. The interconnectedness of states and societies especially from the late 1990s has been brought about by the rapid development of communication technologies and the sophistication of international capitalism.<sup>160</sup> The world as a whole has now become one global village, with the availability of technology, the internet and other forms of media. Influences are easily transferred and carried over across the internet, and through sound and video airwaves. The ease with which this happens depicts what is referred to as globalisation.

Capitalist forces have been globalised through the influence of international organisations, and multinational corporations like the International Monetary Fund (IMF), World Bank, the World Trade Organisation (WTO), the United Nations (UN) and others; and even relations between developed economies and underdeveloped ones have invariably made it relatively easier for the spread of democracy.<sup>161</sup> Democratisation in itself is a form of globalisation, because it accentuates the transformation of a global political economy in which hitherto closed economies dictated by authoritarian regimes were brought into a mutual interdependence through economic and political interconnectedness.<sup>162</sup>

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<sup>159</sup> Kura SYB (2005) 'Globalisation and Democracy: A Dialectical Framework for Understanding Democratization in Nigeria' 2005 5(1) *Globalisation* 2.

<sup>160</sup> Kura (2005).

<sup>161</sup> *Ibid*

<sup>162</sup> *Ibid*.

Looking at the historical antecedents of globalisation, one can see that it is not a new phenomenon. European colonialism marked the beginning of global interconnectedness and interactions. The newness in the phenomenon is however the way in which global interconnectedness has been reinforced by the conditionalities that the International Financial Organisations like IMF and the World Bank attaches to the grants it gives to developing countries.<sup>163</sup>

The effect of globalisation on the African state is not only of an economic nature, it is actually felt all through the different areas of the continent. It includes the diffusion of political ideas and practices, of cultural and religious beliefs and practises, of administrative and managerial concepts and practices across borders, across organisations and across continents. It also includes the domination by super-powers through military coercive means and the imposition that go with it, and it involves internationalisation of conflicts that would have otherwise remained local.<sup>164</sup>

### 3.5. 1.2 Effects of globalisation

Globalisation is heralded as the new wave of international influence in Africa. It signalled a new beginning in the impact that economic, political and even social events all over the world have on Africa. However, in relation to statehood, Kura asserts that globalisation is now rendering the efficacy of state sovereignty rather irrelevant, because as long as states continue to participate in interactions with each other in economic, social or political matters, they would continue to lose a substantial degree of their autonomy.<sup>165</sup>

As mentioned earlier, globalisation and democracy are inextricably interlinked. Democratisation is one of the several consequences of globalisation, and the one is aided by the other.<sup>166</sup> Democratisation and integration into the world economy (a form of globalisation) have been described as mutually reinforcing.<sup>167</sup> This is

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<sup>163</sup> See, generally, Kura (2005).

<sup>164</sup> Nsibami (2001) 3.

<sup>165</sup> *Ibid.*

<sup>166</sup> Akinboye SO 'Globalisation and the Challenge for Nigeria's Development in the 21<sup>st</sup> Century' (2008) *Globalisation* 1-11 at 6; where he indicates that the general acceptance of democratic forms of governance constitutes the third major force of globalisation in the contemporary world.

<sup>167</sup> Bates RH 'The Economic Bases of Democratisation' in Joseph (ed) (1999) *State, Conflict and Democracy in Africa* 96.

because the web of interaction amongst societies in the area of trade, production and finance, have made economic and political liberalisation easier. Repeated interactions bring about a situation in which developing societies and former communist societies are continuously subjected to political aid conditionalities.<sup>168</sup> Part of the ways by which global liberalisation has shown its links with democratisation is through the conditionalities that developing countries and former communist societies are continuously subjected to in order to get aid. These conditionalities usually would be to the effect that only ‘liberal democracy’ and economic openness on the part of the country seeking the aid, would pave the way for such aid. This further establishes the authority of western capitalism over developing countries, most of which are in Africa. The conditionalities form part of the reasons that the growth of western modelled democracies has been witnessed amongst the worlds’ developing countries and former communist societies, as these societies have sought aid at different levels from the developed states.

Another way of globalisation encouraging democratisation is through the effect of economic liberalisation, which is actually the creation of a free global market that facilitates new forms of citizenship, middle class and civil society, which classical democracy theorists contend to be engines of democratisation.<sup>169</sup> The countries in South East Asia, like Taiwan, Hong Kong, Singapore, Thailand, Malaysia and others for example, have benefited immensely from the liberalisation and diversification of their economies, and this has enhanced their economic developments.<sup>170</sup> There are, however, those who feel that democratisation in Africa and economic liberalisation are not compatible, as these will open up African economies to necessarily hostile international forces.<sup>171</sup>

Different countries have reacted differently to globalisation. The speed with which it caught on as an international phenomenon, initially, made many countries wary of it and they initially refused to engage with it. For some countries, globalisation is a problem, for others, it offers a development potential that can be used to

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<sup>168</sup> Kura (2005).

<sup>169</sup> Kura (2005).

<sup>170</sup> Akinboye (2008) 7.

<sup>171</sup> Joseph (1999) 96.



advance their growth and their self-interest, whether national or personal.<sup>172</sup> Indeed, globalisation offers great opportunities and can contribute in immense ways to the development of a society or country. It has ‘positive, innovative, dynamic aspects’ while at the same time it carries with it a ‘cost’. This cost is what is referred to as the negative effect of globalisation. It is like the two-sided coin, having the positives on the one side and the negatives on the other side.<sup>173</sup> The cost of globalisation varies from place to place, society to society, people to people. The particular costs to Africa would be discussed later in this chapter.

Part of the effects of globalisation in Africa is the impact the phenomenon has had on state sovereignty. It has to a large extent reduced the autonomy of African states. The state decision and policy making processes have been and are being influenced by globalisation as well as by international law. It is said that the evolution of global economic forces undermines the sovereignty of African governments over economic matters, consequently making democracy essentially irrelevant.<sup>174</sup> Thus the power of the state in itself has been globalised and shared amongst various world decision making bodies, like countries in the west; human rights organisations; international environmental organisations; the UN; international tribunals and courts systems and many others. Although these influences seem positive at first glance, African states often find themselves the target of the decisions, reports and practices of international courts, international human rights organisations, international military conventions, international laws, rules and regulations, international and regional trade organisations, international lobby and pressure groups.<sup>175</sup>

Education is also a vehicle to bring the influences to the people. Currently, the curriculum in universities and institutions of higher learning in Africa are modelled after the western type education. This means that in their knowledge, skill and attitude-imparting duties, these institutions shift the behaviour of societies and

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<sup>172</sup> Nsibambi (2001) 2.

<sup>173</sup> UNDP Human Development Report 1999, 25.

<sup>174</sup> Ake C ‘Dangerous Liaisons: The Interface of Globalisation and Democracy’ in Hadenius A (eds) (1997) *Democracy’s Victory and Crisis* 282-296; see also Cheru F ‘New Social Movements: Democratic Struggles and Human Rights in Africa’ in Mittleman JH (ed) (1996) *Globalisation: Critical Reflection* 145, where he suggests that globalisation will necessarily result in more hardship and further marginalisation for the majority of poor African peasants and the third world as a whole.

<sup>175</sup> Nsibami (2001).

state leadership, as well as followership. All of these contribute to reinforce the phenomenon of globalisation and force the state to shift its behaviour and the way it relates with both its subjects and its internal and external partners.<sup>176</sup>

### 3.5.1.3 Costs of globalisation in Africa

As mentioned above, the forces of globalisation and internationalisation have impacted heavily on Africa. The impact (or cost) has been both positive and negative. Economically, Africa can be said to have benefited in terms of the opening up of and increased access to trading partners and trade in general, though this benefit is to be questioned in terms of the inequality and disparity in trade between African traders and their western partners. For instance, in the agricultural sector, even though there has been increased access to trade products and partners, and even though African goods compete on the same plane and level, it is perceived that there remains a huge disparity and inequality to the benefit of the western traders. This is due to the ability of western governments to subsidise their farmers and manufacturers heavily, so that at the end of the day, they are able to reduce the price at which their products get into the market, resulting in more produce getting into the market, quicker turnover and increased yield for them, compared to their African counterparts who have no such benefit as subsidisation, and whose products therefore get to the market at a higher price tag. Apart from the agricultural sector, there are many other areas in which globalisation impacts on Africa. Some of these will be discussed below.

African countries are in many ways developing, and as such they do not yet have the requisite capacities demanded of them in many areas of state life. Issues such as production of harmful chemicals, global warming, depletion of natural resources and many other environment related cases, bear smaller relevance in Africa, compared to the West (even though the effects of environmental degradation is being felt all over the world). However, as globalisation takes place, and as industry, agriculture, mining, manufacturing and others, expand their activities into African countries, the already limited regulatory capacities of these states are becoming overstretched. This results in the states becoming highly incapacitated to cope with the demands on them. African states are then often caught between

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<sup>176</sup> *Ibid.*

their need to speed up economic development (through industrialisation, agricultural modernization and exploitation of natural resources); the need to provide for the social needs of their people and the pressure of local and global environmental groups.

Globalisation has also led to a situation whereby most African governments are finding themselves technically stripped of their powers to make law and policies.<sup>177</sup> At various times, policies (especially financial and economic) are being made at certain levels by those to which the countries are indebted to. International organisations such as the World Bank, IMF, the UN and WTO also operate in such a way that they take decisions that are binding on states. This erodes the sovereignty and power of the state, and the poorer states suffer more from this.<sup>178</sup>

Also linked to the above, is the impact that globalisation plays in the democratic process. This process usually requires the people of the country in question to get involved in the taking of decisions and policies that concern them. However, this is at times not the case in an increasing number of African states. Due to globalisation, the decisions affecting Africa today are perceived by the people as being imposed by ‘globalisation’ players such as the World Bank, IMF, the WTO and others.<sup>179</sup> This engenders distrust of the democratisation process by the people,<sup>180</sup> especially since they feel that their leaders at times have no say in certain matters, and are usually confronted with a *‘fait accompli’* in some respects.

Globalisation has brought with it an era for change. In terms of crimes, the types of crime have evolved from the ‘traditional’ crimes like robbery and theft, to more sophisticated crimes like drug abuse, piracy, pornography, internet frauds or

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<sup>177</sup> Nsibami (2001).

<sup>178</sup> *Ibid.*

<sup>179</sup> For example, looking at the privatisation and liberalisation policies in operation in Africa presently, one tends to feel that these policies are usually imposed from the level of those organisations,

<sup>180</sup> As they have no sense of ownership of the process. Nsibami reports that it has become evident that there is a discrepancy between the rhetoric from these bodies about the need for democracy, rule of law and good governance in some cases, and the way these bodies arrive at decisions of great consequence and importance to African countries, without even consulting with the people the decisions will affect the most. See Nsibambi (2001).

scams, ponzi schemes,<sup>181</sup> and others. The Information Technology (IT) era has seen the evolution of new types of computer-based crimes, which have really challenged the capacity of law enforcement, particularly in Africa. Many of the law enforcement agencies in Africa have limited training in the use of IT, and find it difficult to investigate the crimes. Also to contend with, is the increase in these crimes across borders, which makes the forces of law and order look helpless, unhelpful and incapable. The effect of the challenge by criminals on the state is the creation of an atmosphere of uncertainty and insecurity in the public, thereby reducing the required confidence that would normally attract both local and foreign investment.<sup>182</sup>

Globalisation brings pressure to bear on African governments to allow and maximise foreign investment and capital inflows. This leads to a situation in which many times, the focus of African governments is in trying to please and cope with globalisation demands, to the detriment of its own peoples. Many of the economic policies being implemented by African governments have turned out to be more suited to the globalisation partners than their own people.<sup>183</sup> This further worsens the situation of poverty in the countries, and promotes a situation where the gap between the poor and the rich becomes wider and wider (ultimately leading to crime and other forms of social ills).

Globalisation has enabled African countries to source for financial and other forms of aid. The phenomenal burden and stranglehold that debt has on African countries is well known. The question of how African countries came to be in so much debt can partly be explained by virtue of the incapacity on the part of the borrowers to pay back the money borrowed, irresponsibility of the leaders, lack of accountability by the leaders and states, and the ease at which the lenders gave out the money to the countries without ascertaining that the countries were willing and

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<sup>181</sup> This is a fraudulent investment operation that pays quick returns to initial contributors using money sourced from subsequent contributors rather than profit. It is named after Charles Ponzi, who carried out such a scheme in the US in the early 20<sup>th</sup> century (sourced from Collins English Dictionary, 10<sup>th</sup> edition, 2009).

<sup>182</sup> Nsibambi (2001).

<sup>183</sup> For example, economic policies like SAP, imposed on African countries, were of such a nature that they actually worked against the development of African peoples and their economies.

able to pay back.<sup>184</sup> Globalisation has facilitated all of these types of transactions. The paradox that comes to light is that governments borrow in the name of poverty reduction, while the social spending that would go towards alleviating poverty remains very low.<sup>185</sup>

Globalisation has also opened doors and borders and allowed relatively free labour movements. This has aggravated the problem of brain drain, which has ravaged Africa for a while. Skilled Africans, who are often educated abroad, and who desire a better life for themselves emigrate to the west using their skills to make a better living there. The removal of these levels of expertise, skills and knowledge from Africa affects the development of the countries from which they are removed, because those skills and expertise would have been useful in the growth and development of their respective countries. Presently, the situation that these countries enjoy remittances from their nationals working abroad, which go to boost their income on paper, is not tenable. It is suspected that the actual contribution of the experts would have been more valuable than the remittances.<sup>186</sup>

The effect of globalisation on the rule of law in Africa becomes apparent, in all of the ways mentioned above. The same way in which it influences African states, it also influences the law making capabilities and of the states. Law-making then becomes subject to external actors and influences which influence the state of affairs in African states. These actors and influences, to a large extent, determine the trajectory of the state, and because of the fact that African states remain highly

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<sup>184</sup> See Boyce JK & Ndikumana L 'Africa's Debt: Who Owes Whom?' in Epstein GA (2005) *Capital Flight and Capital Controls in Developing Countries* 334 -339. The author describes how African states got themselves into these situation of debt, noting also the insincerity on the part of the ruling elite in Africa; how funds are converted into private pockets and not used for the developmental purposes for which they given; and how the interest paid on the debt far outstrips the principal debt.

<sup>185</sup> Nsibami (2001); Nikoi KN (1996) *Beyond the New Orthodoxy: Africa's Debt and Development Crisis in Retrospect*; Parfitt TW et al (1989) *The African Debt Crisis* 14, in which the author gives a synopsis of why the issue of Africa's debt is of concern. Even though developed countries are also in debt, in the case of Africa, when compared to the economic size and potential of African states, such high debt figures worryingly large.

<sup>186</sup> Nsibambi (2001).

dependent on the goodwill of their creditors,<sup>187</sup> they abide by the conditionalities put down.

### 3.5.2 Democratisation in Africa

#### 3.5.2.1 What is democratisation?

The term ‘democracy’ is defined in the Oxford Dictionary as ‘a system of government in which all the people of a country can vote to elect their representatives, the fair and equal treatment of everyone in a country, their right to take part in decision making’.<sup>188</sup> This means a system whereby the people within a country are allowed to make their own decisions especially in terms of their leaders and those who govern them. This definition was first proposed by ancient philosophers and links democracy to the social contract theory. It has undergone a lot of refinement with time. Huntington, in his book, *The Third Wave: Democratisation in the Late Twentieth Century*, describes democracy ‘as the institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’.<sup>189</sup> He further defines the concept relatively as the extent to which a political system’s most powerful collective decision makers are selected through fair, honest and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote.<sup>190</sup> This stands as the contemporary definition of the term. As can be noted from this definition, it is based on the ideas and postulates of the social contract theory. The idea of the ‘people’ within a particular society coming together to choose their leaders is an offshoot of the social contract theory.<sup>191</sup>

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<sup>187</sup> This is prevalent due to huge levels of mismanagement, failure of leadership and bad governance amongst African states. For example, Nigeria that is a huge producer of crude oil, often still depends on external aid.

<sup>188</sup> Oxford Advanced Learner’s Dictionary (7<sup>th</sup> ed) (2005), Oxford: Oxford University Press.

<sup>189</sup> Huntington S (1991) *The Third Wave: Democratisation in the Late Twentieth Century* 6. Note that the definition was first provided by Schumpeter (1976) *Capitalism, Socialism and Democracy*.

<sup>190</sup> Huntington (1991) 7.

<sup>191</sup> See also Manning C ‘Assessing African Party Systems after the Third Wave’ (2005) 11(6) *Party Politics* 707-727; Decalo S ‘The Process, Prospects and Constraints of Democratisation in Africa’ (1992) 91 *African Affairs* 7-35. The author gives a good synopsis of what led to and militated against democratisation on the continent.

Democracy as it is understood in this present age is a western notion, which, for instance, connotes the existence of structures and institutions within a country that ensure free and fair elections, and accountability on the part of office holders. However, the simple definition of the term is that of a system that gives people a voice in the affairs concerning them; that provides for a process whereby everyone has a voice and can have an input in decision making; and whereby decisions made reflect the consultative process that has preceded it.

This is evident in pre-colonial societies where the chief, even though having authority over the people, is traditionally constrained by having to consult with his elders and they with their constituencies, before any major decision is made. Failure to do this would be an indication that the chief is becoming despotic.

### 3.5.2.2 Trend of democratisation in Africa

In Africa, democratisation has become a somewhat elusive and even a rhetoric chant. It is a state of affairs that is strived for in most countries of the continent, but difficult to achieve. The influence of western based, western inspired ideas on the continent, coupled with the globalisation drive, has led to a situation in which the drive to democratise Africa has become of paramount importance for both the globalisation partners and the African countries. This has led to a series of what some have referred to as ‘false starts’ in Africa since the 1960s, at a time when de-colonisation was ongoing. Almost all African countries went through varying periods of autonomous civilian rule and military intervention.<sup>192</sup>

Africa has gone through what has been termed ‘crosscurrents’ in the democratisation process. These crosscurrents are evident in the many changes and different events taking place in countries in Africa. They underscore the stubborn vitality, yet precarious fragility of the political liberalisation process.<sup>193</sup> Young, in his attempt to outline the outcomes of the democratisation processes that began in Africa around the late 1980’s, borrows from Huntington’s exposé of the third wave of democratisation that swept through the international community.<sup>194</sup> In dealing

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<sup>192</sup> Joseph R, ‘Autocracy, Violence and Ethno Military Rule in Nigeria’ in Joseph R (ed) (1999) *State, Conflict and Democracy in Africa* 4.

<sup>193</sup> Young C, ‘The Third Wave of Democratisation in Africa: Ambiguities and Contradictions’ in Joseph (1999) 15.

<sup>194</sup> Huntington (1991) 109.

with the African scenario, Young feels that democratic experiments in Africa fall into the later stages of Huntington's second and third surges, while the long period of autocracy (from independence to 1989) as experienced in Africa corresponds to his period of interwave reversal (1958 – 1975).<sup>195</sup>

In juxtaposing the African scenario with that of the international community, he sees the institutions that were set up for power transfer during the independence era, which were in fact founded on constitutional provisions modelled on the colonial states, as the initial African wave of democracy. In the second wave, the global environment at the time exercised an important influence on the nature and short duration of the liberalisation efforts.<sup>196</sup> This influence is seen in the imprint of the global environment, which clearly marked the termination of colonial rule. International hostility to colonial rule and anti-colonial nationalism intensified after World War II and put the colonial powers on the defensive. To fend off the growing pressures for rapid power transfer, the colonial powers claimed to open the formerly exclusionary institutions of rule to indigenous participation and to conduct an apprenticeship in democratic self-rule.<sup>197</sup> For them, departure with dignity in the face of the international pressures for withdrawal and the rising local nationalist challenge meant that they would have to equip the colonial territories with constitutional structures replicating their own. In addition, the nationalist successors needed ritual consecration as popular representatives by electoral triumph if the colonial conscience was to be clear as the imperial flags were lowered.<sup>198</sup>

While the west saw democratisation as the natural end point in the transition to self-rule, in Africa, the road to democratisation was not quite easy. Amongst Africans, democratisation was favoured because it opened new political space to challenge the imperial powers. Anti-colonial groupings and organisations that had been banned and repressed by the colonial governments were allowed levels of freedom, and allowed to begin to articulate themselves in public. The nationalist forces on the continent were particularly in favour of the notion of democratisation before independence because it gave them two main advantages. Firstly, it

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<sup>195</sup> Young (1999) 15.

<sup>196</sup> Young (1999) 16.

<sup>197</sup> *Ibid.*

<sup>198</sup> Young (1999) 16-17.



provided an avenue for a mandate to be given by a competitive electoral process and populace, which conferred respectability on them at the international front. Secondly and more importantly, it promoted the removal of the repressive restrictions which the colonial governments had placed on political organisations, and this greatly facilitated the task of mobilizing mass support for independence.<sup>199</sup>

Even though powerful forces, within and outside the continent, converged to create the initial African wave of democratisation,<sup>200</sup> this was unfortunately not sustained, and after independence, support for democratic government began to evaporate on all fronts.<sup>201</sup> The same nationalist figures and organisations which had fought for independence earlier began to coalesce into single party structures, which did not entertain opposition within their different countries.<sup>202</sup> With independence won, the main doctrinal goals became rapid development and uprooting neo-colonial control of the economy. It was felt then that state developmental energies were infinite, and whatever resources were diverted to political competition and opposition debate had to be subtracted from the state wealth and capacities for a united assault on underdevelopment. In order to consolidate nationhood, there was a need to eliminate the tendencies of others to break away, and in doing so, it was found to be necessary to concentrate authority. It was believed that this was crucial to push development and the assertion of economic sovereignty. Thus, in the view of the leadership at that time, authoritarianism was the tool to ensure development and growth; there was no room for competitive democracy, ‘as Africa’s democracy has not yet matured to such an extent as other developed countries’.<sup>203</sup>

As these events were unfolding in newly independent African states, the Soviet bloc and China with its communist ideology, served as the most inspirational

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<sup>199</sup> Young (1999) 17.

<sup>200</sup> Forces outside of Africa were in the form of international organisations like the United Nations which stepped up its campaign against colonisation by passing Resolution 1514(XV) of 1960 titled, Declaration on the Granting of Independence to Colonial Countries and Peoples, and the setting up of the Special Committee on Decolonisation. Forces within were the various nationalist movements that gradually gained momentum on their various societies.

<sup>201</sup> Young (1999) 17.

<sup>202</sup> A number of examples abound in Africa: Zanu-PF in Zimbabwe; ANC in South Africa; in Kenya, the Kenya African National Union (KANU) has remained in power since independence in 1963 till 2002, turning the country into a one-party state. Mwai Kibaki, who took over as President under the auspices of the opposition party, has shown that he is no better.

<sup>203</sup> Young (1999) 17.

examples of swift economic transformation for the newly independent African countries, which were looking for ideas that would bring about the fastest transformation to nation building within their societies.<sup>204</sup> In addition, a strong anti-imperial sentiment existed amongst African states, and as a result, anything from the west was viewed with utmost suspicion. Thus, at the dawn of independence, there were exemplary lessons drawn from the soviet model (which ironically was not democratic, but represented what African states were looking for) which included the importance of state central planning; the capacity of the state to organise and direct development; the urgency of industrialisation, and the political and economic attractions of a large state enterprise sector.<sup>205</sup> However neither the socialist model nor radical anti-imperial third world nationalism attached much value to constitutional democracy after independence and African states prioritised economic development over political democracy, and went on a path of state led development of the economy and control.<sup>206</sup> Young argues that this emphasis on economic development over political development meant that the margins and bases of political legitimacy were not entrenched and solidified, and as attention was on economic development, this was at the expense of solidifying the political base of the African states.<sup>207</sup>

Amongst development theorists, there is the acknowledgement that state-led economic development came first and that democratisation followed later. This perspective was unfortunately easily enlarged to accommodate ‘military rule’ and one party states in Africa.<sup>208</sup> Former colonial powers were more interested in preserving their economic advantage and privileged connections at any cost, and did not attempt to set a democratic path for the continent. The human rights movement at the time had also not cohered into the strong solid movement that it is

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<sup>204</sup> This was because these countries were said to have grown greatly, economically and industrially, during this period. However the growth figures were later found to be false due to various contradictions and policy related deaths in those countries.

<sup>205</sup> Young (1999) 18.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid*; see also Van de Walle N (2001) *African Economies and the Politics of Permanent Crisis, 1979-1999*; Janowitz M (1964) *Military in the Political Development of New Nations*; Johnson JJ (ed) (1962) *The Role of the Military in Underdeveloped Countries*. These works give an indulgent appraisal of the military as an institution equipped with the integrity, nation-building commitment and discipline to direct the early stages of development. This was however not the case, as countries that have had military regimes in power all over Africa can testify.

today, and so there was no focus on Africa at that time. Thus, even though the de-colonisation wave had drawn important international support during the terminal period of colonial rule, such support no longer existed by the time state-led economic development began to gradually give way to authoritarianism.<sup>209</sup>

By the late 1970s, when Europe's last few dictatorships fell in Portugal, Spain and Greece, constitutional democracy became the universal mode of governance in Western Europe. Africa initially was not impacted in any way; however, the authoritarian system of governance had started losing its appeal, especially with its failure to meet the needs and aspirations of the people. The promises of economic development, social and cultural prosperity had not fully materialised, and the citizenry had grown sceptical of further promises.<sup>210</sup> With this loss of appeal, African states went through different ways of gradually experimenting with changes to the system.<sup>211</sup> Many of the experiments with democracy in the second era of civilian governance (sometimes referred to as 'the second republic) in Africa failed due to a host of reasons,<sup>212</sup> for example, the case of Ghana (1969-70),<sup>213</sup>

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<sup>209</sup> Young (1999) 18. In the initial few years of post-independence Africa, the tide of authoritarianism flowed strongly. This was based on the fact that in the 1970s and early 1980s, the Soviet Union and Western states struggled to gain superior grounds in Africa, in moves which were tantamount to a new form of colonialism referred to as 'neo-colonialism'. The Soviet Union pursued an active strategy of backing and supporting states with socialist orientation in Africa, whilst Western powers made efforts to bestow favours on states that were willing to stand against the Soviet influence, without any democratic litmus test being applied. The reign of Idi Amin of Uganda is an example of this. His rise to power was initially supported by the west even though he already showed despotic tendencies.

<sup>210</sup> The sentiment amongst the citizenry was that the single party system had merely provided cover for political monopoly for the rulers.

<sup>211</sup> Tanzania provided a model which was borrowed by countries such as Zambia, Kenya, Zaire, Malawi etc. This model was of competitive contests within the single party for parliamentary seats, although the rulers themselves were not challenged. Senegal abandoned the single party model in 1979, and gradually adopted a truly multiparty system in 1983; Gambia and Botswana remained moderately democratic throughout this period, even though without political alternation. See Posner D 'Regime Change and Ethnic Cleavages in Africa' (2007) 40 (11) *CPS* 1302-1327; Decalo (1992).

<sup>212</sup> These reasons include the lack of proper implementation of the law by the states, effects of the 'resource curse' (to be discussed in chapter four) and the subtle interference of western powers.

<sup>213</sup> In the case of Ghana, an attempt at restoring democratic rule in 1969 lasted two years before it fell to military intervention. The intervening military regime of General Acheampong itself was bogged down by unrestrained predation and corruption. The cocoa boom of the late 1970s in Ghana set in around this time, and led to the ousting of General Acheampong by another military intervention. Two other military interventions later brought Flight Lieutenant Jerry Rawlings into power. He allowed the already scheduled 1979 democratic elections to proceed, and a civilian rule came into power. However, it only lasted two years before he returned to power in his second military intervention.

Nigeria (1979)<sup>214</sup> and Sudan (1965 and 1986).<sup>215</sup> This led to the belief both in and out of Africa that democracy was an improbable, if not impossible dream for the continent.<sup>216</sup>

Around this period of the 70's and 80's, the third wave of democracy was gaining force globally, as autocracies in South Korea, Pakistan and the likes, started to give way to democratic regimes. On the economic front, Africa had reached an impasse in its economic plan. Following from the economic nationalism experienced in the 1970s, which had failed dismally, there was now a need to re-evaluate and map out a plan of action.<sup>217</sup> Huge volumes of debt to public and private international creditors meant that African states were on the defensive, and ready to accommodate the lending policies proposed by the International Monetary Fund (IMF) and western donor countries.<sup>218</sup> These came in the form of rigorous economic liberalisation programs such as Structural Adjustment Programs (SAPs).<sup>219</sup>

The programs failed to bring the desired recovery, and the failure led to the insistence by many that economic liberalisation could not be achieved in isolation to political reform. The argument was that in the absence of a responsible culture

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<sup>214</sup> In Nigeria, after more than a decade of military rule, transition began earnestly in 1975 by General Murtala Mohammed, who was assassinated a few months later. The transition program was then concluded by Mohammed's deputy at the time, General Olusegun Obasanjo. At the end of the transition, Alhaji Shehu Shagari became the civilian president in 1979. This was Nigeria's second republic, and it was fraught with colossal levels of corruption which ate deeply into the fabric of the nation, and further marred the 1983 elections. Thus, the second republic lost legitimacy in the eyes of the citizenry, and by the end of 1983, the military once again, intervened in government. More of the path that the country has travelled in terms of governance will be discussed in detail in the next chapter.

<sup>215</sup> The case of Sudan is not any different from those of the two West African countries above. Sudan went through a similar experience in its second republic. After the first military regime was forced to hand over power in 1964, the country went through a period of disillusionment with democratic rule. In 1969, a new era of military autocracy emerged in Sudan. The country thereafter went through sixteen years of military rule from 1969 – 1985 under the military regime of General Jaafar al-Nimeiry. A democratic government was elected in 1986, which lasted till 1989. This government failed as there was another military intervention in the same year 1989. This military government had its own agenda of turning the country into an Islamic country, and began to implement it. This led to violence and armed insurrection which brokered the 2<sup>nd</sup> civilian war in Sudan.

<sup>216</sup> Young (1999) 20.

<sup>217</sup> Lagos Plan of Action for Economic Development of Africa (1980 – 2000), developed by Organisation of African Union members to facilitate growth and development of the continent.

<sup>218</sup> Boyce (2005); Parfitt (1989).

<sup>219</sup> Young (1999) 22; Decalo (1992) 15. These programs were used as ransom for debt rescheduling and further development aid that African states sought from the international community. The effects of these programs are discussed in the next chapter.

of accountability and transparency, economic liberalisation could not be sustained.<sup>220</sup> At this time, the African state (and its institutions) had lost legitimacy and had become a predator state for its citizens in particular; it was thus incapable of effective macroeconomic management, and not in a position to be an implementer of economic liberalisation policies.

This set the stage for the third wave of democracy, described by Huntington. This period started around 1989 as internal mechanisms began to unfold within African countries. These sought to effect transition from the monopolist governments in power to governments that were more acceptable to the people. Events unfolded from the republic of Benin to South Africa, to Nigeria. The 1990 release of Nelson Mandela and the legalisation of the African National Congress furthered the impetus to democratise all over Africa. In addition to the continental events unfolding, at the international level, there was the complete collapse of state socialism as a system of government in the Soviet Union. This gave the US ground to aggressively promote democratic government as a system of governance all over the world. The World Bank also began to include governance in its economic policies discourse.

Another factor that drove democratisation in Africa was the need for an electoral process to legitimise the different peace accords that had been entered into and were designed to settle long-standing crises within the different states.<sup>221</sup> Elections also provided a means whereby the people were allowed to decide for themselves who they wanted to lead them in the midst of different factions and insurgent groups jostling for power. This conferred legitimacy on whoever was victorious in the election process.

Till date, the third wave of democratisation has experienced many problems in Africa, making it imperative that building good and effective democracies continue to be the goal of political discourse in Africa. The process of democratisation in Africa has lent credence to Larry Diamond's characterisation of democratisation as being 'bound to be gradual, messy, and fitful and slow, with many imperfections

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<sup>220</sup> See generally Joseph R (1987) *Democracy and Prebendal Politics in Nigeria*.

<sup>221</sup> Young (1999) 24; conflicts in Angola and Mozambique between the internationally recognised regimes, and the insurgents that were challenging power; Namibia had the South West African People's Organisation as opposition to the government, whilst Liberia and Sierra Leone also had gone through years of civil war.

along the way'.<sup>222</sup> Events that have unfolded in Africa have shown that this is indeed the case on the continent. The peculiar messiness of the process in Africa can be attributed to a number of factors, key amongst which is the ethnic question, which has shaped politics in Africa, led to a lot of contestation on the continent, and many times resulted in violence. It will now be examined briefly.

### 3.5.3 Identity politics as a limit to democracy in Africa

The process of attaining democratic rule is competitive. Free and fair elections demands that there be competition between political parties, which unfortunately in Africa, frequently mobilises and politicises regional, ethnic, religious and racial solidarities.<sup>223</sup> This intensifies pressures on the fragile African states, as such competition flows along the lines of ethnicity, religion or race. This pattern of ethnic, religious or racial solidarity, though not limited to Africa, is very much pronounced in Africa due to the continent's peculiar history.<sup>224</sup> The pre-colonial times of wars between different groups and nationalities; the colonial system of administration of 'divide and rule' (an example of which is what operated in Nigeria and other British colonies); and the post-colonial period in which these differences have manifested and further been capitalised upon, have all contributed in concretising these solidarities on the continent. Therefore in Africa, where ethnic and communal alignments go a long way to impact on the patterns of voting, the goal of having a nationalistic sentiment amongst the people is far from being achieved. This situation has been replicated all over the continent, and in some cases, escalated to levels of violence.<sup>225</sup> Instances of these are the 1990 crisis

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<sup>222</sup> *West Africa*, no 4089 (March 4-10, 1996) 328.

<sup>223</sup> Young (1999) 29; see also Ottaway M 'Ethnic Politics in Africa' in Joseph (1999) 299-318; Posner D (2005) *Institutions and Ethnic Politics in Africa*; Posner (2007) 40(11) *CPS* 1302 - 1327; Young C (1976) *The Politics of Cultural Pluralism*; Glickman H (1995) *Ethnic Conflict and Democratisation in Africa*.

<sup>224</sup> This will be seen in the cases of Nigeria and South Africa. In the former, these patterns are still strongly divisive and play out between the different ethnic groups, and also sometimes religious groups. In South Africa, due to the years of racial manipulation, the pattern is seen playing out between the different races.

<sup>225</sup> The height of it was the Rwandan genocide in 1994. The Nigerian civil war in 1967 between Hausa-led military government and the Igbo-led faction of the military is another example.

in East Africa,<sup>226</sup> the inter-ethnic and inter-regional violence in Uganda and Ethiopia.<sup>227</sup>

Young asserts that democratisation in Africa is made up of and seen through different special circumstances.<sup>228</sup> The 1990s saw the emergence of a different type of regime in Africa. Semi-democracies have emerged in a number of countries, and taken root. This is associated with liberalisation through, *inter alia*, a press with greater freedom, enhanced respect for human rights, and open contestation, while at the same time pushing forward political rules that make change of government impossible.<sup>229</sup> These types of democracies work to the extent of placating the West in its demand for a full democratisation. Africa seems to gradually be on the way to economic and political liberalisation, and though there are many challenges and false starts, it would appear that the continent is

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<sup>226</sup> The crisis of the 1990s in East Africa was largely due to ethnic solidarity problems. Young (1999) 30 cites examples of the Burundi ethnic massacres of 1965, 1972 and 1988 between the Tutsi and Hutu ethnic groups of that country; the 1994 Rwandan genocide, which was as a result of the deep seated ethnic friction between the Hutus and the Tutsis. In Burundi in 1993, the head of the Hutu-dominated government of Burundi, and several other leaders were assassinated by a Tutsi faction of the military, thus obliterating hopes for ethnic accommodation through power-sharing. This singular event plunged the country into a state of violence that brought it to the 'brink of a genocidal dissolution of state and society'. For a summary of the events leading to the massacres, see also Lamarchand R (1996) *Burundi Ethnic Conflict and Genocide*; Report of the United Nations Security Council mandated International Commission of Enquiry for Burundi, 2002 available at <http://www.usip.org/files/file/resources/collections/commissions/Burundi-Report.pdf> (accessed on 1 October 2010).

<sup>227</sup> In Ethiopia, a system was worked out to address the ethnic question. After the ethnic and regional violence led to the defeat of the ethnic-based Derg in 1991, the polity redefined itself and granted the right to self-determination to the people of Eritrea. For an analysis of the conflict, see Assefa H (1998) *Regional Approach to the Resolution of Conflicts in the Horn of Africa*. The nationality principle then became the basis for redrawing provincial boundaries and this ultimately led to the birth of the Eritrean state. The new Ethiopian constitution is more progressive in recognising the right to ethnic self-determination and succession, as articles 39 and 47 of the 1994 Ethiopian Constitution provides for the 'right of Nations, Nationalities and Peoples to self-determination, including secession'. This shows one of the ways in which institutional arrangements can be made to address the ethnic question, and can be used as an African example of ways of seeking constitutional formulas that facilitate accommodation of ethnic or religious differences. The presence of ethnic politics in Africa should not be seen as an obstacle to political liberalisation and democracy, rather it should be considered as one of the many African challenges that need to be surmounted.

<sup>228</sup> Young (1999) 34. According to him, one of these is the high level of communication and interconnectivity amongst African states and leaders. The strong influence of the international financial institutions and the continuous monitoring of the African economy and politics by these institutions (sometimes seen in the form of international election observers), point to a comprehensive superstructure of international accountability to which Africa is subject. These influences have now manifested in such a way as to make it difficult to revert to the old system of autocracy that we saw on the continent in the 60s and 70s.

<sup>229</sup> Young (1999) 35; an example being Zimbabwe.

making increasing progress in its move towards more democratic forms of governance as opposed to autocratic ones.

In making this assertion however, it is important to use standards of measurement that are used all over the world, and not to lower the standard to suit the peculiar ‘African’ situation. Olukoshi looks at the democratisation debate in this way, arguing that it is important to use and apply standards of assessment in Africa that are same as those used in other areas of the world. He furthers that it is uncalled for to have a ‘tropicalized’ version of democracy built on lower standards of assessment that will unwittingly encourage the embrace of dubious electoral and political arrangements on the ground that it is the best that can come out of Africa.<sup>230</sup> Whilst it is true that Africa needs to use the general standards of assessment, it is important whilst doing so, to avoid a situation where the law, policies, systems, and structures being built will be foreign to the African people, traditions and culture. The general standards should be adopted and implemented in ways that reflect African values, beliefs and way of life. African norms should be evident therein and not be jettisoned.

For the Olukoshi, ‘the chief challenge of democratic consolidation in Africa today centres on the need to anchor representation, the rule of law, and the freedom of speech and association to popular participation and control in decision making at all levels’.<sup>231</sup> The issue of popular participation and control (popular sovereignty as he calls it) in the democratic process is affected by a number of issues, one of which is the meaning and content of citizenship (both historically and presently) in Africa, and the erosion of what Roche has described as ‘social citizenship’ on the continent.<sup>232</sup> The erosion of social citizenship is a result of the economic crisis on the continent and the implementation of IMF and western policies. The result is that there is now a disjuncture between the state and the citizens, and this disjuncture is so severe that the state has been referred to by some scholars as

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<sup>230</sup> Olukoshi A ‘State, Conflict and Democracy in Africa: The Complex Process of Renewal’ in Joseph (1999) 456-457.

<sup>231</sup> Olukoshi (1999) 458.

<sup>232</sup> Roche M (1992) *Rethinking Citizenship: Welfare, Ideology and Change in Modern Society*.



being ‘irrelevant’,<sup>233</sup> while others have spoken about a process of ‘disengagement’ of the citizenry from the state.<sup>234</sup>

Olukoshi sees the decline of social citizenship and the decline in the role of the state in providing social infrastructure as being partly responsible for the rise in ethnic, communal and religious alignments and structures. This is because the people will look for and find alternative ways of producing answers to their own social welfare needs. Their inability to get answers from the state means that they have reverted to their solidarities (ethnic, religious and so on) to get answers. This process invariably challenges the post-colonial secular state of the independence project.<sup>235</sup>

In order to address the dissociation that has come about due to the failure of the state to provide for the social welfare needs of its people, not only must the political rights and liberties of the people be restored, but the state must also be revived in its role of advancing social citizenship.<sup>236</sup> In restoring the political rights of the people, participation in the making of the law(s) is very crucial. Laws that reflect the values and aspirations of the people will be able to fundamentally address issues of the people’s social livelihood. As has been stated by a commentator, the path to democracy in Africa will not necessarily succeed if the people continue to suffer the deficit in their social livelihood.<sup>237</sup> Olukoshi feels that the democratisation project discourse in Africa must engage with three crucial issues for it to succeed. These are: the need to rehabilitate the state; the role of the military in the political reform process; and the impact of influential regional players on the direction and content of change. He feels that until these issues are addressed and solutions to them defined, the democratisation project in Africa would continue to experience stultified starts.<sup>238</sup> These issues are being addressed already as democratisation continues to gain grounds.

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<sup>233</sup> Ihonvbere JO (1996) *Economic Crises, Civil Society, and Democratisation: The Case of Zambia*.

<sup>234</sup> Chazan N & Pellow D (1986) *Ghana: Coping with Uncertainty*.

<sup>235</sup> Olukoshi (1999) 459.

<sup>236</sup> *Ibid.*

<sup>237</sup> Makandawire T, ‘Crisis Management and the Making of Choiceless Democracies’ in Joseph (1999) 119-133.

<sup>238</sup> Olukoshi (1999) 460.

Another issue that needs to be explored in a research work on Africa and its law and governance issues is the impact or otherwise of international law on the continent. The field of law referred to as international law has experienced a lot of growth in the past couple of years. The inception of the United Nations and many other international organisations has facilitated the development of international law, expanding its reach to almost every aspect of a states' existence and its relations with other states. International law has impacted greatly on Africa and the continent has also contributed a great deal to the development of international law. This will be examined in the next few sections, in line with the impact of international law on Africa.

### **3.6 International law angle in terms of its impact and influence on Africa**

#### **3.6.1 What is international law?**

In order to be able to assess the impact of international law in Africa, we need first to get a good understanding of the term 'international law' and the role this branch of law plays within African countries. The definition of international law has evolved as the field of law has developed. Initially, international law was defined as provided by the Merriam-Webster's Dictionary of Law as 'a body of laws, rules or legal principles that are based on custom, treaties or legislation, and that control or affect the rights and duties of nations in relation to each other'.<sup>239</sup> The definition has evolved to mean the area of law that deals with the relationships between and amongst states, and between and amongst international organisations. Recent authorities suggest that non-state actors may also fall within the scope of international law.<sup>240</sup> Wallace defines it as 'a body of rules, which regulate the behaviour of states and other entities in their relations with each other, at any given time'.<sup>241</sup> By other entities, reference is being made to international organisations

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<sup>239</sup> Merriam-Webster's Dictionary of Law, Merriam-Webster, Inc. available at [http://dictionary.reference.com/browse/international\\_law](http://dictionary.reference.com/browse/international_law) (accessed on 11 September 2009).

<sup>240</sup> Cassese A (2005) *International Law* 3, 71-72 & 124-150, where the author discusses the status of other international subjects like insurgents, *sui generis* entities (*The Holy See*), and international organisations; see also Aust A (2005) *Handbook of International Law* 1-15; Shaw M (1997) *International Law* 39; Brownlie I (2003) *Principles of Public International Law*.

<sup>241</sup> Wallace R & Holiday A (2006) *Nutshells: International Law* 1.

and individuals. The criterion is that they possess at least a degree of international personality.<sup>242</sup>

From these definitions, ‘international law’ is seen as the law that governs nations, international organisations, and individuals as they deal, trade and maintain relations with each other on the international plane. It is also at times referred to as the ‘law of nations’.<sup>243</sup>

One thing to note about the definition is the developments that have taken place in respect of ‘international organisations’. The changes brought about in the modes of interaction amongst states, the development of the world economy, industrialisation and ultimately globalisation, have led to inter-state transactions between citizens of different states, inter-regional transactions and even inter-continental transactions to a great extent. Industrialisation has given rise to people entering into commercial, technical, scientific, administrative, and other types of transactions, not only with their fellow citizens, but now with people in other countries. Over the last couple of decades, in virtually every field of human endeavour, great development and increased collaboration and interdependence amongst scientists, doctors, lawyers, engineers, students, teachers and other professions have been experienced. These developments are mostly driven by globalisation. As this interdependence amongst states increased, it became necessary to have a framework to organise and guide these interactions. This heralded the emergence of international organisations on the world stage. These organisations have been defined as ‘institutions drawing membership from at least three states, having activities in several states and whose members are held together by a formal agreement’.<sup>244</sup>

For the purposes of international law, an international organisation is described as one established by agreement, and has states as its members (or not, in the case of non-governmental organisations), for example, the United Nations.<sup>245</sup> In the *Reparations for Injuries Suffered in the Service of the United Nations case*,<sup>246</sup> the

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<sup>242</sup> *Ibid.*

<sup>243</sup> See, generally, Shaw (1997) chapter 1 on ‘Nature and Development of International Law’.

<sup>244</sup> Britannica Concise Encyclopaedia, 1994 – 2008, Encyclopaedia Britannica, Inc.

<sup>245</sup> Wallace (2006) 53; Cassese (2005) 135-140; Shaw (1997) 90; Aust (2005) 196, Brownlie (2003) 647-670.

<sup>246</sup> (1949) ICJ Rep 174.

International Court of Justice (ICJ) held that the UN, as an international organisation, possessed international personality which may be enforced vis-à-vis all members of the international community. However, such personality was not the same thing as conferring the status of statehood on the organisation. According to the court, what it means is that ‘it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims.’<sup>247</sup>

The ICJ in explaining the capacity of the UN to bring claims before it, stated that as an international organisation, it had rights and duties which,

‘must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice... the members have endowed the organisation to bring international claims when necessitated by the discharge of its functions.’<sup>248</sup>

In order to examine the impact of international law on Africa and vice versa, we would need to take a look at what exactly constitutes international law, and how it is formed. This is explained in the following paragraphs.

### 3.6.2 Sources of international law

The generally recognised authoritative statement on the sources of international law is Article 38(1)(a)–(d) of the Statute of the International Court of Justice (ICJ). It provides that the sources shall be applied in deciding disputes that are submitted to the court.<sup>249</sup>

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<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.* See also the *Advisory Opinion of the ICJ in the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1996) 35 ILM 809, wherein the ICJ held that international organisations were governed by the principle of specialty, meaning that the states which create them invest them with such powers. The ICJ also stressed that international organisations, have a limited competence and field of action.

<sup>249</sup> Shaw (1997) 55; Aust (2005) 6; Brownlie (2003) 5; Art. 38 (1) of the ICJ states:

‘The Court whose function is to decide in accordance with International law such disputes as are submitted to it, shall apply:

- a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b) International custom as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;

The first three sources listed in (a)-(c) are generally regarded as the primary sources of international law, whilst the last, (d) is seen as secondary source of international law.<sup>250</sup> These provisions are expressed in terms of the function of the Court, but they also represent the previous practice of arbitral tribunals.<sup>251</sup> They are not independent of one another, for example, a treaty that is contrary to a custom or to a general application part of the *jus cogens* would be void or voidable.<sup>252</sup> Sources (a) and (b) are the most important of the sources of international law, source (c) is not as important, while source (d) in the use of the phrase ‘...as *subsidiary means* for the determination of rules of law’ (own emphasis), implies that it is only used in a situation where the sources in (a) to (c) are not applicable. These sources are next examined.

### 3.6.2.1 Treaties

A treaty<sup>253</sup> is defined in the Vienna Convention as ‘an international agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.<sup>254</sup> Like the definition of international law, this definition has over time been broadened to include written agreements between international organisations also. A treaty is thus ‘a written agreement between states or between states and international organisations, operating within the field of international law’.<sup>255</sup>

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d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law’.

<sup>250</sup> The phrase in (d) ends with ‘as subsidiary means for the determination of rules of law’. This implies that it is used or called into use when other means listed before it are lacking in or have failed to solve the dispute.

<sup>251</sup> Brownlie (2003) 5; the first source, (a) refers to a source of mutual obligations of the parties, and as such Brownlie feels that it is not primarily a source of rules of general application, even though the ‘treaty’ may provide evidence of the formation of custom.

<sup>252</sup> Brownlie (2003) 5.

<sup>253</sup> Wallace (2006) 10, notes that this is the generic term used in international law to refer to Conventions, agreement, protocol and even exchange of notes; see also Cassese (2005) 170-182.

<sup>254</sup> Shaw (1997) 74; Aust (2005) 53. Art. 2(1) of the Vienna Convention on the Law of Treaties, 1969. Wallace (2006) 11, discusses the possible legal consequences of oral statements, noting that such would only be of binding effect if the obvious intention of the state (party) concerned is for it to have binding effect.

<sup>255</sup> Dugard J (2005) *International Law: A South African Perspective* 28; the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations, 1986, recognises this fact. While noting that there is no clear and dogmatic

Treaties represent the most concrete form by which states can record an agreement and registration in accordance with Art 102 of the UN Charter which then allows a treaty to be invoked before an organ of the UN.<sup>256</sup> Treaties currently govern a wide area of international life and have a very strong influence on the content of international law. They create legal obligations between or amongst states and international organisations (as the case may be). Such obligations are binding between and/or amongst the parties to it, in accordance with the principle of *pacta sunt servanda*.<sup>257</sup>

Treaties are generally binding only on the parties thereto, however, in some instances, the number of parties, the explicit acceptance of the rules of law, and the declaratory nature of the provisions, could produce a strong law-creating effect which could be sufficient to support the formation of a customary rule.<sup>258</sup> This may lead non-parties, through their conduct, to consent to be bound by the provisions contained in such multilateral treaties.<sup>259</sup> In the *North Sea Continental Shelf* case, the ICJ in examining whether the German Federal Republic was bound by the provisions of the Continental Shelf Convention which it had signed but not ratified, held that only the first three articles of the Convention were emergent or pre-existing customary law, and as such these articles were binding on the German Federal Republic even without its' ratification.<sup>260</sup>

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distinction between 'law-making' treaties and others, Brownlie (2003) at 12 makes the distinction between 'law-making' treaties and other material sources. By law-making treaties, he refers to those treaties which create legal obligations the observance of which does not dissolve the treaty obligation. They are said to create general norms for the future conduct of the parties in terms of legal propositions, e.g. the Hague Conventions of 1899 and 1907, the General Treaty for the Renunciation of War of 1928.

<sup>256</sup> Wallace (2006) 11; Article 102 of the UN Charter provides:

- (1) Every treaty and every international agreement entered into by any member of the UN after the present charter comes into force, shall as soon as possible be registered with the secretariat and published by it.
- (2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraphs 1 of this article may invoke that treaty or agreement before any organ of the UN.

<sup>257</sup> Shaw (1997) 633. The rules relating to the capacity of a state to enter into a treaty, interpretation of treaties, termination of treaties and other issues related to treaties, are governed by the Vienna Convention on the Law of Treaties of 1969; Art 2 of the Convention reaffirms this principle.

<sup>258</sup> Brownlie (2003) 13.

<sup>259</sup> For example, the Hague Convention IV of 1907; the Geneva Protocol of 1925 (on prohibited weapons); see also the ICJ decision in *North Sea Continental Shelf Cases* ICJ Report 1969 3.

<sup>260</sup> *North Sea case, ibid.*

### 3.6.2.2 Customary International Law

Article 38(1)(b) refers to ‘international custom as evidence of general practice accepted as law’. Just as custom is a source of law under the common law in national jurisdictions, so also does international custom occupy a significant role in the international legal order. For there to be an international custom, there must be a general recognition among states of the obligatory nature of a certain practise.<sup>261</sup> Customary international law is therefore the conduct or behaviour, which is engaged in because those doing so feel legally obliged to behave in such a way.<sup>262</sup> Brownlie and Wallace, while noting the similarities between the two terms, also indicate that the main difference is the absence of ‘a legal obligation’ when it comes to usage.<sup>263</sup> A rule of customary international law, once established, is binding on all states. The consent of a state to a particular customary rule is inferred from its conduct. The question of whether a state has consented to a rule of international customary law by its conduct raises difficult questions of proof.<sup>264</sup> There are said to be two main requirements to aid in determining the existence of a customary rule: settled practice (*usus*) and the acceptance of an obligation to be bound (*opinion juris sive necessitates*).<sup>265</sup>

- a) Settled Practice (*usus*): There must be evidence of the state practice being alluded to, which can be in the form of diplomatic correspondence, policy statements by government officers, opinions of official legal advisers, decisions of national and international courts, treaties, state practice within international organisations, and others.<sup>266</sup> All of these and more would be construed to be evidence of state practice, though the weight to be attached to each of the sources would vary from situation to situation. The ICJ in

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<sup>261</sup> Brierly (1963) *Law of Nations* 61.

<sup>262</sup> Wallace (2006) 4-5.

<sup>263</sup> Brownlie (2003) 6 & Wallace (2006) 5.

<sup>264</sup> Dugard (2005) 29.

<sup>265</sup> *Ibid*; Brownlie (2003) at 7-10 refers to these as the elements of custom, and mentions four of them, namely duration, uniformity and consistency of practice, generality of practice and *opinion juris et necessitates*. Wallace (2006) 5, on the other hand, describes the two elements of customary international law as being material and psychological.

<sup>266</sup> Dugard (2005) 29; Brownlie (2003) 6. In inferring the consent of a state to be bound by a particular rule, many things will be taken into consideration; such as the state’s conduct, its silent acquiescence, its failure to protest against a rule in its formative stages.

the *Asylum*<sup>267</sup> case stated that a practice must constitute ‘constant and uniform usage’ before it would qualify as a custom.<sup>268</sup> The Court also found that there had been no ‘consistency’ in the behaviour of states in this regard, and that ‘complete uniformity is not required, but substantial uniformity is’.<sup>269</sup>

- b) *Opinion juris sive necessitates*: The provisions in article 38(1)(b) of the ICJ Statute refers to ‘... general practice *accepted as law*’ (own emphasis). The emphasised part of this phrase has been interpreted to mean that there must be something that goes beyond the ‘general practice’; there must be an acceptance *as law* by the community of states before a customary rule can be said to be created; a sense on the part of states that they are legally bound by the practice, a sense of obligation on the part of states.<sup>270</sup> The requirement of this psychological element has been emphasised by the ICJ in the *North Sea Continental Shelf Cases*,<sup>271</sup> where the Court held that despite state practice in favour of a provision requiring the continental shelf

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<sup>267</sup> *Columbia v Peru* 1950 ICJ Rep. 266. This case involved the question whether the practice of granting asylum to political refugees in embassies in Latin American countries amounted to a customary rule.

<sup>268</sup> *Ibid*, 276-277; in deciding whether the practice of states in question amounted to a customary rule, the Court held that,

‘the party which relies on a custom must ... prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state ...’

<sup>269</sup> *Fisheries (United Kingdom v Norway)* case 1951 ICJ Rep 116 at 131. Here the Court stated that ‘customary international law is the generalisation of the practice of States’. If a state has, right from the time the ‘practice’ was being carried out, by its actions or vocally expressed dissent (or persistently objects) to a particular practice of states (while the law is still in its formative stage), such a state would not be bound by the rule of customary international law. This is referred to as the ‘Persistent Objector’ rule. The ICJ in *Fisheries case* acknowledged this when it held that the ten-mile rule, if it had qualified to be a rule of customary international law, would not have been applicable against Norway, because Norway had consistently opposed any attempts to apply the rule. Wallace (2006) 5-6 and Brownlie (2003) at 7 indicate that in some cases it may be required that a practice be ongoing over a period of time for it to crystallize into a customary rule, but generally no particular duration is required, as long as the consistency and generality of the practice is proved, for example rules relating to the legal principles governing activities in the outer space. This is seen in the General Assembly Resolution 1962 (XVIII) of 1963 on outer space travel, which was promoted only by the two states (the US and the then USSR) capable of outer space travel at that time. This quickly materialised into a rule of customary international law.

<sup>270</sup> Dugard (2005) 33; Brownlie (2003) 8.

<sup>271</sup> 1969 ICJ Rep 3, between West Germany and the Netherlands; and West Germany and Denmark.



amongst the states to be divided in accordance with the principle of equidistance contained in the 1958 Geneva Convention, such had not become a rule of customary international law, as there was no evidence that states acted so because they felt legally bound to do so.<sup>272</sup>

### 3.6.2.3 General Principles of Law

This source is provided for by article 38(1)(c) of the ICJ statute. As indicated above, it refers to ‘general principles of law recognised by civilised nations’. These principles of law have been interpreted to mean common principles of law found in municipal systems (as long as they are capable of application to relations between states), which are used to fill up areas where gaps exist in international law.<sup>273</sup> Though it is scarcely used, the general principles of law nevertheless constitute a ‘reserve’ of legal principles upon which international tribunals may draw when there are no rules of treaty or customary law applicable.<sup>274</sup> Examples are principles of ‘unjust enrichment’,<sup>275</sup> ‘*res judicata*’,<sup>276</sup> ‘state responsibility for

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<sup>272</sup> *Ibid*, 44-45, where the Court was of the opinion that the mere evidence of practice by states did not suffice to establish *opinio juris*. The Court in this case called for more positive evidence of the recognition of the validity of the rules in question in the practise of states and stated that

‘not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough’.

A similar approach was adopted by the Court in the *Nicaragua v United States (Merits)* 1986 ICJ Rep, 14, where the Court in referring to the *Continental Shelf* case and the need for *evidence of a belief* that a practice was *obligatory*, held that ‘the need for such a belief i.e the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*’ (own emphasis). Brownlie maintains that the general tenor of the judgement in the *North Sea Continental Cases* appears hostile to the general rule that the existence of a general practice raises a presumption of *opinio juris*. He maintains that this case was peculiar in that there was little practice amongst the states, except for the records of the International Law Commission (ILC), and the fact that the Court felt that practice based on a convention that had only been in force for less than three years then could not be sufficient to indicate the development of a rule of customary international law. See Brownlie (2003) 9-10.

<sup>273</sup> Dugard (2005) 38.

<sup>274</sup> Dugard (2005) 37.

<sup>275</sup> *Lena Goldfields Arbitration* (1930) 5 AD 3.

<sup>276</sup> *Effect of Awards of Compensation Made by the UN Administrative Tribunal* 1954 ICJ Rep 47 at 53.

the acts of its agents’, ‘estoppels’<sup>277</sup> and others, which have been considered and some used by an international tribunal at some stage or the other.<sup>278</sup>

The fact that international tribunals are comprised of judges from different states and legal backgrounds makes it easier and possible for them, when faced with different cases and scenarios, to draw on their knowledge and experience of the law in domestic jurisdictions, whenever they feel such would be applicable.<sup>279</sup> These tribunals exercise their discretion in the matter, as the application of rules from domestic legal systems, does not always lead to appreciable results.<sup>280</sup>

The ICJ has made use of these principles sparingly to provide clarity in instances where there are no treaty provisions or customary law provisions applicable.<sup>281</sup> An example of this is the *South West African* case,<sup>282</sup> where the Court alluded to and applied certain principles of the English system of trusts to the effect that the rights of the trustee were limited and the trustee had a legal obligation to administer the

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<sup>277</sup> *Temple of Preah Vihear case* (1962) ICJ Rep 6, in which Thailand, having acquiesced in a map in which the Temple was shown on the Cambodian side was precluded from denying its earlier acceptance of the map.

<sup>278</sup> Dugard (2005); Brownlie (2003) 16. It is interesting to note the observation of the Court in the *Barcelona Traction Light and Power Company case (Second Phase)* 1970 ICJ Rep 3 at 37, where the court observed the need to take into cognisance the relevant principles of municipal law as follows:

‘[I]f the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognisance of municipal law but also to refer to it’.

<sup>279</sup> It has been observed that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. The duty of an international tribunal would thus be to choose, edit and adapt legal rules and principles of law from better developed domestic legal systems, which then ultimately results in international law. See Brownlie (2003) 16.

<sup>280</sup> In the *North Atlantic Fisheries* case, the tribunal considered the concept of servitude and then refused to apply it.

<sup>281</sup> The recognition of some of these domestic principles predates the ICJ. In 1928, the Permanent Court of International Justice (PCIJ) in the *Chorzow Factory (Merits) case* (1928) PCIJ, Series A, no 17 at 29, referred to ‘general notions of responsibility and reparation for breach of an undertaking’. The Court stated that, ‘... it is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation’.

<sup>282</sup> *International Status of South West Africa Case* 1966 ICJ Rep 298, in this case, the region referred to as South West Africa (now Namibia) had been declared a League of Nations Mandate Territory with South Africa placed in charge of the administration of the territory. After the dissolution of the League of Nations and the inception of the United Nations in 1948, the mandate was transferred to the United Nations as Trust Territories. The then Union of South Africa refused to relinquish control, having regarded the mandate territory as an extension of its own territory. The Court held that South Africa was unable to absorb the territory of South West Africa into its own territory, without first obtaining the consent of the UN.

trust property for the benefit of another, and the trustee was not permitted to absorb the trust property into its own estate.

The difference between ‘general principles of law’ as a source of international law, and the other two sources considered above is that unlike the latter, ‘general principles of law’ is not consent based. In order to have a treaty, there must be agreement between the parties to the treaty. For customary international law also, states must have by their actions indicated that they agree with the particular custom. However, in the case of general principles of law, there is no provision for any consent to be given or to be withheld. The application of the principle is at the discretion of the court or tribunal. Once there is a domestic rule identified that is believed would provide a solution to the set of facts before the court, it is applied, irrespective of the sentiments of the parties.

Another difference between the two sets of sources is that article 38(1)(c) seeks to draw from already established principles or rules of law that are in practice in some domestic jurisdiction at some point, whereas, treaties and customary international law are rules and principles of law that are formed on the international stage. Treaties are entered into by state parties (and/or other agents having international personality), and customary international law is created through state practice (and/or practices of other agents having international personality). These sources are created and limited to the international platform, while general principles of law are those principles derived from domestic legislation.

It is necessary to note that the sources discussed above, are not exhaustive. They only form the traditional sources of international law as derived from the ICJ statute. There are other and newer sources of international law today, and the development is still ongoing. Resolutions of the UN General Assembly, resolutions of the Security Council, statements by heads of states or political figures, and ‘soft law’<sup>283</sup> may all be construed as forming international law.

International law has developed and become more and more of a legal rule reflecting the behaviour of states and other parties in the global world, and also

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<sup>283</sup> These are those non-binding statements of intent, codes of conduct, declarations adopted by diplomatic conferences, resolutions of international organisations, etc, which are intended to serve as guidelines to their states. These are not law, and on the other hand do not qualify as non-law. They are in-between, and assist in the promotion of international law.

used to shape such behaviour. Globalisation has led to a situation whereby states are compelled to cooperate internationally and to find common ground to deal with common problems.<sup>284</sup> Actions and the interactions of member states and parties on the world stage are many times constrained and guided by the rules of international law, despite the fact that states are sovereign entities.<sup>285</sup> This can be explained in two ways: firstly is the fact that states really do view themselves as legally bound by whatever rule is in question, and secondly, states are influenced by what the reaction of other members of the international community would be if they do not follow the rules of international law.

The development of international law has led to what some have now referred to as the rule of international law, in which international law becomes over-arching and binding on municipal systems.<sup>286</sup> This is concomitant on the current trend in international law towards the constitutionalisation of international law, and internationalisation of constitutional law. There are divergent views on this trend, as the possibilities and impossibilities of it have been analysed by many.<sup>287</sup> The trend is felt to challenge the legitimacy of traditional international law which was embedded in state consent and sovereignty.<sup>288</sup>

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<sup>284</sup> Peters 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of National Law* 570.

<sup>285</sup> The conflict between sovereignty of states and international law has now been settled in favour of international law. The concept of sovereignty has gone through a process of limitation, and is no longer viewed as all-encompassing and allowing a state to behave as it wishes inside and outside its territory. This is the effect of the development of international law, which has extended in the form of treaties and other sources to limit, guide and direct interactions between states and other parties, between states and their citizens and even amongst citizens. Brownlie (2003) 288, 289-290; See Olivier ME 'International and Regional Requirements for Good Governance and the Rule of Law' (2007) 32 *SAYIL* 39 at 40-41, in which the author discusses the changes in the traditional conception of 'sovereignty', and the introduction of the term 'sovereign equality' as reflected in art. 2(1) of the UN Charter; Ferreira-Snyman MP 'The Evolution of State Sovereignty: A Historical Overview' (2006) 12(2) *Fundamina* 1-28; Ferreira-Snyman A 'Sovereignty and the Changing Nature of Public International Law: Towards a World Law?' (2007) 40(3) *CILSA* 395-424 at 406.

<sup>286</sup> Olivier (2007) 32 *SAYIL* 39 at 45; Peters (2006) 19 *LJNL* 570 at 583; for further discussion on the concept, see Ferreira G & Ferreira-Snyman A 'The Constitutionalisation of Public International Law and the Creation of an International Rule of Law: Taking Stock' (2008) 33 *SAYIL* 147-167, where the authors emphasise that the creation of an international rule of law is a necessity for the constitutionalisation of international law; Tamanaha BZ (2004) *On the Rule of Law: History, Politics, Theory* 132-133.

<sup>287</sup> *Ibid.*

<sup>288</sup> Olivier (2007) 32 *SAYIL* 39 at 43; see also Ferreira & Ferreira-Snyman (2008) 33 *SAYIL* 147 at 148-160.

International law promotes and enthrones the rule of law in countries around the world. The standards and policies to ensure the rule of law have become international standards which have to be respected. African countries have greatly been impacted by the developments on the international stage, as seen in their change of attitude since independence. Initially, there was hostility towards international law by African states, due to the fact that it was regarded as another weapon of the west to continue the process of colonialisation; these attitudes, however, have changed positively and have impacted on the prominence of international law and consequently, the rule of law within African states. African states have now made their fair share of contributions to the development of international law, and as a block of countries, they play an important role in global affairs. A good indication of the change in attitudes is seen in the way, manner and extent to which African states have increasingly availed themselves of the jurisdiction of the ICJ in the settlement of disputes.<sup>289</sup> This is evident in the list of cases which have come before the Court over the past fifty-three years of its existence, in which either or both of the parties have been an African state.<sup>290</sup> The first African state before the court appeared in the 1949 in the case of *Protection of French Nationals and Protected Persons in Egypt (France v Egypt)* which was initiated by France. The first case which an African state initiated at the ICJ was the 1960 case of *South West Africa (Liberia v South Africa)*, and *South West Africa (Ethiopia v South Africa)*.<sup>291</sup>

### 3.6.3 Africa and international law:

Africa has long interacted with and is a product of international law, though this interaction has at certain times been viewed as one in which Africa was a recipient, rather than a contributor to international law. Mutharika expressed the view over a decade ago that ‘because of its marginalisation, Africa has been generally viewed as a recipient of, rather than a contributor to, the development of international

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<sup>289</sup> Olivier ME ‘The International Court of Justice and the Development of International Law over the Past Ten Years’ (2004) 29 *SAYIL* 23-31 at 25.

<sup>290</sup> See ICJ website at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (accessed on 2 November 2010).

<sup>291</sup> See table 1 in the annexures for a list of African cases that have appeared before the ICJ.

law'.<sup>292</sup> Other authors have, however, disagreed with this view and attempted to prove that Africa has also contributed to the development of international law. Maluwa in particular has attempted to assess the type and level of interaction of African states with international law. He mentions two ways to assess Africa's contribution to international law.<sup>293</sup> The first way is in the actual practice of African states in their interactions with each other and with other states on various issues that have a bearing on the creation of legal rules for the international community.<sup>294</sup> The second way is in the role played by African states within the UN, especially in the light of the UN's role in the formation and development of new rules of international law, and within other international organisations also.<sup>295</sup>

In exploring the interactions of African states with international law, one would need to assess the role and status of international law within the municipal legal systems of African countries; its relevance in the interpretation and application of law and legal principles in municipal legal systems in Africa, and the degree to which international law is applied and regarded as a tool of interpretation by the courts on the continent.<sup>296</sup> It is envisaged that the use of international law as a tool of interpretation would differ in the two major African legal systems on the

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<sup>292</sup> Mutharika AP, 'The Role of International Law in the Twenty-First Century: An African Perspective' (1995) 18 *Fordham Int'l Law Journal* 1706 at 1759.

<sup>293</sup> Maluwa T (1999) *International Law in Post-Colonial Africa Studies and Materials on the Settlement of International Disputes vol 4* xviii.

<sup>294</sup> Part of these would be the involvement of African states in peace-keeping missions in troubled areas under the auspices of the African Union (AU). See Okumu W 'Africa and the UN Security Council Permanent Seats' (2005) 2(5) *African Renaissance* 16-22 at 18, also the involvement of African states in the anti-apartheid struggle at the UN, as reflected in the voting patterns on various resolutions of the UNGA, UNSC, and other international organisations at the time. See Klotz A (1995) *Norms in International Relations: The Struggle Against Apartheid* 47-49; 57-72 (detailing the influence of African states within the Commonwealth on the apartheid issue); 73-90 (detailing how African states, in the early 60s and 70s, used the OAU as a platform for their struggle against apartheid in South Africa).

<sup>295</sup> Maluwa (1999) xviii; The composition of the UN Security Council (UNSC) in respect of the five permanent members (P5) with veto powers has been of great concern in this regard. More concerning is the fact that there is currently no African state amongst the P5, and thus decisions are made regarding Africa without any African input. Recent deliberations over the reform of the UNSC raised hopes of a change in the composition of the council, but these hopes have been dashed with no structural change being made to the composition of the P5, the only changes made related to the remaining 10 'non-permanent' members of the Security Council. By this, Africa remains excluded from the most important decision making body on the international arena. The continent however exercises influence in the UNGA due to its membership numbers when voting as a block. See Okumu (2005) 2(5) *African Renaissance* 16; Souare IK 'The Debate on the UN Reform: Near Consensus on the Need for Reform but Rifts on How To Go About It' (2005) 2(4) *African Renaissance* 10-14.

<sup>296</sup> Maluwa (1999) 33.

continent, namely, the common law and civil law systems. This is due to the fact that the approaches to the relationship between international law and municipal law would mainly reflect the traditional approaches of the courts and constitutions of each of the former colonial powers of these two systems.

The focus in this work is on the common law system, due to the fact that both Nigeria and South Africa are common law jurisdictions. Also the way and manner in which international law is incorporated and used for interpretation and other purposes within the system will be explored. In certain countries within the common law jurisdictions, the national constitutions provide for the express incorporation of international law into the municipal law. South Africa is a case in point.<sup>297</sup> Even in other states where international law has not been explicitly provided for in their constitutions, the norms of international law are still being used in the interpretation of the law and legal principles within the states.<sup>298</sup>

#### **3.6.4 Incorporation of international law in English common law African countries (commonwealth countries)**

The issue of the relationship between international law and municipal law have been dealt with by most international law scholars and experts.<sup>299</sup> Theoretically, there are two doctrines that have been used to explain the manner in which international law is incorporated into municipal systems. These are the ‘monist’ and ‘dualist’ theories. Those who follow the monist theory view all law as part of one single, unified body of rules and regulations, and thus international law is also viewed as part of that body of rules. This implies that international law and municipal law are part of the same system, and as a result, there is a hierarchical order of laws, in which international law is supreme in both the municipal and international spheres.<sup>300</sup>

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<sup>297</sup> Sections 231, 232 and 233 of the 1996 Constitution of the Republic of South Africa.

<sup>298</sup> Maluwa (1999) 33.

<sup>299</sup> Brownlie (2003); O’Connell DP (1970) *International Law* 38-79; Dugard (2005); Okeke CN (1986) *The Theory and Practice of International Law in Nigeria*; Wallace (2006) in Chapter 4; Evans MD (ed) (2006) *International Law* Chapter 14.

<sup>300</sup> *Ibid.*

With the dualist theory, advocates argue that municipal law is the evidence of sovereign will that is directed within the territory of the sovereign, whilst international law is evidence of the sovereign will directed externally within the world system.<sup>301</sup> Therefore, the two types of law are viewed as being separate and distinct, and thus, the question of which of the laws would be supreme is regarded as being dependent on the forum in which the matter arises (whether a domestic court or an international tribunal).<sup>302</sup> Thus, with this theory, international law will take supremacy in the international sphere, while municipal law will take supremacy in the municipal sphere.

These theories are however not strictly followed or construed, as the effect of international law on a particular municipal system would depend for the most part on what the constitution of that system stipulates. Also, between the two opposing theories, one finds that there exist many other interconnections that can be called ‘grey areas’, which do not lend to easy definition, but which exist and are used to different degrees by courts within States.<sup>303</sup>

In the English common law countries in Africa, the approach is largely influenced by the colonial heritage derived from the United Kingdom, as mentioned above. Amongst these states, the relationship between international law and municipal law is based on whether that which is involved is a rule of customary international law or treaty law.<sup>304</sup> This differentiation impacts largely on the effect that the particular rule of international law will have within the jurisdiction. If the rule of international law in question is treaty law which has been ratified by the State, it can only become part of the municipal law after it is passed into law by an Act of Parliament.<sup>305</sup> However, if it is a rule of customary international law, the approach is different and even controversial to an extent.

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<sup>301</sup> Brownlie (2003) 32; See also Olivier ME *International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice* (LLD dissertation 2002 Unisa) 56.

<sup>302</sup> Maluwa (1999) 34; Olivier (LLD Dissertation) *ibid*.

<sup>303</sup> Maluwa (1999) 35.

<sup>304</sup> *Ibid*.

<sup>305</sup> See section 231 of the SA Constitution; decision of the South African Constitutional Court in the case of *Kaunda & Others v President of RSA & Others* 2004 (10) BCLR 1009(CC); s. 12 of the 1999 Constitution of the Federal Republic of Nigeria provides that after domestication by both houses of Assembly, such needs Presidential assent before it can be incorporated into law; decision of the Nigerian Supreme Court in *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228 at 289 para D-E.



Customary international law by virtue of being ‘customary’ is binding on all states, as discussed earlier, and would be deemed to be automatically incorporated in full in the municipal system. This is based on the Blackstonian doctrine of incorporation.<sup>306</sup> English courts have not been very consistent in their application of this doctrine; they have many times vacillated between the approach that deems rules of international law to be automatically part of English law (unless in conflict with Act of Parliament), and the opposing approach that holds that the rules of international law are not to be considered part of municipal law unless they have been specifically adopted by decisions of judges, or by an Act of Parliament.<sup>307</sup>

The courts in commonwealth African countries have thus, at the times when faced with a body of facts requiring the application of international law, tended to adopt whatever position of the law was in force in England at that material time. In South Africa, right until 1993, the courts had settled on the incorporation approach in relation to customary international law, and on the transformation approach in relation to treaties. This was later solidified by the express constitutional provisions governing the status of both customary international law and treaties in the 1996 Constitution.<sup>308</sup>

In Nigeria, the position of the law relating to the adoption of treaties is explicitly stated in the constitution.<sup>309</sup> The provisions of the 1999 Constitution, however, in no way clarify the position of the law relating to customary international law. Section 12 of the Constitution provides that a treaty shall not have the force of law except it is first enacted into law by the National Assembly.<sup>310</sup> This adopts the

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<sup>306</sup> This doctrine views ‘the law of nations’ whenever issues arise which fall within the jurisdiction, to be automatically applicable. See also Blackstone W (1809) (7<sup>th</sup> ed) *Commentaries on the Laws of England*, Book IV, Chapter 5, 67.

<sup>307</sup> Maluwa (1999) 35.

<sup>308</sup> Sections 39, 231, 232 and 233 of the 1996 South African Constitution.

<sup>309</sup> Section 12 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>310</sup> Section 12 of the 1999 Constitution of Nigeria provides as follows:

- (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

Blackstonian doctrine of ‘transformation’ of a treaty obligation first into national law before it can be applicable in Nigeria. Unlike the South African constitution however, nothing is said in the Nigerian constitution regarding customary international law and that situation is left to the courts to determine. It would appear that like most common law countries, Nigeria has taken after the United Kingdom<sup>311</sup> in following the incorporation approach that determines that customary international law is automatically part of the domestic law, except where it conflicts with the constitution.

In examining the constitutional incorporation of international law in Africa, one sees that apart from a few of the common law countries which specify a specific role or status for international law (whether customary or treaty) in their constitutions, many other common law countries do not do the same, and rather leave the matter to be determined by the common law approaches developed in the English system.<sup>312</sup> The contrast is the situation in Francophone African countries, where they follow the French practice of expressly incorporating treaties into the municipal law and granting such treaties a superior authority to domestic legislation under the stipulated conditions of ratification or approval, publication and reciprocity.<sup>313</sup> In relation to general principles of law, African states have come to be bound by the national law of other states, operating under general principles. This will mostly happen when such states are involved in cases before the ICJ, or before any other international tribunal. These principles also enable states to participate in the development of norms for behaviour that they are expected to observe.<sup>314</sup>

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<sup>311</sup> *Trendtex Trading Corp Limited v Central Bank of Nigeria* (1977) QB 529, (1977) 1 All ER 881 at 888-893; in which the Court of Appeal in England gave a brief exposition of the two doctrines dealing with the place of international law in English law, and held that the doctrine followed in England was one of incorporation, and the court applied it in the case to allow the appeal against the decision of the lower court which had held that the Central Bank of Nigeria could claim sovereign immunity.

<sup>312</sup> Maluwa (1999) 41, for example, cites the case of the Nigerian constitution mentioned above, which is silent on the incorporation of customary international law into the legal system. Ghana’s Constitution of 1992, for example, only provides in Art. 40(c) that ‘the government shall promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means’.

<sup>313</sup> Maluwa (1999) 41.

<sup>314</sup> Akintoba TO (1996) *African States and contemporary International Law: a case study of the 1982 Law of the Sea Convention and The Exclusive Economic Zone* 36; see, generally, Janis MW (2008) *International Law* 200-204.

#### 3.6.4.1 The influence of international law in Africa: The example of state succession to international instruments (treaties)

One area in which the relevance of international law has had a profound impact on states is that of state succession to international obligations or instruments. Few areas of law have generated as much interest and controversy from scholars and other legal commentators as that of state succession.<sup>315</sup> In post-colonial Africa, this issue is further compounded by the legacies of the colonising states. To most writers, state succession is an area of both great uncertainty and controversy.<sup>316</sup> It would seem that this is partly due to the fact that the practice of states in this area has been more equivocal than consistent, and these differences and lack of unanimity in state practice is responsible for the lack of settled legal rules in this area of international law. The problem of state succession, especially the succession of newly independent states to pre-independence treaties, has been of much relevance to the African continent in the last thirty years or more.

State succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law.<sup>317</sup> Although in many cases, such changes in sovereignty may be occasioned by diverse political factors, such as the dismemberment of an existing state, annexation, cession, secession and others, the most common cause in Africa has been de-colonisation.<sup>318</sup> This phenomenon is particularly pertinent in the case of former colonial states. De-colonisation has given rise to the problems associated with state succession in Africa. Legally, one of the important questions arising out of de-colonisation was whether the new state was bound by the treaties entered into by its predecessor, the former colonial power.

This enquiry is still relevant today, and is not actually limited to the de-colonisation process alone. The term 'de-colonisation' itself may be taken in a wide sense to include, for example, the unresolved problem of the Western Sahara, with the Saharawi people seeking independence. If the dispute regarding the statehood of the Saharawi Arab Democratic Republic is resolved in favour of an

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<sup>315</sup> Maluwa (1999) 61.

<sup>316</sup> Brownlie (2003) 622; Dugard (2005) 420-425; Shaw (1997) 682.

<sup>317</sup> Brownlie (2003) 621; see also Shaw (1997) 674-682 for a short description of the different instances in which state succession would take place.

<sup>318</sup> Maluwa (1999) 61.

independent state that enjoys international acceptance and recognition, the question of the devolution of treaties entered into, first, by Spain and, later by Morocco in respect of the Western Sahara territory will have to be determined. Similar issues have definitely arisen in the case of Eritrea and Ethiopia, and what became of the pre-independence treaties entered into by Ethiopia on behalf of Eritrea. South Africa is another example, in which the validity of certain treaties entered into by the apartheid regime has been called into question.<sup>319</sup>

This scenario is not limited to Africa. The question of succession to treaties and obligations was also dealt with by the new independent states that emerged out of the former Soviet Union. However, the way and manner this case was handled by the international community signalled a preference for a political settlement of the question of state succession, as opposed to a legal abidance of the rules of international law.<sup>320</sup> On the international plane, the United Nations Vienna Convention on State Succession in Respect of Treaties 1978, which entered into force in 1996, provides a framework with which to address this problem. The treaty deals with the effects of a succession of states in respect of treaties between states. It provides for different instances in which state succession may occur; pertaining to succession in respect of part of a territory, or succession with newly independent states.<sup>321</sup> The main basis of the succession to treaties as provided in this convention is consent. The successor state must indicate that it wishes to continue to be bound by the treaty provisions.

There are two opposing views on the issue of state succession to treaties and international law agreements; however, in between these two theories are a number of varied propositions combining elements of the two major theories.<sup>322</sup> There is the 'universal succession' theory, with those of this view believing that there is a rule of absolute inheritance (devolution) of rights and obligations flowing from engagements entered into by the predecessor state.<sup>323</sup> This theory has over time

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<sup>319</sup> Maluwa (1999) 63.

<sup>320</sup> *Ibid.*

<sup>321</sup> Shaw (1997) 683; Dugard (2005) 421.

<sup>322</sup> Maluwa (1999) 69; Dugard, *Ibid.*

<sup>323</sup> Dugard, (2005), 421; Ong DM, 'The Legal Status of the 989 Australia-Indonesia Timor Gap Treaty following the end of Indonesian Rule in East Timor' 2000 (31) *NYIL* 67 at 94.

become of diminishing appeal due to the constraint it puts on the doctrine of state sovereignty.

On the other hand, there is the ‘non-devolution or negativist’ theory, also referred to as the ‘clean slate’ theory. Exponents of this view hold that a successor state acquires its territory on a clean slate and as such is not bound by pre-independence treaties.<sup>324</sup> The basis of this, they argue, is the fact that independence means the ‘total destruction of the previous state identity and the creation of a new international legal person’.<sup>325</sup> Thus the new state is deemed to get its sovereignty from international law, and as such, there is a substitution of sovereignties. The successor state is regarded as possessing its own sovereignty because of its succession to statehood (having acquired its territory, which had been forcibly or unlawfully acquired from the pre-colonial indigenous polity), and should not be encumbered by obligations created by any agreement entered into by the departing colonial government.<sup>326</sup> This theory is supported in the Vienna Convention on Succession of States in Respect of Treaties.<sup>327</sup>

In looking at the legal evolution of most African states, one would see that it has followed a logical progression. The first phase occurred in the pre-colonial era, when indigenous societies were organised into different forms of groups. They were then referred to as city-states, kingdoms or empires. The second phase of the legal evolution of African states that saw the independent African societies being subsumed by the colonial powers meant that the colonial powers assumed responsibility for the external or international relations of the colonised territories. This phase came to an end through the de-colonisation process, and gave rise to the issue of the succession to treaties.

With the 1885 partitioning of Africa,<sup>328</sup> the colonial powers were regarded as possessing the sole authority and competence to conclude treaties for and on behalf of the African territories. For example, under British colonial practise, the initial

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<sup>324</sup> Ong (2000); Dugard (2005), 421.

<sup>325</sup> Maluwa (1999) 70; Shaw (1997) 694.

<sup>326</sup> Maluwa (1999) 70; the US appealed to this after gaining independence from Great Britain to explain why the former colonies were not bound by treaties to which Britain was a party.

<sup>327</sup> Article 16 of the Convention.

<sup>328</sup> Partitioning was done at a conference held in West Berlin in Germany from the end of December 1884 – January 1885.

presumption was that all British treaties were deemed to apply to all British territories and subjects. Older territories (dominions) like Australia, Canada and New Zealand did not follow this presumption, as they were able to enter into their own treaties and withdraw from treaties entered into by Britain on their behalf, even while they were still under some measure of British rule, thus exercising a *de facto* international legal personality.<sup>329</sup> The scenario with British African colonies was different; they could only attain international legal personality after independence, and thus they could not enter into, or negate any treaty before such a time.

The French colonial practice in Africa was, to a certain degree, similar to that of the British. All French treaties were deemed to extend to the colonies, except in the case of an express or implied limitation, where the affected treaty would not be deemed to extend to the colony. Gradually, France began to invite their colonial territories to be involved in the conclusion of those treaties that would specifically affect them, and making those treaties territorially applicable. This later evolved to the practice of locally promulgating a treaty before it could apply to a given territory. However, to all intents and purposes, France remained the only authority able to enter into international agreements on behalf of the territories, and local authorities merely implemented the decisions of the French government.<sup>330</sup>

African States have not stuck to any particular one of the various ways of handling pre-independence treaties. They have varied and adopted a number of trends in their approach to this question. These have been enumerated by the International Law Association Committee on State Succession to Treaties and Other Governmental Obligations (1965). The various ways include:

- i) varying between the successor, assuming all responsibilities arising from treaties between the predecessor and third parties;
- ii) the successor adopting a trial period within which all the treaties are to be studied and a decision made;
- iii) the successor opting to be bound by customary law but not treaties;

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<sup>329</sup> Maluwa (1999) 67-68.

<sup>330</sup> *Ibid.*

iv) and the successor issuing a declaration concerning treaties.<sup>331</sup>

In effect, African state practice is highly varied and indicates that there is no distinction between those states which have concluded devolution agreements, and those which have not. Even in the case of those states which have not concluded devolution agreements, there appears to be a general acceptance of the continued validity of treaties entered into pre-independence. There are said to be two underlying principles applicable here. The first is the principle of the recognition of the need for legal continuity (in the short term at least to give the new state an opportunity to establish its own policies and identity without it being unduly fettered by the colonial legacy), and the second is the principle that, ultimately, a state has the discretion whether or not to accept such pre-independence treaties.<sup>332</sup> This second principle referred to as the Nyerere Doctrine. The Nyerere doctrine in itself is seen to be no more than an acknowledgement that even in instances where the new state declares itself not bound by the pre-independence treaties, certain of such treaties still survive as a result of the application of the rules of customary law.<sup>333</sup>

Ultimately, it would appear that an underlying theme in the issue of state succession is that of sovereign discretion. Each sovereign state has an overriding discretion as to which of the treaties to allow itself to be bound by. In matters of state succession, states guard this discretion jealously, and as they do so, this continues to affect the way and manner the pre-independence treaties are viewed and dealt with by individual states. There is thus no definitive practice amongst states, as seen in the case of South Africa, where the courts have shown support for both continuity and non-continuity of treaty obligations, even though the judicial decisions for the former is weightier.<sup>334</sup>

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<sup>331</sup> International Law Association Report of the 52<sup>nd</sup> Conference in 1966.

<sup>332</sup> Maluwa (1999) 73. This is referred to as the Nyerere Doctrine, and Malawi adopted this after its independence. It opted to continue to apply treaties that had been entered to on its behalf by the UK government on a basis of reciprocity for a period of eighteen months. This was contained in the November 1964 Declaration of the then Prime Minister of the region of Tanganyika (comprising of Malawi) to the Acting Secretary General of the UN. After the period of eighteen months, it decided it would review all the multilateral treaties entered into on its behalf, and then decide on which to confirm or terminate.

<sup>333</sup> Maluwa (1999) 78.

<sup>334</sup> Dugard (2005) 423, where reference is made to the cases of *S v Eliasov* 1965 (2) SA 770 (T), where the court held that Southern Rhodesia (Zimbabwe) did not succeed to an extradition

### 3.7 Conclusion

This chapter has sought to explore and analyse the specific theories deemed to have played important roles in state formation and in particular constitutional developments. The social contract theory has been taken as a point of departure in respect of the basis of the constitutional form of government and of state formation. Consent of the members of the society to be governed is impliedly present in any form of constitutional arrangement, giving rise to the presence of the rule of law. The fact that there are criticisms to this theory is apparent, and these criticisms have been dealt with in this chapter against the knowledge that there is no perfect theory. These criticisms are found not to be fundamental enough to make the theory inapplicable.

Kelsen's pure theory of law was also explored in light of an aspect of his postulate that relates to the *grundnorm*. The implications of this regarding the constitution in a state, and how this affects the rule of law, were explored. This theory lends credence to the need for the constitution making process to be carried out in such a way that the society views the resultant document as its own and therefore necessarily binding on it. This is important in view of the problems and challenges experienced in Africa in the aspects of governance and enthronement of the rule of law. It therefore makes it necessary to examine the constitutional arrangements existing in these countries to determine the place of the notions of consent (of the people) in such constitutional arrangements. This will be explored further in the subsequent chapters dealing with Nigeria and South Africa.

This chapter also brings to light the influences of the global world and events therein on the rule of law in Africa. In particular, the roles played by the developments of international law and globalisation in Africa are examined, and the impact these have had on the rule of law. It is significant to note that with these developments, the rule of law within a country is not longer necessarily the product of the singular factor of consent of the people to the law making processes.

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agreement between South Africa and the Federation of Rhodesia and Nyasaland (comprising of regions now known as Zambia, Malawi and Zimbabwe) on the dissolution of the federation; and the case of *S v Bull* 1967 (2) SA 636 (T), in which the court held that Malawi succeeded to the extradition agreement between South Africa and the Federation of Rhodesia and Nyasaland, where South Africa's intention to continue to be bound by the treaty was evidenced by an executive certificate.



These other influences also mould to a large extent the state of the rule of law within each country. Notwithstanding this reality, the participation and consent of the people in the process remain essential.

The aim of the following chapters would be to build on this foundation and examine the rule of law and its international dimensions as these exist in Nigeria and South Africa, (two very prominent states in the African continent, with quite dissimilar histories).

## CHAPTER 4

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### Regional Case Study: Nigeria

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## **4.1 Introduction**

In the post-colonial period, constitutional democracies emerged as the form of government in Africa. As seen from chapter three, this system is based on the metaphorical social contract theory of state formation in which legitimate state authority is derived from the consent of the governed. The theory (as discussed in chapter three) posits that man in his natural state decides to voluntarily and wilfully give up his rights in the natural state to a common ‘authority’. This is based on an implied agreement by the people within a specific location to form a nation with social, legal and political structures, and to maintain a social order. Against the background of the earlier discussion on the scope and critical analyses of this theory, the application of the social contract theory in Nigeria will be explored in this chapter. This will be done in relation to the ‘consent’ or otherwise of Nigerians to the system of constitutional democracy existing in the country. How this ‘consent’ plays out in the behaviour of the people and the state to the rule of law within the nation, is the question at the core of the following discussion.

The next section will start with a brief historical background of Nigeria, in particular the system of government and the rule of law under colonial rule and under military regimes, with special reference to the different constitutions that Nigeria has had. This is followed by section three which will discuss the 1999 Constitution that is currently in force, against the backdrop of the social contract and Kelsenian theories. Section four will seek to examine the structure of the Nigerian legal system and the place of the rule of law within that structure. The following two sections (five and six) will investigate the impact of global and internal realities on the rule of law and democracy in Nigeria, followed by the conclusion in section seven.

## **4.2 Historical Background of Nigeria**

Nigeria is easily characterised as the ‘most-populous’ country on the African continent. It is a country with a history of political and social instability. It is a country that is fractured and polarised along ethnic, religious and political lines.

This gave rise to a civil war in 1967, when the Igbo ethnic group made an unsuccessful attempt at secession.<sup>1</sup> Ethnic and religious solidarities have since solidified and continued, with the incessant outbreak of conflict on these grounds in certain areas of the country, resulting in tensions being felt all over the country.<sup>2</sup>

Nigeria is situated on the west coast of Africa, on the shores of the Gulf of Guinea. It lies between the parallels of 4° and 14° north, and is thus entirely within the tropics.<sup>3</sup> It is bounded on the south by the sea, on the west and north by the Republics of Benin and Niger respectively,<sup>4</sup> and on the east by the Republics of Cameroon and Chad. Nigeria attained independence on the 1<sup>st</sup> of October 1960, having been formerly colonised by the British.<sup>5</sup> Various historic events and outside influences contributed to shape Nigerian history. Interaction with the colonial powers is an example of such an event which had a profound influence on the shaping of Africa as a whole. This is no less so in the case of Nigeria. An understanding of these influences is essential to gaining full understanding of Nigerian peoples, politics and society.

Naturally, the history of the Nigerian peoples predates that of colonial rule and presents a fragmented picture, due to the various traditions and cultures indigenous to the country. There are three regionally dominant groups in Nigeria; the Hausa's in the north, the Yoruba's in the west and the Igbo's in the east. Other groups include the Fulani, Kanuri (both in the northern parts), the Ibibio, Edo, Tiv and Nupe.<sup>6</sup> These and all of the over 250 ethnic groups fall into the three dominant groups mentioned.

As indicated in chapter two of this thesis, indigenous African societies were categorised into two main types of societies: the centralised and non-centralised

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<sup>1</sup> The civil war, also referred to as the Biafra Civil War of 1967, came about when the predominantly Igbo dominated Eastern part of Nigeria attempted to secede, and declared itself the 'Federal Republic of Biafra'.

<sup>2</sup> It is worthy to note that many times, these solidarities are capitalised on by the political class for political gains. The riots and wave of killings that continue to break out in Jos, Plateau state, are no longer regarded as purely religious conflicts.

<sup>3</sup> Burns A (1978) *History of Nigeria* 16.

<sup>4</sup> These are former French territories which became independent in 1960. The Republic of Benin was formerly called Dahomey.

<sup>5</sup> Burns (1978) 16.

<sup>6</sup> Falola T *et al* (1989) *History of Nigeria: Nigeria before 1840 AD* 17.

societies. This was also the case in Nigeria. By 1800 AD, centralised societies had developed in different parts of the region known as Nigeria.<sup>7</sup> To the north were the great Islamic kingdoms of Kanem-Borno, Kano, and Katsina. Others were the Igala, Nupe, and Ebira kingdoms, amongst others.<sup>8</sup> To the west and south were the kingdoms of Ife, Oyo and Benin, amongst others.<sup>9</sup> These centralised societies had varying degrees of development and political organisation.

There were also the non-centralised societies in Nigeria. These were unified and they had relatively restricted social-political structures with which they ordered their lives. They include groups such as the Igbo in the east, and the Isoko and Urhobo groups in the south.<sup>10</sup> These societies and peoples continued to exist separately and independently until they were grouped together to form the country of Nigeria by order of the colonial British government.

As stated earlier, a number of influences have worked over the years to shape Nigeria and its peoples; and the impact of these are still being felt today. For the purpose of examining the rule of law in Nigeria, the following merit special attention:

- a) The Spread of Islam
- b) The Slave Trade
- c) Colonial Rule

- a) The spread of Islam through Africa had a great influence on Nigeria as we know it today. Islam spread to the northern territory of Nigeria around 1800 after the Berlin West Conference, and trickled down to the south west. The creation of the Sokoto caliphate in Holy Jihad<sup>11</sup> and its consolidation in the nineteenth century also worked greatly to extend

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<sup>7</sup> See, generally, chapters 4 and 5 of Falola (1989).

<sup>8</sup> Falola (1989) 37.

<sup>9</sup> Falola, (1989) 57.

<sup>10</sup> Falola (1989) 85.

<sup>11</sup> The Sokoto Caliphate is a loose confederation of emirates (small kingdoms in northern Nigeria) that recognise the historical leadership of Usman Dan Fodio, as the 'commander of the faithful'. It was founded in the 1800's through holy war (Jihad) and wielded great power in sub-Saharan Africa prior to the European colonisation. It still exists in Nigeria at present, and still carries a lot of power, though not as much as it did in times prior to colonisation.

Islam within Nigeria, especially northern Nigeria.<sup>12</sup> Courts administering Islamic law were created in the north as Islamic law became the governing law in that region; however Islam did not make as much inroads in other parts of Nigeria, especially in the west or southern parts. These areas experienced a sharper influence of British missionaries during colonial rule.<sup>13</sup> Northern and southern regions of Nigeria have historically had their differences. This is partly due to the fact that they are in fact different nations who were forced to live together by the British act of amalgamation in 1914, and partly due to the fact that the forces that influenced them were different. Ecologically, the difference is in the fact that the northern states are savannah, whilst the southern states are mangrove.<sup>14</sup>

- b) A second important factor that had a profound influence on Nigeria was the slave trade across both the Sahara Desert and the Atlantic Ocean.<sup>15</sup> Called the transatlantic slave trade, it was reputed to have been started by the Portuguese around 1471. By 1472, Portuguese vessels had made inroads to the Bight of Benin, where they found safe anchorages between Lagos and the Cameroons.<sup>16</sup> The Portuguese established a monopoly of trade with the West African cities along their route, until the early sixteenth century when the Dutch took over both the trade and the Portuguese trading stations on the coast.<sup>17</sup> Around the mid-sixteenth century, in 1553, French and particularly British traders emerged and took over the trade.<sup>18</sup> Britain eventually became the dominant slave trader in the eighteenth century.<sup>19</sup>

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<sup>12</sup> Federal Research Division, Library of Congress Country Studies: *Nigeria*, available at <http://memory.loc.gov/frd/cs/ngtoc.html#top> (accessed in May 2008).

<sup>13</sup> Library of Congress, *ibid.*

<sup>14</sup> Library of Congress, *ibid.*

<sup>15</sup> Library of Congress, *ibid.*

<sup>16</sup> Burns (1978) 66.

<sup>17</sup> The Dutch captured the Portuguese fort at Elmina, Gold Coast in 1637 which ultimately led to the Portuguese surrendering all their property in the Gold Coast to the Dutch.

<sup>18</sup> Burns (1978) 67.

<sup>19</sup> Library of Congress; generally Burns (1978) 73 -77.

Slave trade accounted for the migration of about 3.5 million people from Nigeria to the Americas, between 1650s and 1860s.<sup>20</sup> A steady stream of slaves flowed north across the Sahara for a millennium, ending only at the beginning of the twentieth century. Slave trade was not limited to non-African destinations, but was equally widespread within Nigeria, and caused distortions in the social framework of the country. It has been said, for example, that the Sokoto Caliphate exceeded any other modern nation, except perhaps the United States, in the number of slaves it had then.<sup>21</sup> Slave owning was common amongst the Igbo, Yoruba, and many other ethnic groups also (living in what would later become known as Nigeria), whereby the chiefs and rulers of those communities, and even the wealthier members took on slaves for themselves and their households. It should be noted here that the ultimate aim of any form of slave trade (whether internal or external) was to provide slave labour for farms, plantations, households and whatever other form of labour that was required.

Slave trading was likewise common amongst local communities and ethnic groups. Villages and communities went to war very often with their neighbouring villages, hoping to take the people of the other village as slaves upon victory. This interesting point, namely that slave trade existed on the West African coast before the first European arrived there, has also been noted by Burns.<sup>22</sup> He however notes that slave trade expanded

‘owing to the enormous demand caused by the establishment of plantations in the New World (Americas), and the greater facilities provided by fire-arms for the slave-raiding chiefs. The trade increased by leaps and bounds under European management’.<sup>23</sup>

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<sup>20</sup> Library of Congress.

<sup>21</sup> Banwo A ‘Slavery, Commerce and Production in the Sokoto Caliphate of West Africa’ (2008) 51(1) *ASR* 140.

<sup>22</sup> Burns (1978) 71.

<sup>23</sup> *Ibid.*



The great amount of cruelty and indignity that accompanied the trade gave rise to various pressure groups in Europe, agitating for the abolishment of slave trade.<sup>24</sup> These efforts paid off, when in 1802, the Danish Government declared slave trade illegal. This was closely followed by the British Government in 1807, and other European Governments.<sup>25</sup> This abolition also extended to the colonies of these countries. The immediate impact of the abolition was not felt in West Africa, as merchants devised other illicit ways of continuing slave trade for almost another century.<sup>26</sup> The island of Lagos (known referred to as Lagos Island, within the larger Lagos state) specifically, became a booming slave port. In a bid to stop the trade at the source, the British government, in a campaign to substitute slave trade with trade in other commodities, became more and more involved in the affairs of the interior of the region of Lagos Island. Eventually, Lagos was annexed by the British in 1861 (thus began what is referred to as the colonialisation of Nigeria). By the end of the 19<sup>th</sup> century, Britain began an aggressive military expansion in the region, with the result being that a protectorate was declared over northern Nigeria in 1900.<sup>27</sup>

- c) The third occurrence that has influenced and continues to influence Nigeria is colonial rule. As indicated above, Nigeria was under colonial rule of the British during late 19<sup>th</sup> century and early 20<sup>th</sup> century. The occupation of Nigeria by the British was achieved gradually and resulted in the British exercising control over most of the region known as Nigeria today. Colonialism itself brought into the country a third system of law in addition to the already existing systems of native law and customs, and Islam. This third system is known as the common law, together with its system of administration of justice. Legal pluralism as found in Nigeria was further compounded by the methods adopted by the colonial

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<sup>24</sup> At the forefront was the Society for the Abolition of the Slave Trade, formed in 1787.

<sup>25</sup> Burns (1978) 77; the British Act of 1807 prohibited any slaves being carried in a British ship or landed in a British colony, as from 1 March 1808.

<sup>26</sup> The thinking at this time was that if the demand for slaves was suppressed, the trade would stop. However, this proved to be wrong, and it was realised that slave trade would illicitly continue until it was attacked at the source.

<sup>27</sup> Geographic Map, *History of Nigeria*, available at <http://www.iss.co.za/af/profiles/Nigeria/Politics.html> (accessed on 28 May 2008).

administration. These methods that will be discussed below, had to do with the parallel court systems allowed at the lower levels (inferior courts) and the dominant courts of common law adopted at the higher levels (superior courts).<sup>28</sup> In administering Nigeria, the colonial administrators had two separate dependencies; northern and southern Nigeria, which were referred to as protectorates. As stated above, the northern and southern protectorates were merged into a single territory in 1914.<sup>29</sup>

The Nigerian colonial era was a relatively brief period of about six decades in average, but the change it unleashed on the country and the continent in general, was so extensive that the full impact is still being felt in present times. The consequential friction that resulted between ways introduced by colonial rule and the old, indigenous way of life continues to reverberate throughout the country.

Trade in African products boomed under colonialism and led to distorted and unsustainable economic growth (which has since collapsed). In Nigeria, trade was in cocoa products and palm oil, amongst others. Another important area of impact is the imposition of ‘foreign’ laws as discussed in chapter two. These laws did not reflect the values, beliefs and thinking of the indigenous people, and they were imposed because they were felt to be of a superior nature, to the detriment of existing laws within the communities, which were regarded as primitive by the settlers.<sup>30</sup>

#### **4.2.1 System of government under colonial rule**

The advent of British interest in this region now known as Nigeria resulted in the proclamation of British protectorates. Changes were introduced into existing structures, in an effort to secure control over the area. Nigeria, like many other African countries, is a creation of European rule, having been so named after the

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<sup>28</sup> Oba AA, ‘The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction’ (2004) 52 *ALJ* 859–900 at 861.

<sup>29</sup> Geographic Map.

<sup>30</sup> Library Congress.

river Niger by British settlers. The boundaries were arbitrarily mapped out at the Berlin West conference of 1885. Nigeria as a country is a collection of over 250 very distinct and independent ethnic groups of widely varying cultures, traditions and modes of political organisation.

The modern history of Nigeria dates from the completion of the British conquest<sup>31</sup> in 1903 and the amalgamation of northern and southern Nigeria into the Colony and Protectorates of Nigeria in 1914.<sup>32</sup> As a country, 'Nigeria' came into existence in 1914, when the northern and southern protectorates of Nigeria were merged by the British administration.<sup>33</sup> Before 1900, there existed three separate independent territories (all under British control) in the country.<sup>34</sup> These were the Niger Coast Protectorate (created in 1891), the Colony of Lagos (ceded to Britain in 1861), and the Territory of the Royal Niger Company (the equivalent of northern Nigeria). These were all ruled by different officials.<sup>35</sup> An important point to note about the Royal Niger Company is that it was a trading company chartered by the British government in 1886, and granted broad concessionary rights to carry out trade within the territory covered by the Niger Coast Protectorate.<sup>36</sup>

In 1906, preceding the amalgamation of the northern and southern protectorates of Nigeria, the Colony and Protectorate of Lagos was fused with the Colony and Protectorate of Southern Nigeria, and known as the Colony and Protectorate of Southern Nigeria. This was later merged with the colony and protectorate of Northern Nigeria. It is necessary to note that whilst the 1914 amalgamation of

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<sup>31</sup> British jurisdiction over the Nigerian territories originally emanated mainly from treaties of cession by the various chiefs and heads of the different kingdoms and societies. Of course, as indicated in the historical chapter, many of the chiefs probably did not have full knowledge of the import and implications of the documents they had agreed to with the Europeans.

<sup>32</sup> Nwaubani E 'Constitution-Making and The Nigerian Identity, 1914 – 1960' in Oyebadé A (ed) (2002) *The Transformation of Nigeria: Essays in Honour of Toyin Falola* 75-76. This amalgamation was by the British government, and Lord Frederick Lugard was thereafter appointed the Governor-General of Nigeria.

<sup>33</sup> By Order in Council dated November 1913 which came into force in January 1914. This merger was purely to further the administrative and economic interests of the British. There was the need to build a railway line from the north through to the coastal areas in the south, in order to ease the transportation of goods they traded in, in addition, the south was relatively richer than the north, and amalgamation made it easier to use the resources from the south to develop the whole country.

<sup>34</sup> Falola T *et al* (1991) *History of Nigeria 3: Nigeria in the twentieth century* 4.

<sup>35</sup> Falola (1991) 5.

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

these protectorates was for administrative and economic reasons,<sup>37</sup> it did not result in the unification of the Nigerian peoples, as the socio-political particularism of Southern and Northern Nigeria was maintained.<sup>38</sup> Two groups of provinces were created out of the region Nigeria; the northern and southern group of provinces. These were run separately, and the differences and peculiarities of the peoples were preserved.<sup>39</sup> There was thus no attempt to unify the peoples under a Nigerian nation. This could be seen as the genesis of the ethnic and regional solidarities that exists till date in Nigeria. The author, Falola, remarks, however, that even though the amalgamation might not have been well effected, this does not justify the failure of the Nigerian leaders and peoples on their own to build a united nation.<sup>40</sup>

This structure of separation of the regions (provinces) continued under successive Governor-Generals, and became entrenched without any attempt at unifying the people. Regionalism became the system in practice, and was introduced in the 1947 Constitution. The colonial government introduced a federal structure later in 1954, based on three regions: eastern, western and northern. It is said that the idea behind this was to reconcile the regional and religious tensions that were mounting between the different regional, ethnic and religious divides.<sup>41</sup> Federalism as a system of governance is often championed in ethnically diverse countries in the hope that it would foster greater political participation and reduce inequality amongst diverse populations.<sup>42</sup> This view was also shared by those involved in the negotiations for Nigeria's independence. One of such people was Chief Obafemi Awolowo, who is quoted as saying in the early 1940's:

‘[F]rom our study of the constitutional evolution of all the countries of the world, two things stand out quite clearly and prominently. First, in any country where there are divergences of language and of nationality,

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<sup>37</sup> Oyebade (2002) 76.

<sup>38</sup> See Chapter 9 of Tamuno T (1972) *The Evolution of the Nigerian State: The Southern Phase, 1898 – 1914*. He gives a more wide-ranging critique.

<sup>39</sup> *Ibid.*

<sup>40</sup> Falola (1991) 9.

<sup>41</sup> Geographic Map.

<sup>42</sup> International Crisis Group Africa Report No 119, dated 25<sup>th</sup> October 2006, *Nigeria's Faltering Federal Experiment*, available at [http://www.chr.up.ac.za/indigenous/documents/Nigeria/Report/Nigerias\\_faltering\\_federal\\_experiment.pdf](http://www.chr.up.ac.za/indigenous/documents/Nigeria/Report/Nigerias_faltering_federal_experiment.pdf) (accessed on 20 June 2009).

particularly of language, a unitary constitution is always a source of bitterness and hostility on the part of linguistic or national minority groups. On the other hand, as soon as a federal constitution is introduced in which each linguistic or national group is recognised and accorded regional autonomy, any bitterness and hostility against the constitutional arrangements as such disappear ...'<sup>43</sup>

The task of addressing conflicting demands for ethnic/regional self-government and central government by the various political groups compelled the British in 1954 to introduce a federal structure. A federal government with substantial regional autonomy was introduced, with specific powers being allotted to the federal government. These powers included the police force, defence, banking, custom duties and many others. Powers were also allotted to the regions, including healthcare, agriculture, education and economic development.<sup>44</sup> The Federation of Nigeria achieved independence on 1st October 1960 with Dr Nnamdi Azikiwe appointed as the Governor-General (succeeding Sir James Robertson).<sup>45</sup>

Even after the attainment of independence, ethnic and regional rivalries continued to threaten the unity of the federation. It has been said that factionalism and the desire for autonomy within the system is what inspired the formation of various political groupings and political alliances.<sup>46</sup> At the time the federation of Nigeria became self-governing in 1954, the leaders of the call for independence were stalwarts from the different regions, who had distinguished themselves in the pan-African struggle. Amongst such were Dr. Nnamdi Azikiwe and Herbert Macaulay of the National Council for Nigeria and Cameroons (NCNC), a party dominated by those from the eastern region (the Igbos), Obafemi Awolowo of the western based Action Group (AG)(the Yorubas), and Sirs Ahmadu Bello and Abubakar Tafawa Balewa of the Northern Peoples Congress (NPC) (the

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<sup>43</sup> Obafemi Awolowo *Thoughts on Nigerian Constitution*, quoted by Sagay Itse 'Nigeria, Federalism, the Constitution and Resource Control' in Ikein AA *et al* (ed) (2008) *Oil, Democracy and The Promise of True Federalism in Nigeria* 357; Sagay also quotes Sir Ahmadu Bello, then Premier of the northern region, as also supporting this view in the 1953 debate on the motion for independence.

<sup>44</sup> See the 1960 Constitution of the Federal Republic of Nigeria.

<sup>45</sup> Burns (1978) 261.

<sup>46</sup> *Ibid.*

Hausa's).<sup>47</sup> These were visionary leaders who knew what they wanted and fought for it. They had put the interest of the nation before theirs. Unfortunately, since independence in 1960, Nigeria has gone through a period of defective leadership, and has had rulers instead, who have repeatedly tinkered with the federal structure to suit their own motives. The resultant effect of these actions is that it has promoted ethnic and regional interests rather than national interests.<sup>48</sup>

The ethnic and regional contentions were not helped by the fact that the initial government of the Federation, headed by Sir Tafawa Balewa,<sup>49</sup> was unable to achieve much in the area of unification. Citizens felt allegiance to and identified with their separate and immediate ethnic groups rather than to the country. Different instances of conflicts as a result of these sentiments led to feelings of alienation, and the perception that some ethnic groups were being marginalised, whilst others were reaping the dividends of freedom more than others. Feelings of alienation in many instances led to factionalism within the parties or regions, due to the fact that people within the regions were sometimes seen to be in cahoots with those from outside the ethnic group or belonging to other ethnic groups.<sup>50</sup> All of these, coupled with concerns at the growing economic disparities in the Nigerian society and the then already visible signs of corruption in public life, led to a general strike in 1964, and the consequential coup and instability that besieged the country.<sup>51</sup>

#### **4.2.2 Developments relating to Nigeria's constitutional system**

As already stated above, the main bequest of the British was not only the carving out or creation of a state called Nigeria, but also the common law and its system

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<sup>47</sup> Geographic Map.

<sup>48</sup> Crisis Group Report No 119.

<sup>49</sup> The Prime Minister of Nigeria in 1960 and Head of Government.

<sup>50</sup> Conflicts in the early 1960s' within the AG (Action Group) party attest to this. After the exclusion of the AG party from power at the federal level in 1959, an attempt at re-aligning the party gave rise to great conflict and disorder, which led to a six month state of emergency being imposed on the West. Also, the Tiv in Benue, Plateau state, who were aggrieved that their demands for autonomy since 1960 had been repeatedly denied, attacked members of the NPC in 1994, assaulting them and destroying their offices and property. This insurgency was quickly curbed by the federal army.

<sup>51</sup> Geographic Map.

of governance. When the British government introduced federalism and a constitutional government as the best way of accommodating the demands of different ethnic groups and regions in Nigeria, they probably envisaged the smooth running of the country. Little did they realise that colonialism had led to deep-seated ethnic, regional and even religious alignments within the country which hindered the functioning of the federal and constitutional systems of government in Nigeria. In its history, Nigeria has had a number of constitutions passed into law in a bid to address these problems. This despite the fact that the phenomenon of a “constitution” - a written document that embodies or serves as a grundnorm (foundation) from which the rules and regulations in a country stem – was in itself strange to Nigeria and Africa generally.

The colonial legacy of Nigeria includes the following constitutions:

- the Constitution of the Colony and Protectorate of Nigeria 1914;
- the 1922 Clifford Constitution;
- the 1946 Richards Constitution (which were virtually imposed on the country by the colonial government);<sup>52</sup>
- the 1951 MacPherson; and the
- 1954 Lyttleton Constitutions.<sup>53</sup>

The 1914, 1922, and 1946 Constitutions were all direct impositions of the colonial government with no input from the indigenous society. The 1951 and 1954 Constitutions were the first indications of the move to federalism after the amalgamation of the northern and southern protectorates in 1914. The drafting of these constitutions were more consultative, as the members of the society were involved.<sup>54</sup> The 1951 Constitution was drafted after consultations with people at all levels of the country; villages, settlements, communities, divisions, and regions within the country. These series of consultations were said to reveal the peculiar fact that Nigerians desired a situation where the regions would have

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<sup>52</sup> Nwabueze B.O (1982) *A Constitutional History of Nigeria* 38-46; Metz HC (1991) (ed) *Nigeria: A Country Study* Library of Congress, available at <http://countrystudies.us/nigeria/67.htm> (accessed on 30 March 2010).

<sup>53</sup> These constitutions were each named after the colonial governor who formulated them.

<sup>54</sup> Burns (1978) 251.

greater autonomy and political space.<sup>55</sup> It established a House of Representatives, as central legislature, which was made up of regional representative members.<sup>56</sup>

The 1954 Lyttleton Constitution established the Federation of Nigeria, to consist of the three regions of the North, East and West; and the Federal Territory of Lagos.<sup>57</sup> These regions had authority in their internal administration and policy, whilst the central government was responsible for foreign affairs and relationships amongst the regions.<sup>58</sup> This Constitution provided a basis for the 1960 independence Constitution.<sup>59</sup> It gave the regions considerable powers, as they had concurrent jurisdiction with the central government (also called Federal government) over issues like higher education, the judiciary, the police and many others. The regions were also responsible for residual matters dealing with their own socio-economic policies and they were able to strive towards self-government at their own pace.<sup>60</sup> The independence Constitution, whilst conferring independence on Nigeria, still preserved the role of the Queen as sovereign over Nigeria, even though she was only now acting through Nigerian officials.<sup>61</sup>

The move and demand for independence in Nigeria was championed by nationalists who felt that the federal structure was the best suited for Nigeria's diverse peoples. In July 1960, the United Kingdom Parliament passed the Independence Act for Nigeria.<sup>62</sup> On the 12<sup>th</sup> of September 1960, the Queen approved The Nigerian (Constitution) Order in Council, which set up the Federation of Nigeria to consist of Northern Nigeria, Western Nigeria, Eastern Nigeria and the Federal Territory of Lagos.<sup>63</sup> This order set up the 1960 Nigerian Constitution, which followed the federal structure already existing under the 1954

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<sup>55</sup> Crisis Group Report No 119.

<sup>56</sup> These members were appointed from the three regions that had been identified, namely the north, west and the east.

<sup>57</sup> Burns (1978) 252.

<sup>58</sup> Crises Group Report No 119.

<sup>59</sup> The Constitution of the Federation of Nigeria, 1960.

<sup>60</sup> Crisis Group Report No 119.

<sup>61</sup> Nwabueze (1982) 75. Appeals from Nigerian courts also lay to Her Majesty, as the sovereign. This appellate jurisdiction was exercised for the Queen by the Judicial Committee of the Privy Council, established by the Judicial Committee Act of 1833.

<sup>62</sup> Burns (1978) 257.

<sup>63</sup> *Ibid.* this Order set up the 1960 Nigerian Constitution, which gave a broad framework.



Constitution. It granted extensive powers, along with revenue allocation to the regions (later known as States), thus effectively making them autonomous entities.<sup>64</sup> It also maintained the central government with limited powers.

In 1963, Nigeria became a Republic,<sup>65</sup> and the 1963 Republican Constitution reflected the power sharing and revenue allocation formula of the previous constitution, and it also guaranteed the regions considerable powers.<sup>66</sup> However, the already existing deep ethnic differences and the fact that the regions were divided along ethnic lines, gave rise to challenges regarding the functioning of the federation. This was to become more pronounced in subsequent constitutions.

As stated earlier, the initial post-independence government of the country, led by Sir Abubakar Tafawa Balewa, was unable to advance the unification of the country. The north continued to be perceived by the other regions as being in control of the whole country and enjoying the benefits of that control. This view was further reinforced by the size of the northern region, which was almost double that of both the east and west put together. The dominant position of the north was regarded as unjustifiable and a means of dominating the federal government. Thus, by 1964, inter-ethnic struggles ensued amongst the three major ethnic groups of Hausa, Igbo and Yoruba, at the federal level, whilst the minority ethnic groups remained marginalised.<sup>67</sup> Falola has observed that the 1964 federal elections revealed the fragility of the Republic of Nigeria. Dogged by bitterness and violence in the regions, the elections were also blatantly rigged and compromised.<sup>68</sup>

Another problem that prevailed was the failure on the part of the government to properly deal with the growing corruption in the public sector. All organs of government displayed this failure, and the weakness that existed in the political

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<sup>64</sup> Ikein (2008) 359.

<sup>65</sup> By this, the Queen ceased to be the sovereign of Nigeria, and her functions and powers devolved on the president of the republic and on the governors of the different regions. Also Her Majesty's jurisdiction in appeals from Nigerian courts was abolished.

<sup>66</sup> Sections 1, 2 and 3 of the Constitution of the Federal Republic of Nigeria, 1963, established the country as a federation and a republic by the name the Federal Republic of Nigeria. It consisted of four regions and a Federal Territory.

<sup>67</sup> Crisis Group Report No 119.

<sup>68</sup> Falola (1991) 107.

structure of the new Nigeria. This is because the culture of nepotism invaded the public sector and consequently other sectors of the country. Those in the public sector displayed an unfortunate propensity to personal gains instead of service delivery.<sup>69</sup> As illustrated in chapter 2, people were being employed or favoured for contracts based on who they knew, what region of the country they came from and who their ‘godfather’ was.<sup>70</sup> Given the lack of leadership from those in authority, these ills continued unabated in the country.<sup>71</sup> The ‘breaking of the camel’s back’ came with the elections into the regional assembly in October 1965. This was marked by massive rigging which gave way to violence in the west. In 1966, the military in a purported bid to restore some sanity into the politic, took over the government by coup d’etat, thus marking the end of the first republic.<sup>72</sup>

#### 4.2.3 Military regimes

The military’s involvement in Nigeria’s politics has had a lasting influence on the Nigerian political structure and on the development of the rule of law in the country. The problems of the 1<sup>st</sup> republic set the stage for the first military takeover of government on January 15, 1966. This culminated in the establishment of military rule headed by Major-General Aguyi-Ironsi, who reversed the federal process and imposed a unitary system of government through the promulgation of Decree No 34 of 1966, titled, The Constitution (Suspension and Modification) (No 5) Decree of 1966.<sup>73</sup> As the case of subsequent military takeovers in the country, the justification by the Aguyi-Ironsi led military government for the coup d’état was the lack of legitimacy of the civilian government in the country due to its inability to deal with the issues of

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<sup>69</sup> *Ibid.*

<sup>70</sup> This term became associated in Nigerian politics with whoever a person had as a protector, sponsor, someone who was well connected and able to open doors for a particular person.

<sup>71</sup> Jarmon C (1988) *Nigeria: Reorganisation and Development since the Mid-Twentieth Century* 52-57.

<sup>72</sup> Falola (1991) 107. The first republic means the first period of civilian rule experienced by the country, there were subsequently other republics.

<sup>73</sup> Falola (1991) 123-124. The imposition of unitary rule was carried out despite opposition from different quarters, even the military governors of the time. The nationalist stalwarts, in the persons of Dr Nnamdi Azikiwe and Chief Obafemi Awolowo, had also as far back as 1943 advocated against a unitary government due to the different peculiarities within the regions.

corruption, nepotism and ethnicity.<sup>74</sup> Again, due to the deep divisions already existing along ethnic lines in the country, this coup was perceived, especially by the north, as one that was carried out to promote and ensure Igbo domination from the eastern part of the country where Major General Aguyi-Ironsi originated from.

The perception of the promotion of Igbo domination was buttressed by different versions of the account of the coup, which indicated that there seemed to have been a deliberate elimination of senior politicians and military personnel from the north and southern regions of the country, with the Prime Minister, Sir Abubakar Tafawa Balewa (a northerner), also falling victim.<sup>75</sup> Also, the Aguyi-Ironsi led government appeared to have surrounded itself with majority members of the Igbo ethnic group.<sup>76</sup>

A very violent counter-coup, costing many lives, was carried out by northern military officers in July that same year. Many Igbos living and working in the north were killed, and this was reciprocated in the east by the Igbos themselves, who killed many northerners, resulting in a high number of casualties. Lieutenant Colonel Yakubu Gowon, who was then the most senior surviving officer of the northern region, came to power in the July 1966 coup as the head of the Federal Military Government of Nigeria. He immediately reinstated federalism by the promulgation of Decree No 59, titled Constitution (Suspension and Modification) (No 9) Decree of 1966.<sup>77</sup> Unfortunately, his military government was also not able to correct the already prevalent wrongs and ills in the society. The factionalism and ethnicity which was now ingrained in the society had spilled over into the armed forces, where it was more pronounced, resulting in discontent and dissension in the military. Social, political and ethnic discord turned into violent conflict and bloodshed, and Nigeria became a nation divided against itself. All of these spilled over and culminated in the outbreak of violence as was seen in the civil war of 1967.<sup>78</sup>

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<sup>74</sup> Jarmon (1988) 58.

<sup>75</sup> See generally Udoma U (1994) *History and the Law of the Constitution of Nigeria* 225-229 at 227; Falola (1991) 121-125; Falola (1991) 122.

<sup>76</sup> Udoma (1994) 237.

<sup>77</sup> Udoma (1994) 242.

<sup>78</sup> Jarmon (1988) 60.

The outbreak of the 1967 civil war in Nigeria was due to an attempted secession by the eastern region of Nigeria. On the 30<sup>th</sup> of May 1967, the eastern region, led by Lieutenant-Colonel C.O Ojukwu, the Military Governor of the region, declared itself an independent country, called the Republic of Biafra. The reaction of the Federal Military Government of Nigeria was to declare war on the region, in defence of the territorial integrity of Nigeria and her unity.<sup>79</sup> The ‘Biafran’ military, which comprised of the officers from the eastern region, entered into combat against the Nigerian armed forces, resulting in the Nigerian civil war. The civil war lasted from May 1967 to January 1970, and reportedly cost between 50,000 and 2,000,000 lives.<sup>80</sup>

After the civil war, a succession of military regimes ruled in Nigeria.<sup>81</sup> The first acts usually carried out by these military regimes after a coup, was the passing of a decree to the effect of either suspending, or limiting the reach of the constitution, or undermining the federal structure of the country.<sup>82</sup> Through such decrees, military governments completely violated the concept of both federalism and constitutionalism in Nigeria, and moved more towards being a dictatorial unitary government.<sup>83</sup> An increasing number of powers were given to the central government whilst the powers at the regional and state levels were gradually diminished. This was done to suit the military regimes, which by their very nature, were all about power and control. Existing states in the country were further sub-divided and more states were created, under the guise of assuaging

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<sup>79</sup> Udoma (1994) 59.

<sup>80</sup> Crisis Group Report No 119, *supra*.

<sup>81</sup> General Gowon continued from 1970 to July 1975; Brigadier Muritala Mohammed’s regime from July 1975 to February 1976; General Obasanjo’s regime from February 1976 to October 1979; Major General Muhammadu Buhari’s regime from December 1983 to August 1985; General Ibrahim Babangida’s regime from August 1985 to August 1993; and General Abacha’s regime from November 1993 to June 1998.

<sup>82</sup> An example of this is the contents of sections 3 and 4 of Decree No 1 of 1966. It states as follows:

3. The Federal Military government shall have the powers to make laws for the peace, order and good government of Nigeria or any part thereof, with respect to any matter whatsoever.
4. The Military Governor of a Region:
  - (a) shall not have power to make laws in respect of any matter included in the Exclusive Legislative List; and
  - (b) except with the prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List.

<sup>83</sup> Rothberg RI (2004) *Crafting the New Nigeria* 92-93.

the clamouring of the different ethnic groups, giving them autonomy, and also bringing government closer to the people.<sup>84</sup>

However, the created states were starved of funds as revenue allocation to the states was continuously reduced.<sup>85</sup> It has been suggested that the underlying purpose of this proliferation of states and cut in revenue allocation was aimed at diluting regional and ethnic power; at limiting any secessionist tendencies amongst the people, and empowering the central government. This ploy achieved a minimal level of success. For example, the Ijaws<sup>86</sup> of the Niger-Delta region, which were spread across five states as a result of the bifurcation of existing states and the creation of more and more states, were still able to remain loosely connected and to mobilise across state lines in their struggle for greater resource control.<sup>87</sup>

The creation of states and concurrent cut in the revenue accruing to the states had an adverse effect on the federal structure on which Nigeria was hinged, as Nigeria was gradually diminished to a 'Federal Republic' only on paper. The created states were weak and handicapped, not able to deliver in terms of infrastructure development, social amenities provision, poverty alleviation, and meeting the needs of its peoples. This led to further discontent amongst the citizenry. The discontent arose from the unrealised and frustrated expectations of the citizenry that the creation of more states would translate to development, better standards of living and increased opportunities for them.<sup>88</sup> They had felt that if the states were smaller units, the separate state governments would be able to focus their resources and efforts on development within the smaller units.

In the military, the civil war had very negative effects. It had done nothing to curb the ethnic and tribal tendencies within the military; instead, it further entrenched these tendencies. Falola opines that vices of corruption, greed, gross indiscipline, professional carelessness and others had become rampant in the

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<sup>84</sup> *Ibid.*

<sup>85</sup> Crisis Group report *supra*; states were subdivided from 12 in 1967, to 19 in 1976, to 21 in 1987, to 30 in 1991, and 36 in 1996.

<sup>86</sup> Arguably the fourth largest ethnic group in Nigeria.

<sup>87</sup> Crisis Group Report No 119.

<sup>88</sup> See generally Udoma (1994) 244-246; 249.

armed forces.<sup>89</sup> This state of affairs, he states, made it impossible for the army to play the role of correcting the ills and wrongs of the politicians. For example, General Gowon, in his broadcast in 1970, gave a transition timetable that indicated that the military government would hand over power to a democratically elected government in 1976. However, by 1974 he changed this date of return to civil rule without any indication of when this would take place.<sup>90</sup> This action was viewed by the populace as an attempt by the military to perpetuate itself in power.<sup>91</sup> The failure on the part of the Gowon-led military regime to keep to its transition timetable led to the next coup d'état in 1975.

With the coup d'état in July 1975, General Murtala Mohammed took over power and immediately 'set out' to reverse some of the ills and problems with the previous regime. In October of the same year, a decade after the commencement of military rule, General Murtala Mohammed appointed a Constitution Drafting Committee (CDC) to redraft the Nigerian Constitution. This was in response to the view amongst many that the prevailing 1963 constitution allowed for intense rivalry between the regions and states, and also that the parliamentary system had failed to provide the strong central leadership that was needed.<sup>92</sup>

General Mohammed was not able to see the process of drafting a new constitution through, as he was assassinated on the 13<sup>th</sup> of February 1976 in an abortive coup attempt.<sup>93</sup> His Chief of Staff, General Olusegun Obasanjo, was sworn in as the Head of State, and continued with the process of constitutional review. A draft of the new constitution was produced and debated at a popularly elected Constituent Assembly.<sup>94</sup> However, the military government (which had retained the right to amend and nullify sections of the draft constitution before passing it into law), added seventeen amendments to the draft and passed it into law. The effect of this was that a document, vastly different to the draft produced and deliberated on at the Constituent Assembly, was passed into law as the Constitution of the Federal Republic of Nigeria 1979. This Constitution negated

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<sup>89</sup> Falola (1991) 144.

<sup>90</sup> *Ibid*; Udoma (1994) 260-261.

<sup>91</sup> Udoma (1994) 262.

<sup>92</sup> Crisis Group Report No 119.

<sup>93</sup> Udoma (1994) 309.

<sup>94</sup> Consisting of elected representatives of the population.

the federal nature of the country, and gave even more powers to the federal government at the expense of the states.<sup>95</sup> It also jettisoned the parliamentary system of governance (a bequeathal of the colonial government) for the presidential system of governance, as this was thought to be a better suited system for Nigeria.<sup>96</sup>

A civilian government was elected on the basis of the 1979 Constitution, and this heralded the second republic in Nigeria. Alhaji Shehu Shagari came into power as the first civilian president of Nigeria in the second republic. He hailed from the north, and continued in the line of his predecessors by not doing enough to de-tribalise or de-ethnicise Nigerians. During his presidency, lawlessness, nepotism, tribalism, corruption in public places and lack of accountability continued unabated.<sup>97</sup> The elected politicians displayed wanton disregard for the provisions of the Constitution; they abused their power and carried on with their squandering, corruption and embezzlement, ignoring the expectations of the people.<sup>98</sup> Unfortunately, there was a chronic lack of effective leadership and control at the very top to curb the excesses in government.<sup>99</sup> Consequently, all these vices seeped into every area of public and even private life. Law enforcement gradually became a thing of the past as necessary sanctions that attached to crimes and breaches of the law were not imposed. This resulted in a drastic increase in crimes.

Every area of life became caught up in the web of ills to the detriment of the nation and the citizens. The educational system, health care, public infrastructure and others all fell victim and collapsed under the weight of corruption, fraud and embezzlement in the public and private sectors of the economy.<sup>100</sup> The factionalism that prevailed in the country continued unabated as the allegiance to ethnic group gradually began to take dominance over allegiance to the nation.<sup>101</sup> This situation persisted up until August 1983, when the country went to the polls

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<sup>95</sup> Crisis Group report No 119.

<sup>96</sup> See Nwabueze (1982) 256-268 for the reasons he adduces for this change in system of governance.

<sup>97</sup> Falola (1991) 177.

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

<sup>99</sup> Falola (1991) 176.

<sup>100</sup> See, generally, Falola (1991) 176-179.

<sup>101</sup> Crisis Group report No 119.

to elect another democratic government. This election was, as usual, fraught with rigging; thuggery; politically induced violence, fraud and many irregularities.<sup>102</sup> The elections were conducted in stages<sup>103</sup> and ended up being too costly, complex and unwieldy.<sup>104</sup> The outcome of the rigged elections was that the incumbent party and president, together with the discredited politicians, were re-elected and re-appointed. This precipitated a coup d'état at the end of December 1983, in which the military one again took over power.

Just like the other coups, the justification given by the military for its action was the widespread corruption and maladministration in government.<sup>105</sup> The military presented itself as having taken over power to 'clean up the economic mess and save the country...'.<sup>106</sup> Military rule in Nigeria continued from 1983 up until 1999, with different regimes taking over power as indicated below. During this period, the federal system of government was subjected to further abuse and subjugated to the unitary system that best suited the generals.<sup>107</sup> The military government that took over from President Shagari was headed by General Muhammadu Buhari. It lasted till August 1985, when another coup d'état brought General Ibrahim Babangida to power. His regime lasted from 1985 to 1993. These periods of military rule saw corruption becoming endemic in the country, and it was institutionalised as a way of life for Nigerians.<sup>108</sup>

During the regime of General Babangida, another process of constitution review was started as it was felt that the 1979 Constitution did not express or reflect the wishes and needs of the people. This process and that of the transition to civil rule moved along until elections were conducted in 1993 to elect a democratic government.<sup>109</sup> Hopes were high and expectations were rife, as Nigerians felt that the military would keep to its word to hand over power to a civilian government. It was felt that there was some credibility in the actions of the military. This encouraged people to turn out in large numbers to vote for the

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<sup>102</sup> See generally, Hart C, *The Nigerian Elections of 1983 (1993)* 63(3) *JIAI* 397-418.

<sup>103</sup> Presidential elections; governorship elections and legislative elections.

<sup>104</sup> Hart (1993) 63(3) *JIAI* 416.

<sup>105</sup> Hart (1993) 63(3) *JIAI* 416.

<sup>106</sup> Speech of General Buhari, in his broadcast to the nation, quoted in Falola (1991) 180.

<sup>107</sup> Crisis Group report No 119.

<sup>108</sup> Crisis Group report No 119.

<sup>109</sup> See generally Lewis PM, 'Nigeria: Elections in a Fragile Regime' (2003) 14(3) *Journal of Democracy* 131- 144.



candidates of their choice in the 1993 elections. The 1993 elections were adjudged by both local and international observers as one of the freest and fairest elections in the history of the country.<sup>110</sup> The transition was initially viewed with scepticism by the populace, but as the elections were conducted, people felt that the return to civil rule was inevitable. Unfortunately, General Babangida did not allow the results of the elections to be fully released, before announcing an annulment of the results due to ‘irregularities’.<sup>111</sup> This annulment was announced after the military saw from the results already released, that the candidate of ‘their choice’ was not going to win. Though General Babangida declared that the annulment was in the national interest, Obadare, after a critical review, enunciates what he describes as ‘a more convincing explanation’.<sup>112</sup> This being the fact that the ‘northern choice’ candidate was in all likelihood not going to win the elections. The annulment precipitated a lot of violent demonstrations and protests and almost led to the disintegration of the country. It resulted in General Babangida having to step down as the Head of State of the country, and handing over the reins of government.<sup>113</sup> This effectively aborted the process of the review of the 1979 Constitution which had commenced under his tenure.

Another coup d’état in November 1993 saw the toppling of the interim national government, and the taking over of power by a military government headed by General Sani Abacha. His despotic and tyrannous regime lasted until his death in June 1998. He quelled any dissenting voice with unlawful arrest and detention, violence and the use of force. He and his cronies looted the wealth of the nation in no small quantities.<sup>114</sup> The process of constitution revision that had been started by General Babangida’s government was concluded by General Abdusalami Abubakar, who came into power after General Sani Abacha’s death.

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<sup>110</sup> See, generally, Lewis (2003) 326; Ihonvbere JO, ‘Organised Labour and the Struggle for Democracy in Africa’ (1997) 40(3) *ASR* 89; Reno W, ‘Crisis and No (Reform) in Nigeria’s Politics’ (1999) 42(1) *ASR* 105.

<sup>111</sup> *Ibid.* The 1993 Presidential elections were annulled by the General Babangida in a broadcast on the 23<sup>rd</sup> of June 1993.

<sup>112</sup> Obadare E, ‘Democratic Transition and Political Violence in Nigeria’ (1999) 24(1) *Africa Development* 210-213.

<sup>113</sup> Crisis Group report No 119, *supra*. On 26 August 1993, General Babangida announced that he was stepping aside as Head of State, and handed over power Ernest Shonekan, who he appointed as head of an interim national government.

<sup>114</sup> For a short summary of the regime of Sani Abacha, see Lewis P. ‘Nigeria’s Economy: Opportunity and Challenge’ (1999) 27(1) *Issue: A Journal of Opinion* 50-51.

He facilitated the transition program and the 1999 elections, and handed over power to a civilian government in May 1999, headed by retired General Olusegun Obasanjo.<sup>115</sup> The reviewed 1979 Constitution was then hurriedly promulgated as the 1999 Constitution of the Federal Republic of Nigeria (otherwise referred to as the 1999 Constitution of Nigeria) shortly before the departure from power of General Abubakar on the 5<sup>th</sup> of May 1999.<sup>116</sup>

The 1999 Constitution, which is currently in force, is not perfect and does not meet with the yearnings and aspirations of the people. As with previous constitutions, the constitutional review process that yielded it was not consultative, representative or even reflective of the demographics of the nation. It has been generally criticised for maintaining the legacy of military meddling, lack of public consultation (and thus lack of legitimacy and moral authority), and moving towards centralism or a unitary government by the reduction of state and local power, instead of reinforcing federalism.<sup>117</sup> As one commentator summed it all up in 2006, '[T]he 1999 [C]onstitution subverts the federal principle in its overt empowerment of the centre, leaving the states prostrate and atrophied in terms of power relations and control of resources'.<sup>118</sup> The 1999 Constitution has also been condemned as a fraudulent document, in that it is not a document produced by the people of Nigeria, as its preamble claims. The preamble states as follows:

*'We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved... to provide for a constitution for the purpose of promoting the good governance and welfare of all persons in our country ... do hereby make, enact and give to ourselves the following constitution'* (own emphasis).

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<sup>115</sup> Gen Olusegun Obasanjo (rtd) was the military ruler of Nigeria from 1976 to 1979 when he handed over power to a civilian government. He had succeeded General Murtala Mohammed who was assassinated in Feb 1976.

<sup>116</sup> Crisis Group Report No 119; the promulgation was by virtue of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999, and was done a few days before the departure of General Abubakar from power.

<sup>117</sup> Crisis Group Report No 119.

<sup>118</sup> Mr. Sylvester Odion-Akhaine, Executive Director of the Centre for Constitutionalism and Demilitarisation (CENCOD), one of the many NGO's operating within the country, quoted in Crisis Group Report No 119.

Several commentators have indicated that at no time did the ‘people’ of Nigeria agree by themselves or through their elected representatives to the document.<sup>119</sup> This chapter will later return to the issue of the legitimacy (or otherwise) of the 1999 Constitution and other preceding constitutions.

President Olusegun Obasanjo emerged as the fourth civilian president of the Federal Republic of Nigeria on the 29<sup>th</sup> May 1999, and continued till May 2007, serving two terms. After sixteen years of military rule, Nigerians were happy to usher in a civilian regime in the hopes that the atrocities and injustices of the military regime would be corrected. High hopes of real nation building, development and growth accompanied President Obasanjo’s ascension to presidency. This came on the heel of his being released from a 3-year prison detention on an allegation of coup-plotting against the then government of General Sani Abacha. In the 2003 elections, he was re-elected for another four year term which he served until 2007, when his attempts at imposing a third term were thwarted.<sup>120</sup> This is discussed later in this chapter. In 2007, President Umaru Yar’Adua (now deceased) was elected civilian president of Nigeria.

President Yar’Adua served as the president of Nigeria from 2007 to the 6<sup>th</sup> of May 2010, when he died after a prolonged illness. The illness had affected his effectiveness in office, especially during the last months of his presidency. As a result of this, the Vice-President, Mr Goodluck Jonathan, was elevated to the position of ‘Acting President’ in February 2010 by parliament.<sup>121</sup> On the 6<sup>th</sup> of May 2010, President Yar Adua died and Mr Jonathan was immediately sworn in

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<sup>119</sup> Late FRA Williams SAN (Senior Advocate of Nigeria), a foremost constitutional lawyer and one of the great jurists of his time, indicated as far back as June 1999 (a month after the 1999 constitution came into force), at a gathering to discuss the constitution, that the 1999 constitution was a forged document, a fraud, due to the fact that the preamble lied about the ‘people of Nigeria’ having been involved in the process. He rather classified it as an imposition on the people of Nigeria by the military regime of General Abubakar. This view was echoed by others, see Ogowewo TI, ‘Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria’s Democracy’ (2000) 44(2) *JAL* 135; Statement released by the Campaign for Democracy quoted in ‘Whither the 1999 Constitution?’ by Bakoji S in *PostExpress* 23 May 1999.

<sup>120</sup> There was great opposition to President Obasanjo’s third term plan; this opposition was from both within his party (the ruling party), and from opposition parties. The general public sentiment was vehemently against this third term agenda.

<sup>121</sup> This was based on separate resolutions passed by the two bodies of parliament, the Senate and the House of Assembly. See ‘Jonathan is Acting President’, available at [http://234next.com/csp/cms/sites/Next/Home/5524744-146/jonathan\\_is\\_acting\\_president\\_\\_.csp](http://234next.com/csp/cms/sites/Next/Home/5524744-146/jonathan_is_acting_president__.csp) (accessed on 29 May 2010).

as the substantive president of the country. He is expected to conclude the tenure of the late president which ends in 2011.<sup>122</sup>

The above paragraphs provide a brief historical picture of governance and its problems in Nigeria from the colonial times. The problems are not peculiar to a civilian or military regime, and did not end with the change to civil rule in 1999. Since the return to civil rule in 1999, there has been a slow and tedious mending process going on, although there are still many problems to contend against. One of the major problems is that of bringing legitimacy to the government and changing the way Nigerians perceive their country and their leaders.

It is necessary to note here that the issue of bringing legitimacy to government has always been of great concern and interest to the people right from the inception of the country. The many attempts that have been made to review the constitutions of Nigeria are evident of a desire and clamour by Nigerians for something legal and written that would be the basis and an encapsulation of the goals and aspirations of the people. It is also the evidence of a desire for constitutional democracy and the enthronement of the rule of law, underlined by the knowledge that the effective operation of the state on these principles is the only thing that would ensure that the needs and desire of the people are met. Unfortunately, the actualisation of these desires has been stultified many times by the elite (both the military and political elite) who use their positions to influence the content of the constitution in their favour.

In the case of President Obasanjo, under the cover of heeding the many calls for a national conference to discuss issues and problems under the 1999 Constitution, his government in 2005 set up a committee to consult with all groups and regions of Nigeria, in an attempt to determine the desires of the people with respect to the politics in the country and the amendments to the 1999 Constitution. The committee consulted widely and drew up a comprehensive report for the oversight committee, the Joint Constitution Review Committee (JCRC).

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<sup>122</sup> See 'Jonathan Becomes Nigeria's President', available at [http://234next.com/csp/cms/sites/Next/Home/5565071-146/jonathan\\_becomes\\_nigerias\\_president\\_\\_.csp](http://234next.com/csp/cms/sites/Next/Home/5565071-146/jonathan_becomes_nigerias_president__.csp) (accessed on 29 May 2010).

There were two points of contention in the deliberations of the JCRC. One of the sticking points was on the issue of resource allocation to the states. States from the south-south region did not get the 25 percent derivation they demanded, and they walked out.<sup>123</sup> The other issue related to the increase of the tenure of the president from four years to six years, with possible re-election.<sup>124</sup> This would have given President Obasanjo the opportunity to contest for a third term in office after his second term.<sup>125</sup> These issues raised a lot of concern and opposition in the national assembly, and eventually the bill proposing the amendment of the Constitution was completely rejected by the national assembly and not passed into law.<sup>126</sup> This meant that even the necessary and needed amendments to the 1999 Constitution had been defeated along with the third term provisions, because the whole bill was defeated. It was a case of throwing the baby out with the bath water. The effect of this is that the 1999 Constitution was not amended.

#### **4.3 Critical Analysis of the 1999 Constitution and preceding constitutions in line with the Social Contract Theory and its Requirements**

As stated in the previous section, the 1999 Constitution is an imposition by the government of General Abubakar. This he did a few days before he handed over power to the civilian government of President Obasanjo.<sup>127</sup> It has been labelled a

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<sup>123</sup> Twenty five percent derivation means that percentage of the national revenue of the country in a year. Due to the now unitary nature of government, states were not in control of their resources and revenue, and had to be given a percentage of whatever was derived from the country's resources generally. In this case, the South-South region states are those producing crude oil, and they felt entitled to 25 percent of the national revenue.

<sup>124</sup> Section 135 of the 1999 Constitution clearly provides for a tenure of four years for any person elected as president under the constitution, and section 137 clearly disqualifies any person who has been elected to such office at any two previous elections, effectively limiting the terms of office to two terms.

<sup>125</sup> By the 1999 constitution, President Obasanjo was no longer qualified to contest for re-election, as he had served two terms already under the 1999 constitution. If the constitution had been amended, however, with a provision extending the term of office to six years, and providing for a re-election, he would have been qualified to remain the president for another 12 years.

<sup>126</sup> For a detailed recount of the events that surrounded the Obasanjo third term agenda, see Fombad C & Inegbedion NA 'Presidential Term Limits and Their Impact on Constitutionalism in Africa' in Fombad C & Murray C (ed) (2010) *Fostering Constitutionalism in Africa*, available online at [http://www.pulp.up.ac.za/pdf/2010\\_09/2010\\_09.pdf](http://www.pulp.up.ac.za/pdf/2010_09/2010_09.pdf) at 9-12.

<sup>127</sup> The 1999 Constitution was only enacted into law a few days before the inauguration of the new civilian regime through Decreed No 24 of 5 May 1999. The new regime commenced on the 29<sup>th</sup> of May 1999.

fraudulent document due to the fact that it is not a document fashioned by the people of Nigeria or their representatives. It is rather an imposed document.<sup>128</sup> This anomaly in itself opposes the very nature of a constitution, which is the supreme law of the land, a document reflecting the obligations and responsibilities of its people. Such document would automatically command the loyalty, respect and confidence of the people, because it would be an act of the people.<sup>129</sup> As stated by Ihonvbere:

‘... a constitution should also serve as a basis for controlling state power and involving the people in the political process, and *should clearly articulate the aspirations of all communities and individuals in society*’.<sup>130</sup>

He further explains that the making of constitutions must be popular, inclusive, participatory and democratic, and the constitution itself must be a document which the people can understand, claim ownership to and use in defence of the democratic state.<sup>131</sup> The Canadian Supreme Court, in a 1985 decision has lucidly described this as follows:

‘[T]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.’<sup>132</sup>

The constitution-making process and the extent to which it is democratic and legitimate through the use of available openings, and institutions that are embedded in society, are the cardinal ingredients of constitutionalism.<sup>133</sup>

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<sup>128</sup> ‘Constitution Review in Nigeria: Enriching the debate process’, available at [http://www.peoplesconstitutionng.org/constitutional\\_history\\_of\\_nigeria.htm](http://www.peoplesconstitutionng.org/constitutional_history_of_nigeria.htm) (accessed on 23 July 2010).

<sup>129</sup> Nwabueze BO (1982: 1) *The Presidential Constitution of Nigeria* 4.

<sup>130</sup> Ihonvbere JO, ‘How to make an undemocratic constitution: the Nigerian example’ (2000) 21(2) *TWQ* 343-366 at 343 (own emphasis).

<sup>131</sup> Ihonvbere (2000) 21(2) *TWQ* 343 at 344. The author laid out the extensive consultations and public participation that is necessary in order to make a constitution that is owned by the people (see 347-348).

<sup>132</sup> *Re Manitoba Language Rights case* (1985) 1 RCS 721 at 745.

<sup>133</sup> Omotola JO, ‘Democracy and Constitutionalism in Nigeria under the Fourth Republic, 1999 – 2007’ (2008) 2(2) *Africana* 1- 29 at 6.

As was indicated above, many scholars and political commentators have argued that the 1999 Constitution does not qualify as a document which the people of Nigeria have drawn up.<sup>134</sup> The process through which it was made was an imposition by the military government in power at that time. The Provisional Ruling Council (PRC)<sup>135</sup> of the then Abubakar military regime embarked on the making of the 1999 Constitution by hand picking a 25-member Constitution Debate Committee (CDC) in December 1998.<sup>136</sup> The committee was tasked with the responsibility of co-ordinating the debate over the new constitution. It had barely two months to do its work in a country of about 120 million people. Only 450 people made written submissions to this committee, and they were not in any way representative of the Nigerian people. This negated the principle of extensive consultation with the people which is required for a constitution.<sup>137</sup> The way and manner the committee carried out its duties was totally devoid of encouraging the participation of all facets of the Nigerian people.<sup>138</sup> Also, the PRC retained the power to approve 'with amendments' whatever recommendations were made by the committee.

A further sign of the undemocratic nature of the constitution-making process of 1999 is the remark credited to General Abubakar on receiving the report from the committee, in which he declared that 'the report would assist the PRC in taking a final decision on the forthcoming constitution.'<sup>139</sup> This indicated that the PRC felt it had the final say in the contents of the Constitution.<sup>140</sup> The report of the

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<sup>134</sup> Femi Falana, a notable constitutional law expert was quoted in one of the daily newspapers, The Guardian Newspaper of 19 April 1999, as asking 'but on a serious note, who are these chaps in the PRC (Provisional Ruling Council)? When did they get the mandate of the Nigerian people to give us a constitution? That will not be said to be a constitution of the Nigerian people.' Also Alhaji Balarabe Musa, a notable politician from the north, is quoted as having said, 'it is a political mistake to call the document they are handing over a constitution. This is because it has nothing to do with the will of the people of Nigeria. It was done based on the way the military wants it, it is only a guideline and therefore the civilians should regard it as such. Available at

[http://pdfserve.informaworld.com/481262\\_751308860\\_713701020.pdf](http://pdfserve.informaworld.com/481262_751308860_713701020.pdf) (accessed on 8 April 2010).

<sup>135</sup> Equivalent of the council of ministers in a democratic regime.

<sup>136</sup> Ogowewo (2000) 41(2) JAL 135 at 144.

<sup>137</sup> Okonmah PD, 'Perspectives on human rights violations in Nigeria' 1998 ALAQ 11.

<sup>138</sup> Ihonvbere (2000) 21(2) TWQ 343 at 350.

<sup>139</sup> 'Constitutional Debate Committee recommends adoption of 1979 Constitution' *PostExpress*, 1 January 1999, quoted in Ogowewo (2000) 41(2) JAL 135 at 144.

<sup>140</sup> This is further evident in the preamble to the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999 which reads *inter alia*:

committee itself was never discussed or made public; instead it was treated as a secret, personal document for the members of the military elite (the PRC).

Notwithstanding the undemocratic process that saw the making of the 1999 Constitution, it would have been in a better standing if it had in fact reflected the recommendation of the CDC. The CDC had recommended that the 1979 Constitution be retained with amendments in order to bring it up-to-date with the developments in the country at that time.<sup>141</sup> This included that fact that since the coming into effect of the 1979 Constitution which recognised 19 states in country,<sup>142</sup> 17 more states had been created, bringing the total number of states to 36. The recommendation of the CDC should have resulted in an amendment to the 1979 Constitution. The PRC instead decided to promulgate an entirely new constitution (mostly with provisions of the 1979 Constitution with a few additions).<sup>143</sup>

One of the most important additions evident is section 308 of the 1999 Constitution. This section provides blanket immunity from civil or criminal prosecution for the President, Vice-President, Governors and Deputy Governors, during their period of office.<sup>144</sup> This section was not contained in the recommendations of the CDC to the PRC, but was inserted by the PRC.<sup>145</sup>

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‘whereas the Provisional Ruling Council has *approved the report subject to such amendments as are deemed necessary* in the public interest and for the purpose of promoting the security, welfare and good governance and fostering the unity and progress of the people of Nigeria ... ’  
(own emphasis).

<sup>141</sup> *PostExpress* quoted in Ogowewo (2000) 41(2) *JAL* 135 at 144.

<sup>142</sup> Section 3 provides for 19 states in the Federal Republic of Nigeria.

<sup>143</sup> Ogowewo (2000) 41(2) *JAL* 135 at 145.

<sup>144</sup> Section 308(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section –

- (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued;  
Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.



The making of the 1999 Constitution is a replication of the way that other constitutions that the country has had from independence, have been made. As a colonial creation and a protectorate of the British, Nigeria had its constitutional developments largely shaped and driven by colonial interests. This meant that its constitutions were drafted by the colonial authorities of the time through a highly exclusionary process characteristic of the pre-independence constitutions.<sup>146</sup>

The Constitutions of 1914, 1922, 1946, and 1954 were handed down by the colonial authorities and imposed on the society, creating severe crises of ownership and legitimacy for those Constitutions. They also vested a veto power in the Governor (Governor-General, as they later became known), who was an official of the British colonial government.<sup>147</sup> Even the 1946 Macpherson Constitution which involved consultations with various groups across the country fell short of being regarded as the people's constitution as the Governor-General still retained his power of veto.<sup>148</sup>

It has been noted that the 1960 independence Constitution bequeathed by the colonial government,<sup>149</sup> like the pre-independence constitutions, could also not be described as an act of the people of Nigeria, as it was not made through a referendum or through a constituent assembly of elected representatives.<sup>150</sup> The colonial government had continued with its tradition of drafting and passing down laws that it thought appropriate to serve its own interests. As pointed out by Prof Nwabueze, 'the independence constitution was the product of a final exercise of the [suzerain] power by the departing colonial authority' (own

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(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to 'period of office' is a reference to the period during which the person holding such office is required to perform the functions of the office.

<sup>145</sup> Ogowewo (2000) 41(2) JAL 135 at 146.

<sup>146</sup> Omotola (2008) 2(2) *Africana* 1- 29 at 6, where he quoted Osipitan T *An Authochthonous Constitution for Nigeria: Myth or Reality* (the text of an Inaugural Lecture at the University of Lagos), 24 November 2004.

<sup>147</sup> Omotola (2008) 2(2) *Africana* 1 at 7.

<sup>148</sup> Omotola (2008) 2(2) *Africana* 1 at 7.

<sup>149</sup> By an Act of the Parliament of the United Kingdom, titled the Independence Act.

<sup>150</sup> Ogowewo (2000) 41(2) JAL 135 at 138.

emphasis).<sup>151</sup> This was not peculiar to Nigeria, as it has been noted by Asian author, Go J:

‘... [T]he independence constitutions of Asia and Africa were little else than imitations of Western constitutions. More specifically, they appear to have been dysfunctional duplications of the constitutions of the former imperial master.’<sup>152</sup>

Both the 1979 and 1999 Constitutions as bequeathals of the military governments, also do not really reflect the wishes of Nigerians, and therefore are documents deprived of legitimacy.

#### 4.3.1 Further problems with 1999 Constitution

The result of the faulty nature of these constitutions is evident in the many problems of the 1999 Constitution, some of which have been pointed out by different authors.<sup>153</sup> The phrasing of the preamble of the 1999 Constitution is one of the problems that have been discussed above. The fact of the matter is that the preamble cannot, by using the phrase, ‘We the people of Nigeria’, claim to be representative of the wishes of the people of Nigeria. Ihovbere has referred to this preamble as ‘pretentious and hardly an attempt to capture the dreams and sacrifices made by many Nigerians to maintain the unity and sovereignty of the country.’<sup>154</sup> He further refers to the different cases of unrests and in-fighting amongst the ethnic groups and nationalities that was ongoing at the time the 1999 Constitution with its preamble was signed into law.

Another problem that has been pointed out is that of the fact that the 1999 Constitution, by its provisions, is more unitary than federal in nature, as it ‘consolidates existing relations of power in favour of the central government’.<sup>155</sup>

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<sup>151</sup> Nwabueze BO (1982) *The Presidential Constitution of Nigeria* 6.

<sup>152</sup> Go J, ‘Modeling the State: Postcolonial Constitutions in Asia and Africa’ (2002) 39(4) *SAS* 559, in which the author gives a full examination of independence constitutions and the way and manner in which the colonial (imperialist) government always made sure that it planted a system modelled upon their home countries’ system.

<sup>153</sup> See Ogowewo (2000) 41(2) *JAL* 135 and Ihonvbere (2000) 21(2) *TWQ* 343 at 344.

<sup>154</sup> Ihonvbere (2000) 21(2) *TWQ* 343 at 352.

<sup>155</sup> Ihonvbere (2000) 21(2) *TWQ* 343 at 361.

This means that even though the structure is meant to be one in which the regions are independent but also loosely tied together, in reality, it is a case of the federal government having control. Part 1 of schedule 2 to the 1999 Constitution provides for the Exclusive Legislative List. This lists the areas over which the Federal Government has exclusive powers to make laws. Under the Exclusive Legislative List 68 items are listed, from arms and ammunitions to wireless transmission.<sup>156</sup> This Part 1 does not in any way authorise or give local or state governments any type of jurisdiction. Part 2 of the same schedule 2 lists the Concurrent Legislative List as matters over which both the Federal and State governments may have concurrent powers to make laws.<sup>157</sup> However, as noted above by Ihonvbere, even here the central government has the final say over issues, as the National Assembly is declared the superior power whose laws will prevail in the event of a conflict arising.<sup>158</sup>

These issues raised go to buttress the point that the 1999 Constitution of the Federal Republic of Nigeria is not reflective of the wishes of the people; was not arrived at as a result of a consultative process, and does not in any way indicate the will of the people. Attempts have been made to have this constitution declared invalid by the courts. Particularly of note is the 2004 case by ten lawyers before a Federal High Court in Abuja, seeking as part of its prayers, a declaration by the court that the 1999 Constitution was invalid on the grounds that the Constitution was not made by Nigerians and was therefore illegitimate.<sup>159</sup> The honourable Court at the end of hearings denied the prayer to invalidate the 1999 Constitution, citing *inter alia*, that it did not have the powers to invalidate a constitution which created the court itself.<sup>160</sup>

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<sup>156</sup> Schedule 2 part 1 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>157</sup> Schedule 2 part 2 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>158</sup> Ihonvbere (2000) 21(2) *TWQ* 343 at 361.

<sup>159</sup> They contended that it was the people who could draft a constitution for themselves through a uniformed process and not the government. They further noted that Decree 24 of 1999 (which brought the 1999 Constitution into being) could not be deemed to be a constitution of the people of Nigeria until it was freely initiated, formed, written, published or enacted by the people in its original character without the influence, effect or tampering of a military dictatorship.

<sup>160</sup> Unreported case, available at [allafrica website](http://allafrica.com/stories/200810100682.html), available at <http://allafrica.com/stories/200810100682.html> (accessed on 13 June 2010).

#### **4.3.2 Can Nigerian Constitutions be regarded as manifestations of a social contract theory?**

From the above, it is apparent that Nigeria's pre- and post-independence constitutions, all of which have either been colonial government imposed, or military-government imposed, have not been the results of public consultative and public participatory processes. Instead, they have been imposed from above, first by the colonial government and later by the politicians and the military. This is in great contradiction to the tenets of the social contract theory, which is founded on the people (the members of society), being sovereign, and willingly and freely giving up their will and inherent rights to an identified person(s), or authority, consenting to be governed by such person or authority. As indicated in chapter 3, the social contract theory is regarded in this work as the basis and the blue print for the system of constitutional and democratic government, and rule of law that is adopted in mostly all countries in Africa presently.

In present day terms, the identified person(s), or authority of the social contract theory, is usually provided for in the constitution, which embodies the contract that the society has entered into. This is why the process of constitution-making is very important because it adds legitimacy to the document. When there has been participation by the people in the process, the people 'own' the document and they view it as their creation. There is legitimacy attached to the process. Whoever gets into power and positions as a result of the constitutional process is seen and viewed by the citizens as 'their' own elected official. The government created as a result of the process is seen as one that is placed there by the people. They therefore accord it with their allegiance and their support, their obedience and compliance with the policies of the government. This allegiance, support and obedience will not have to be coerced, but rather will be freely given.

This view had been echoed by Omotola when he says

'many African countries have experienced constitutional instability since independence because constitutions have lacked moral authority, ... for democracy and constitutionalism to be mutually reinforcing, the constitution-making/review process should be democratic, allowing various interest groups adequate space to participate in the process in an

open and transparent fashion. This gives room for the ownership of the project by the people, a feat that legitimizes the exercise. It is only when the constitution is rooted in society that it commands people's respect and loyalty, making the implementation less problematic and vice versa.<sup>161</sup>

That fact that Nigeria's past and present constitutions have not been representative of the people but rather of the elite (be they colonial authority, politicians or military government) makes them devoid of legitimacy. In a situation where the people do not see the constitution as 'their' own document, and thus do not uphold its provisions willingly (in cases where they do uphold its provisions it is due to the fear of sanctions, rather than an inherent acknowledgement of its binding nature), it becomes difficult to maintain the rule of law. In talking about the rule of law, the questions that immediately come to mind are, "the rule of which law? Which law is being sought to be upheld? The one in which the society had no say but which was imposed on it?"

Nigeria's constitutional history as depicted above shows that it is in gross deficit with regard to the virtues that promote legitimacy of the constitution. This partly explains the crisis of governance that the country has been plagued by ever since its independence. It is reflected in the alarming rate at which citizens at all levels violate the laws of the land.<sup>162</sup>

In order to further explain the effect of the deficit of the constitution-making process (legitimacy), and the validity of Nigeria's constitutions (legality); Kelsen's theory of law would be employed here, as the idea of sovereignty residing in the people within a society has been copiously dealt with by Kelsen in his theory of law.

### **4.3.3 Implications of Kelsen's theory on the rule of law in Nigeria**

As indicated in chapter three, various attempts have been made to locate the *grundnorm* in areas of the society and state (such as the judiciary, the legislature

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<sup>161</sup> Omotola (2008) 2(2) *Africana* 1 at 6.

<sup>162</sup> Omotola (2008) 2(2) *Africana* 1 at 6.

and others).<sup>163</sup> One such attempt is that of Etudaiye, in which he refers to the distinction between sovereignty and supremacy. Quoting Kelsen amongst others, he analyses that sovereignty belongs to the people, from whom government through the constitution derives its power and authority (in line with Section 14(2) of the 1999 Constitution<sup>164</sup>), whilst the constitution in itself is supreme.<sup>165</sup> He then attempts to locate the *grundnorm* in the preamble to the 1999 Constitution.<sup>166</sup> This states as follows: ‘We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God ... dedicated to the promotion of ...’

Ogwurike has sought to refute the idea of the constitution as the basic norm, and has however gone further to suggest that in English speaking African countries, ‘the constitution is merely functional and not ordained’, as it cannot find its own definition within the legal order itself. Its efficacy and retention are subject to the common will of the people, or the acts of their acclaimed and popular leadership.<sup>167</sup> It is the assent of the people, from which a sovereign or the political leader derives his power and or authority.<sup>168</sup> In congruence with the social contract theory therefore, Kelsen believes that it is in the ‘people’ that sovereignty reside. The authority and power of the state and its officials derives from the legitimate act of the people granting that authority.<sup>169</sup>

In the Nigerian situation, in view of the problems with the different constitutions that have been enumerated above, can we say that ‘the people’ in whom sovereignty reside have indeed granted the power and authority to rule/lead to the

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<sup>163</sup> Etudaiye ME ‘The Pure Theory of Law and the Fragile New Democracies of the Developing World’ (2007) 33(2) *CLB* 218 at 227-242 provides a brief expose of this.

<sup>164</sup> Section 14(2) provides as follows:

‘It is hereby, accordingly declared that:

- (a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;
- (b) the security and welfare of the people shall be the primary purpose of the government; and
- (c) the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution’.

<sup>165</sup> Etudaiye (2007) 33(2) *CLB* 218 at 227 -242.

<sup>166</sup> Etudaiye (2007) 33(2) *CLB* 218 at 238.

<sup>167</sup> Ogwurike C (1979) *Concept of Law in English Speaking Africa* 112.

<sup>168</sup> Ogwurike (1979) 112-113.

<sup>169</sup> *Ibid.*

political and military governments that have ruled Nigeria thus? As argued above, this is not the case, and the resultant effect is the ‘apathy’ experienced in the people who continue to have governments imposed on them. This is done either by the force of the military (as in the case of military governments), or by the force of rigging elections (in the case of civilian governments). This apathy results from a lack of interest in the operation of the constitution, a document which they have not consented to or agreed to be bound by.

The faulty and ‘elitist’ constitution-making processes that the country operates (whereby the will of the people is not represented or reflected), can arguably be said to have led to democratic and legitimacy deficiencies. Democracy, which implies in simplistic terms, ‘rule of the people, by the people, and for the people’, means that for the people to repose confidence in the governance structures, they must see their representatives working within the structures, and making laws that are in their interest.

In the event of a revolution or a coup d’état, however, Kelsen’s theory of efficacy seems to contradict this line of reasoning. He defines a revolution widely as an occurrence in which the legal order of a community is nullified and replaced by a new order in an illegitimate way. ‘Illegitimate’ implies that it is a way not prescribed by the first order.<sup>170</sup> To him, a successful revolution creates a new legal order which derives merely from the fact of its success, the success having been established by a new *grundnorm* which replaces the old.<sup>171</sup> The nature of the revolution is irrelevant in this context, as long as the legal order in force is overthrown and replaced by another in a way in which the former legal order has not anticipated.<sup>172</sup> This is a successful revolution, which could also include a coup d’état.<sup>173</sup>

Further, he posits that even as such occurrence legally creates a new legal order, this order becomes efficacious and legitimate when the people whom it seeks to bind, behave in such a manner that reflects their belief that it is binding on

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<sup>170</sup> Kelsen H (1961) *General Theory of Law and State*.

<sup>171</sup> Ogwurike (1979) 111.

<sup>172</sup> Kelsen explains that it is irrelevant whether the revolution is effected through a violent uprising, or through a movement emanating from the mass of the people, or through the actions of those in government.

<sup>173</sup> Udoma (1994) 293.

them.<sup>174</sup> That is, if the people then, after the revolution, begin to behave in conformity with the new order,

‘if the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then the order is considered as a valid order’.<sup>175</sup>

He continues that it is according to the new legal order (with its own basic norm) that the behaviour of individuals is interpreted as legal or illegal.<sup>176</sup> Thus he continues that if the people, members of a society comply with the laws imposed by the new order, obey them and live by them, they accord efficacy to the new legal order.

However, the question remains to be asked, what if the ‘compliance’ or ‘obedience’ is due to the fear of sanctions, fear of military force and power, or fear of reprisals for non compliance? Can we in such situations validly say that the compliance of the people has accorded efficacy to the new legal order? Kelsen is of the view that the efficacy of the new legal order is solidified once there is behaviour in conformity with it by the people. This is regardless of the way in which the conformity is achieved. He says that ‘[i]t is irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through the actions of those in government positions’.<sup>177</sup> Thus, in his view, it is irrelevant if the conformity of the people is achieved through the use of force or power, or through the fear of sanctions. As long as there is conformity by the people to the new order, this accords legitimacy to such order.

This view has been reiterated further that military regimes in Nigeria place the country in a realm where power takes ascendancy over law to a degree where it becomes impossible to disregard the actual factors of power and obedience in determining legal validity itself.<sup>178</sup> Thus, by Kelsen’s pure theory of law, the

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<sup>174</sup> Kelsen (1961) 220.

<sup>175</sup> *Ibid.*

<sup>176</sup> Udoma (1994) 295.

<sup>177</sup> Kelsen (1961) 117.

<sup>178</sup> Ojo A ‘The Search for a Grundnorm in Nigeria: The Lakanmi Case’ (1971) 20(1) *ICLQ* 117-136 at 133.



instances of successful coup d'états that have been witnessed in Nigeria are, legally speaking, valid and legitimate governments.

It is suggested here that even if past governments have been legal and 'legitimate', this does not rectify or remove the deficit that has been underlying the Nigerian law making system and its constitutions. The fact that the people have been repeatedly excluded from the fashioning of 'constitutions', and that the legal system that the country operates is itself based on elements of foreign law (like in other African countries), makes it problematic for the citizenry to take ownership of the running of their country, its democracy, constitution and legal systems. This idea will be explored next in the discussion on the Nigerian legal system and its components.

#### **4.4 Mechanism for the rule of law in Nigeria: The Nigerian Legal System**

In analysing the legal system of Nigeria, this section provides an overview of the nature of the legal system. The outcome will assist to assess whether there is a relationship between problems pertaining to the rule of law in Nigeria and the imposition of a foreign legal system and to identify specific problems. The Nigerian legal system has adopted English law as the over-arching system as a result of its colonial history with Britain. The English legal system is known as the common law system. As indicated above, the Nigerian legal system is of a plural nature, comprising common law, indigenous law and Islamic law. The Nigerian state itself is steeped in pluralism comprising ethnic pluralism (composed of over 250 ethnic groups); religious pluralism (with Islam, Christianity, and different traditional belief systems as dominant religious systems); and particularly legal pluralism (with the common law, indigenous laws, and Islamic law).<sup>179</sup>

Thus, in order to examine the rule of law in Nigeria, it would be necessary to seek out the rule of law mechanism as contained within the common law system and the indigenous law systems; and to examine the way and manner in which

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<sup>179</sup> Oba AA, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction' (2004) 52 *ALJ* 859-900 at 859.

the legal system (in this case) makes provision for these different systems within it. These are factors in varying degrees which affect the functioning of the rule of law within English speaking African countries.

#### **4.4.1 Nigerian law and the common law system, and provisions for the rule of law**

By independence, the status of English law in Nigeria had been entrenched. There had been incorporation of English law into Nigeria during the colonial years. The court systems had been created in such a way that English common law and doctrines of equity had already been received into the Nigerian legal system, and were being used initially in matters between Europeans, or matters in which one of the parties was a European. These laws were gradually extended to govern indigenous people also, and eventually the whole nation.<sup>180</sup> The way in which English law was transferred and imposed on Africa has been extensively dealt with in chapter two. This imposition on Nigerian law did a lot to change the nature and development of the law (which would probably have developed from the indigenous law system, with different results, if the English law had not been present). Whilst it had some aspects which were positive, it is felt that it had a generally negative impact on the previously uniquely African law of the country.

The 1960 Constitution, the first post-colonial constitution, did not expressly provide for any arrangement with regards to the status of common (English) law. Despite being silent on this matter, some sections within it raised issues reflecting the control and influence that the British system still had on the new Nigerian legal system. Section 33 of the 1960 Independence Constitution, for example, provided for the office of the Governor-General, who was an appointee of Her Majesty, and who would represent her Majesty and hold office at her Majesty's pleasure.<sup>181</sup> The Governor-General was the most senior officer of the new

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<sup>180</sup> Seidman RB, 'Law and Development: A General Model' (1972) 6(2) *Law & Soc'y Review* 311-342 at 313.

<sup>181</sup> Section 33(1) provides as follows:

There shall be a Governor-General and Commander-in-Chief of the Federation, who shall be appointed by Her Majesty and shall hold office during Her

Nigerian state, and such control by the colonial government implied that the political power was not yet fully in the hands of the Nigerian people.

Section 114 of the same Constitution provides for appeals from the decisions of the Federal Supreme Court (the highest court in the land at that time) to be made to her Majesty in Council, either as of right, or with leave of the Federal Supreme Court. This translated to the fact that her Majesty in Council was the highest judicial authority in the country at the time. Thus, her Majesty in Council was able, through the use of the prerogative of appeals, to further influence the law as existed in Nigeria, as judgements of the courts could be overturned, amended or upheld on appeal, based on the reasoning of the Queen and the English system.

For purposes of this discussion, the meaning of the term 'common law' needs to be clarified. The term 'common law' generally means the law of England that has been developed and practised over the years; that has now been received and is applicable in Africa and especially in Nigeria. Although the way in which common law forms part of the law in Africa has been documented extensively in chapter two, a brief discussion of the situation in Nigeria would be made here.

English law was introduced into the Colony of Lagos in 1863. In 1914, when the Northern and Southern regions were amalgamated to form one Nigeria, English law automatically extended to the rest of the country. English law received in Nigeria consists of the doctrines of equity; the statutes of General Application in force in England on the 1<sup>st</sup> of January 1900; statutes and subsidiary legislation on specified matters; and English laws made before 1<sup>st</sup> October 1960, and extended by application to Nigeria.<sup>182</sup>

Specifically, the common law of England means the law developed by the old common law courts of England, in particular the Kings Bench, the Court of Common Pleas and the Court of Exchequer. Traditionally, the judges in these courts, through their court decisions (that were aimed at enforcing the customs of

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Majesty's pleasure and who shall be Her Majesty's representative in the Federation.

- (2) The Prime Minister shall consult the Premier of each Region before tendering any advice to Her Majesty for the purposes of this section.

<sup>182</sup> Ewelukwa (2004) *Introduction to Nigerian Press Law* 45; see also Mwalimu (2005) *The Nigerian Legal System Vol 1 Public Law* 22-23.

the people) developed this system. The systematic application of these laws by the judges led to the laws becoming formalised, rigid and technical, and ultimately led to injustices being meted out to the people.<sup>183</sup> Common law did not consider the ‘particular circumstances of a person or of a crime’; it meted out judgement according to its prescription. An attempt to ameliorate these injustices led to the development of equity by the Court of Chancery.<sup>184</sup>

Equity focuses on the conscience of the parties involved in a matter. It attempts to go beyond the law, to mete out fairness, justice and right dealing to the parties. This body of rules (principles or maxims) were developed and administered initially by the Court of Chancery in England, before they were extended in their application to other courts. Thus common law and equity were administered together; they however remained two separate systems of rules.<sup>185</sup> In the event of a conflict between the rules of equity and common law, the rules of equity will prevail.<sup>186</sup> As Nigeria adopted the English common law, this is also the case in Nigeria. Some of the maxims of equity include; ‘*equity acts impersonam*’; ‘*equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium)*’; ‘*equity does not act in vain*’; ‘*equity aids the vigilant and not the indolent*’, and ‘*equity looks at the intent rather than the form*’. These rules of equity are also being enforced in Nigerian cases. In *National Insurance Corporation of Nigeria v Power and Industry Engineering Company Ltd*,<sup>187</sup> Justice Aniagolu of the Supreme Court held *inter alia*, that,

‘... equity as we all know inclines itself to conscience, reason and good faith and implies a system disposed to a just regulation and mutual rights and duties of men in a civilised society. It does not envisage sharp practice and undue advantage of a situation and a refusal to honour reciprocal liability arising therefore’.<sup>188</sup>

It has been argued that the doctrine and principle of equity was used by the colonial government as a facilitative agency for change and transformation in

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<sup>183</sup> Olong AM (2007) *The Nigerian Legal System* 13

<sup>184</sup> Olong (2007) 13.

<sup>185</sup> Olong (2007) 14.

<sup>186</sup> See Supreme Court of Judicature Acts 1873 and 1875.

<sup>187</sup> 1986 *NWLR* 1.

<sup>188</sup> 1986 *NWLR* 5.

West Africa, resulting in profound social, economic and political change and consequences for the people of Africa.<sup>189</sup> This resulted in fundamental changes to the nature and function of African customary law.<sup>190</sup> For example, as we will see below, the use by the colonial courts of certain equitable principles, resulted in the fragmentation of customary communal ownership (which was the fundamental basis of land holding under indigenous law systems), and the promotion of individualised ownership by preferring the individual's interests to the communal title of the group.<sup>191</sup>

#### **4.4.2 Encroachment on the indigenous Nigerian law (customary law)**

Indigenous African law, also referred to as customary law or traditional law, refers to the unwritten law that existed in Africa before the arrival of the Europeans. It may be defined as those rules of conduct which the persons living in a particular locality have come to recognise as governing them in their relationships between one another; themselves and things; and themselves and the community. It is the rules of law existing and binding on the particular community to which they apply.<sup>192</sup> These laws could be in a modified form in present day, as customary law is not static and changes and develops with time. Customary law has also been defined as the sum total of social norms sanctioned between members of the community and another.<sup>193</sup> Thus, in Nigeria, customary law is the organic or living law of the indigenous people, regulating their lives and transactions. It is still very much in practise, though in different forms due to development and urbanisation as indicated above. Like most other African countries, it is evident in practices of the people relating to marriage, succession, funeral rites, and so many others. It has been developed through usage or practice of the people, and by common adoption, acquiescence, long and unvarying habit, it has become compulsory and has acquired the force of a law

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<sup>189</sup> Akuffo K, 'Equity in colonial West Africa: A Paradigm of Juridical Dislocation' (2006) 50(2) *JAL* 132-144 at 136.

<sup>190</sup> Akuffo (2006) 50(2) *JAL* 140.

<sup>191</sup> Akuffo (2006) 50(2) *JAL* 141. He details through cases how it was that the colonial courts converted community based property rights into individual rights by enforcing the alienation of communal or family land by contract or other forms of agreement.

<sup>192</sup> Kolajo AA (2000) *Customary Law in Nigeria through the Cases* 1.

<sup>193</sup> Olong (2007) 44.

with respect to the place or the subject matter to which it relates.<sup>194</sup> In the 1963 case of *Alfa and Omega v Arepo*,<sup>195</sup> the court defined customary law as

‘ancient rules of law binding on a particular community and which rules change with the times and the rapid development of social and economic conditions’.<sup>196</sup>

Customary law as we know it existed and thrived in Africa before Europeans came to the continent, but the Europeans did not recognise this system as law, due its unwritten nature, and due to the fact that its principles were greatly contrary to the European principles of law. With the emergence of Nigeria as a nation in 1914 (after the amalgamation of the northern and southern protectorates), the adoption by the British of the indirect rule system of government lent credence and recognition to the use and application of customary law in Nigeria. This was as long as ‘the rule sought to be enforced was not repugnant to natural justice, equity and good conscience or compatible with the law for the time being in force’.<sup>197</sup> In the northern parts of Nigeria, customary law was defined to include Islamic law by the Northern Nigeria Native Courts Law.<sup>198</sup> Thus, the religious law of the Muslim faith is considered as part of customary law in these parts.

As indicated above, economic interests formed the main purpose of colonisation. The large number of Europeans (especially British) present in Africa at the beginning of colonial rule inevitably led to the introduction of major elements of the English law to the continent. It has been pointed out in the previous chapters that the incursion of the Europeans, the influence of capitalism and the influence of communism (to a lesser extent), changed the pre-capitalist indigenous modes of production in Africa from being the sole mode of production. This impact was particularly seen in West Africa, where as a result

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<sup>194</sup> Kolajo (2000) 2.

<sup>195</sup> 1963 *WNL* 95.

<sup>196</sup> *Ibid.*

<sup>197</sup> The Supreme Court Ordinance No 6 of 1914. This indicates that as far back as 1914, control of the indigenous law and a gradual imposition of English law began to emerge.

<sup>198</sup> Section 2 of the Northern Nigeria Native Courts Law of 1956.

of the needs of the colonial economy, there was a total subordination of the local indigenous economy to the needs of the colonial production.<sup>199</sup>

With this situation thus, there was the need to provide an appropriate and adequate legal framework to support the new capitalist production pattern and the colonialists themselves, who were the implementers of the new system in Africa. Also, the fact that Nigeria was a British protectorate meant that the British parliament had unrestricted powers to legislate for a colony as part of Her Majesty's dominions.<sup>200</sup> Some of these laws were made by 'Order in Council', which happened to be a means by which the operation of imperial statutes were extended to a protectorate.<sup>201</sup>

This led to the reception of foreign laws and rules into West Africa, particularly Nigeria. Local statutes were passed into law to legalise the incorporation of English law.<sup>202</sup> This was mostly done either by way of the reception of the current English statute on a particular topic,<sup>203</sup> or by way of a general application of unspecified English statutes, provided they answer to a specified definition,<sup>204</sup> for example, in Ghana, by virtue of the Supreme Court Ordinance of the Gold Coast of 1876, and in Nigeria, by virtue of the Supreme Court Ordinance of 1914, stated above.<sup>205</sup> These statutes integrated English law in its entirety into the legal

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<sup>199</sup> Akuffo (2006) 50(2) JAL 137.

<sup>200</sup> Ezejiofor G, 'The Federation of Nigeria' in Allot A (ed) (1970) *Judicial and Legal Systems in Nigeria* 82.

<sup>201</sup> For example, the Nigeria and Cameroons (Imperial Statutes Extension) Order in Council which extended the following statutes to Nigeria: the British Law Ascertainment Act of 1859; the Foreign Law Ascertainment Act of 1861 and many others. Also the Nigerian (Tribunal & Inquiry) Order in Council 1956; the Colonial Air Navigation Order 1953; the Carriage by Air (Non-International Carriage) Order of 1953.

<sup>202</sup> This was done by way of the reception of the current English statute on a particular topic.

<sup>203</sup> An example of which was section 4 of the Regional Courts (Federal Jurisdiction) Act of 1958 [chapter 177] which legislated that the English Matrimonial Causes Act 1965 was applicable to issues concerning marriage under English law. It stated thus that

'[t]he jurisdiction of the High Court of a Region in a relation to ....*matrimonial causes* shall, subject to the provision of any laws of a Region so far as practice and procedure are concerned, be exercised by the Court *in conformity with the law and practice for the time being in force in England*' (own emphasis).

<sup>204</sup> For example, section 45 of the Law (Miscellaneous Provisions) Act, which provides as follows:

(1) Subject to the provisions of this section, and except so far as other provisions is made by any Federal Law ... the *statutes of general application that were in force in England* on the 1<sup>st</sup> day of January 1900, *shall be in force in Lagos* and in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, *shall be in force in elsewhere in the Federation* (own emphasis).

<sup>205</sup> Akuffo (2006) 50(2) JAL 138.

systems of these countries, by providing that ‘the common law, doctrines of equity and statutes of general application in force in England on the 1<sup>st</sup> of January 1900, shall be in force in Nigeria’.<sup>206</sup> This was amended by section 45 of the Law (Miscellaneous Provisions) Act of 1964 which now made the application of the common law of England and doctrines of equity in Nigeria subject to the provisions of any other federal law.<sup>207</sup>

The received statutes also contained in different variations the requirements to test the validity of any customary or local rule. These are called ‘repugnancy’ clauses, to the effect that indigenous laws and customs of the country would be enforced only if they were not ‘repugnant to natural justice, equity and good conscience and not incompatible either directly or by implication with any law for the time being in force’.<sup>208</sup> This gave the Supreme Court the jurisdiction to observe and enforce the observance of indigenous laws and custom only if they were not repugnant to natural justice, equity and good conscience and not incompatible with any existing law of the time.<sup>209</sup>

The issue that arose from these repugnancy clauses was the question of the standards against which the principles of ‘natural justice’, ‘equity’ and ‘good conscience’ were to be measured. This issue came up before the courts on a number of occasions, and attempts have been made to substantially clarify it, aided by some of the decisions of the courts in cases related to customary law, as will be referred to below.

The repugnancy clause was applied by the courts to many laws and scenarios relating to customary law. This went a long way to change the nature, structure and substance of customary law in Nigeria. From the decided cases examined below, it will become clear that there have been attempts to garner the meaning of the repugnancy clause. It has been interpreted to mean various things, amongst which is, ‘fair and just or conscionable’. Thus, a rule of customary law

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<sup>206</sup> Supreme Court Ordinance of Nigeria 1914.

<sup>207</sup> Section 45 of the Law (Miscellaneous Provisions) Act of 1964.

<sup>208</sup> Section 20 of the Supreme Court Ordinance, 1914.

<sup>209</sup> Also replicated in various laws in the receiving countries and at various levels. See section 33 of the Magistrate Courts Ordinance; section 17 of the Supreme Court Ordinance, Chapters 122 and 211 of the Laws of Nigeria, 1948; and section 26(1) High Court of Lagos State Chapter 52 of 1973.



which is seemingly ‘unjust, unfair or unconscionable’ is deemed to be repugnant to natural justice, equity and good conscience, and thus void. Initially, the trend was to interpret the clause to mean a rejection of any custom that is ‘uncivilised’ or that did not conform to the standard of behaviour acceptable in communities which have reached an advanced stage in social development, like the European communities.<sup>210</sup>

Lord Wright in the case of *Laoye v Oyetunde*<sup>211</sup> viewed the repugnancy clause as being intended to invalidate ‘barbarous’ (uncivilised) customs. He closely followed the view of Lord Atkin in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*.<sup>212</sup> This line of reasoning had been faulted in an earlier decision, to the effect that a custom does not fail the repugnancy test merely because it does not conform to the English standard of behaviour or any other standard of behaviour acceptable in civilised communities. This was in the case of *Lewis v Bankole*,<sup>213</sup> in which the full bench of the Supreme Court rejected this view, and confirmed that lack of conformity to ‘civilised’ standards of behaviour, does not make a custom repugnant.<sup>214</sup> However, if a custom is such that it will warrant injustice or undue hardship on one or more of the parties, it would be viewed as being repugnant.<sup>215</sup> It should be noted that the interpretation and application of the repugnancy clause to the indigenous laws and customs did not always abide by this rule. This was because in some cases, the judges and court officials presiding over a matter were Europeans and colonialists, and thus there was nothing familiar to them in the customs and legal structures they met in Nigeria. Thus, anything that was not familiar, and that did not conform to the English or eurocentric standards was considered repugnant.

In the case of *Edet v Essien*,<sup>216</sup> dowry (lobola) had been paid on a woman, by one Essien, while the woman was still a child. When she was of age, another Edet paid dowry on her, married her and she bore him two children. Essien then claimed the children as his, in the absence of the dowry he paid being returned to

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<sup>210</sup> Olong (2007) 49.

<sup>211</sup> 1944 A.C 170.

<sup>212</sup> 1931 A.C 662 at 673; Okany MC (1984) *The Role of Customary Courts in Nigeria* 46.

<sup>213</sup> (1908) 1 NLR 81.

<sup>214</sup> See also *Dawodu v Danmole* (1958) 3 FSC 46.

<sup>215</sup> *Ibid.*

<sup>216</sup> (1932) 11 NLR 47.

him. The basis of his claim in customary law was to the effect that she could not contract ‘another legal marriage’ until his dowry was returned to him, thus he was entitled to any children born by the woman until the dowry was refunded to him. This constituted a valid claim under customary law. The court, however, invoked the repugnancy clause and held the rule of customary law to be repugnant to natural justice, equity and good conscience.<sup>217</sup> The same has been held of customs based on the concept of slavery in the case of *Re Effiong Okon Attah*.<sup>218</sup> In the relatively recent case of *Mojekwu v Mojekwu*,<sup>219</sup> the court held that any custom which discriminates against women or girls in the distribution of the property of the late father is repugnant to natural justice, equity and good conscience.<sup>220</sup>

Burns<sup>221</sup> dealt with the issue of the repugnancy clause in relation to Muhammadan law, which has effect in the northern parts of the country where the bulk of the people follow Islam. The Muhammadan law or Islamic law (as it is now called) is composed of the sayings, practices and decisions of the prophet as collected individually by the ‘companions’. Even where Muhammadan law is not in force, and considering that there is no written native law of any kind, immemorial custom gives the force of law to the rules which govern the lives of the people in their dealings with one another.<sup>222</sup> The received laws also impacted on these laws immensely. Burns listed the ‘cruel system of trial by ordeal’ and the ‘persecution of reputed witches’ which are no longer permitted by virtue of the imposition of English laws, which found them to be repugnant.<sup>223</sup>

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<sup>217</sup> The court held that it was contrary to natural justice, equity and good conscience to allow the appellant to claim the children of another man merely because the other man had deprived the appellant of his wife without paying dowry on her.

<sup>218</sup> 1930 (10) Nigerian Law Reports; quoted by Yakubu JA ‘Colonialism, Customary Law and Post-Colonial State in Africa: The case of Nigeria’, paper presented at the 10<sup>th</sup> CODESRIA General Assembly, available at

[http://www.codesria.org/Archives/ga10/Abstracts%20GA%201-5/colonialism\\_Yakubu.htm](http://www.codesria.org/Archives/ga10/Abstracts%20GA%201-5/colonialism_Yakubu.htm)  
(accessed on 3 August 2009)

<sup>219</sup> 1997 NWLR 592.

<sup>220</sup> This also measures against international human rights standards that have been set in a number of the human rights treaties that have been passed.

<sup>221</sup> Burns A (1978) *History of Nigeria* 278.

<sup>222</sup> Burns (1978) 278-279.

<sup>223</sup> Burns (1978) 279. It should be noted that these practises existed and still exist in some parts in the west, where ‘witches’ are burned at the stakes.

The second half of the repugnancy clause states that a rule of custom will not be applied if it is incompatible with any law for the time being in force or with any written law. The court in *Rotibi v Savage*<sup>224</sup> limited the application of this test to local statutory laws only and not the received laws of general application.<sup>225</sup> A contemporary provision is found in the Evidence Act<sup>226</sup> which provides for the public policy test, that any law called upon to adjudicate shall not be enforced if it is contrary to public policy (public good or morality). Thus, any law which corrupts public morals will be inconsistent with public policy and unenforceable.<sup>227</sup>

The repugnancy clause and its effects on customary law in Nigeria has been criticised for the fact that it is neither right nor valid to use external tests from different backgrounds as a fulcrum to validate other people's customs and laws.<sup>228</sup>

The place of received English laws in Nigeria has changed with time. The work of the Nigerian Law Reform Commission in 1987 focused on the need to repeal or review the pre-1900 English statutes in force in Nigeria.<sup>229</sup> This was said to be due to the fact that they were now obsolete in England and no longer current law. The issues the commission considered were whether the English statutes should be repealed, re-enacted or merely amended.<sup>230</sup> It should be noted that this was a belated attempt to remove/revise the foreign elements in the legal system. It was belated in the sense that it was happening 27 years after independence, when the laws and elements were already entrenched within the system. The Commission made proposals and recommendations for the enactment in Nigeria of certain of

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<sup>224</sup> 1944 (17) NLRs 77; a case involving a debt of nine years, owed to the plaintiff by the defendant. The defendant sought the limitation of statute regarding the loan. It was held that since they were both natives of Nigeria, and since under law and custom there was no period of limitation in an action for recovery of debt, the defendant could not succeed in the plea of limitation of statute.

<sup>225</sup> The court held that the phrase, 'any law for the time being in force' in the concerned Protectorate Courts Ordinance of 1933, had reference only to local enactments.

<sup>226</sup> Section 14(3) of the Evidence Act, Chapter E14 Laws of the Federation of Nigeria 2004.

<sup>227</sup> Olong (2007) 51.

<sup>228</sup> *Ibid.*

<sup>229</sup> 1987 Report of the Nigerian Law Reform Commission titled, 'Report of the Review of Pre-1900 English Statutes in force in Nigeria', Vol. 1 & 2, available at [http://www.nlrc.gov.ng/publications/EnglishStatuesinForceinNIG\\_Volumel\\_00001.pdf](http://www.nlrc.gov.ng/publications/EnglishStatuesinForceinNIG_Volumel_00001.pdf) (accessed on 14 April 2010).

<sup>230</sup> *Ibid.*, 45-46.

the statutes which were still currently relevant, subject to certain modifications in order to bring them in line with the prevailing norms of the Nigerian society.<sup>231</sup> This resulted in the enactment of some new laws, such as the Insurance (Miscellaneous Provisions) Act CAP 183 Laws of the Federation of Nigeria 1990; section 12 of the Labour Act CAP 198 Laws of the Federation of Nigeria, 1990 and others.<sup>232</sup>

#### 4.4.3 Effects of the reception of English law on customary law

The above section has touched on some of the effects of the reception and the enforcement of English law over indigenous law on the law in Nigeria. These effects are quite pronounced and have left an indelible mark on the Nigerian legal system. The impact and long term consequences of the introduction of foreign laws, English law in this case, into the existing indigenous legal systems are still being felt.

One of the reasons for such impact is that in the colonial and early courts, those who staffed and manned the structures of the imposed legal system (courts, administrative offices, etc), were either colonialists or western-trained Nigerian administrators or lawyers. Therefore in their interpretation of the law, they favoured the western notions and values in which they had been trained.<sup>233</sup> The absence of strict precedents to follow in such novel situations also gave them a lot of leeway in interpreting their notions of repugnancy, good conscience and natural justice in accordance with English values in which they were trained. This resulted in an unhindered transplantation of English law into Africa<sup>234</sup> which ended up having an adverse effect on the indigenous systems of the country. Some of those effects are as follows:

1. Cases that showed up in Nigerian jurisprudence during the early years of colonial presence illustrated how the courts were used as a tool through which

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<sup>231</sup> *Ibid*, 288.

<sup>232</sup> Nigerian Law Reform Commission, available at <http://www.nlrc.gov.ng/projects.php?id=1> (accessed on 14 April 2010).

<sup>233</sup> Ogwurike (1979) 174.

<sup>234</sup> Akuffo (2006) 139.

equitable principles were applied to alter existing custom and practice.<sup>235</sup> In the cases of *Lewis v Bankole*,<sup>236</sup> *Akpan Awo v Cookey Gam*,<sup>237</sup> *Fiscian v Nelson*,<sup>238</sup> the courts invoked equitable principles in overriding and setting aside rules of customary law of property. In the *Lewis* and *Cookey Gam* cases, the equitable maxim, ‘*delay defeats equity*’ and the doctrine of laches were used to set aside a strict customary law rule that adverse possession of land, for however long and under whatever circumstances, could never mature into proper title, and that the original owners could recover possession at any stage. Here the reasoning of the court was to the effect that

‘it would be wholly *inequitable* to deprive the defendants of property of which they had held undisputed possession, and in respect of which they had collected rents for a long term of years with the knowledge and acquiescence of those disputing their title (the real owners), even if it were as clear as it is upon the evidence, doubtful that they entered into possession, contrary to native law’.<sup>239</sup>

It is noteworthy to reiterate here that customary law applied only among the indigenes. In any instance where one of the Europeans or settlers were involved the option had always been to apply English law instead.

These cases were the foundation for changing the nature of customary law relating to land ownership in Nigeria. They are indicative of the decisive role played by equity in fundamentally transforming the nature and function of customary law in Nigeria. This is so because communal ownership had always been the main basis of land holding under indigenous law systems, and individual ownership was foreign to native ideas. As stated by Elias, ‘... ownership of land in the accepted English sense is unknown. Land is held under community ownership, and not as a rule, by the individual as such’.<sup>240</sup> Land belonged to the village or the community, the village or the family, but never to the individual.

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<sup>235</sup> Akuffo (2006) 140.

<sup>236</sup> (1908) 1 NLR 81; cited above.

<sup>237</sup> (1913) 2 NLR 100.

<sup>238</sup> (1946) 12 WACA 21.

<sup>239</sup> (1913) 2 NLR 100 at 101.

<sup>240</sup> Elias TO (1971) *Nigerian Land Law* 7.

As seen from the above, the equitable interventions and superimposition of English law values and principles seen in a plethora of cases (examples of which we have cited above), has resulted in the fragmentation of customary communal ownership and the promotion of individualised ownership, by raising and accepting the individual's interest and claim over and above that of the title of the group.<sup>241</sup>

2. Another impact that can be highlighted is the way the introduction of the English system further compounded the plural nature of the Nigerian legal system. As indicated at the beginning of this chapter, a part of the Nigerian legal system consists of varied and multiple rules derived from cultures and traditions of the local communities. This part is customary law. Another part consists of common law rules, doctrines of equity and statutes made by local legislators at various times, and yet another part consists of Islamic law.<sup>242</sup> These systems of law have from a very early date in the history of administration of justice in Nigeria been administered by two parallel, but distinct systems of court,<sup>243</sup> one indigenous and the other statutory. However, over time there has been fusion of these two and they can be both adduced in courts.<sup>244</sup> Chapter VII of the 1999 Constitution now makes provision for two tiers of courts, federal and state courts.<sup>245</sup>

As indicated earlier, the structure of the courts under the colonial government, and even immediately after, was such that it was made of up the Magistrate Court, the Supreme Court (later reorganised and renamed the High Court), the West African Court of Appeal and the judicial Committee of the Privy Council. However, with the abolition of the West African Court of Appeal, and with the

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<sup>241</sup> Akuffo (2006) 141.

<sup>242</sup> The colonial administration construed Islamic law and indigenous laws as one and the same and in many of their administrative decisions and methods they introduced and implemented this way of thinking.

<sup>243</sup> Okany (1984) 201.

<sup>244</sup> Even though the onus of proof of customary law is higher, and more difficult to prove in a court, as the person who adduces the existence of such law must then get oral or expert testimony to support it.

<sup>245</sup> Sections 230 to 296 of 1999 Constitution of the Federal Republic of Nigeria.

abolition of appeals from Nigeria to the Privy Council, the system now consists of federal courts and state courts.<sup>246</sup>

The federal courts are the Supreme Court; the Federal Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory; the Sharia Court of Appeal of the Federal Capital Territory, and the Customary Court of Appeal of the Federal Capital Territory. The state courts are made up of the High Court of a State; the Sharia Court of Appeal of a State (in the northern states); and the Customary Court of Appeal of a State (in the southern states). There was initially only one Sharia Court of Appeal for the north, but the creation of more states necessitated the creation of a Sharia Court of Appeal for each of the northern states.<sup>247</sup>

The existence of this pluralism within the Nigerian legal system as a whole has led to confusion in some cases. Pluralism has been a source of difficulty, confusion and often injustice all through the history of Nigerian jurisprudence. One of the difficulties encountered is the problem that the legal practitioner encounters in deciding which of the two systems of courts has jurisdiction over a matter, in order to know which court to approach.<sup>248</sup> For example, in certain parts of northern Nigeria, where the ‘mode of life’ test was applied for the determination of which court had jurisdiction, problems arose when the native courts/alkali was held to have jurisdiction over a legal practitioner based in the east, who had only gone to the north for a visit.<sup>249</sup>

All of these effects illustrate how the rule of law in Nigeria has developed in the past and the impact of the different influences (colonial law/English law) on the law in Nigeria. These impacts continue to be felt and continue to reverberate on the rule of law in the country. However, apart from the influences that have resulted from the country’s colonial past, there are also other influences (forces) that have had and continue to have an impact on the place and effectiveness of the rule of law in current times. Thus, whilst noting the effects of the past

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<sup>246</sup> *Ibid.* Sections 230 to 284 provide for the establishment and jurisdiction of federal and state courts.

<sup>247</sup> Okany (1984) 202.

<sup>248</sup> Okany (1984) 205.

<sup>249</sup> Okany (1984) 206.

influences, the next section will turn to some of these forces and examine how much of influence they continue to have on the rule of law in Nigeria.

#### **4.5 Impact of Oil, Globalisation and Democracy on Nigeria**

Nigeria has gone through a long period of instability in terms of governance and government policies, as discussed earlier. This situation was untenable, as government policies changed daily. The country has also experienced different problems in the period since independence ranging from civil unrest, political instability, border disputes, corruption and even poor governance. These issues have plagued and dominated the discourse in Nigeria, with the attendant hope of finding solutions to these myriad of problems. Of particular interest is the effect that governance by military regimes during the years of the ‘oil boom’ has had on the rule of law; and the silent acquiescence by the international community with the atrocities committed by these military regimes.<sup>250</sup> These will be examined next.

##### **4.5.1 Oil and its impact on Nigeria**

The growth and development of the nation’s economy, and even its politics and law have come to be built around crude oil. Nigeria’s economy is largely dependent on the oil sector, which currently supplies about 95 percent of the country’s foreign exchange earnings.<sup>251</sup> An important factor to consider in examining the Nigerian state and its trajectory over the years is the effect and impact of crude oil on the economy, politics and rule of law in the nation. The oil boom experienced in Nigeria should be examined against the background of the struggle for resource control in the oil producing regions, the military in power, the activities of the oil sector, and the huge revenues from oil. All these factors had a decisive impact on the nation and on the rule of law.

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<sup>250</sup> Whaley J ‘Oil in Nigeria - Curse or Blessing?’ Geo-Expro Website, available at [http://www.geoexpro.com/country\\_profile/nigeria/](http://www.geoexpro.com/country_profile/nigeria/), (accessed on 24 June 2009).

<sup>251</sup> ‘Oil and Gas in Nigeria – An Overview’, available at <http://www.mbendi.com/indy/oilg/af/ng/p0005.htm> (accessed on 22 April 2010).



The initial discovery of crude oil in Nigeria was in 1956 in Oloibiri, in the Niger Delta region of Nigeria. Production in huge numbers commenced between the 1960's and 1970's.<sup>252</sup> Prior to the discovery of oil, Nigeria's economy largely depended on the production and export of agricultural products. Cocoa and palm oil (from palm kernel) were being produced and exported in huge quantities from the western part of the country, and groundnut was being exported from the northern part of the country.<sup>253</sup> Nigeria was one of the three largest exporters of cocoa and one of the world's leading producers of palm oil, palm kernel as well as groundnut.<sup>254</sup> However, with the discovery and focus on crude oil, Nigeria's cocoa production has dwindled to count for about 5 percent of the total cocoa beans produced in the world in 2006.<sup>255</sup>

After the discovery of oil in Oloibiri, production started gradually and contributed only a marginal amount to the economy. By the 1970's, Nigeria was producing about 1 million barrels per day (bpd) of crude oil. When oil prices rose sharply around this period, Nigeria's income from oil also rose, creating an unexpected windfall for the country. For example, the contribution of oil to the Gross Domestic Product (GDP) rose from less than 1 percent in 1960, to about 14.6, 21.9 and 29 percents in 1970, 1975 and 1979 respectively.<sup>256</sup> This figure peaked to about 2.5million barrels per day (mbpd) in 2004.<sup>257</sup> As oil production increased in the country, it had a spiral effect on the agricultural sector, in that the production of agricultural products gradually dwindled to a near halt.<sup>258</sup> On the converse however, oil's contribution to the export earnings rose dramatically from 58.1 percent in 1970 to about 95.6 percent in 1979.<sup>259</sup>

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<sup>252</sup> Esogbue E, 'Oil in Nigeria: Curse of Blessing'?, available at <http://www.articlesbase.com/politics-articles/oil-in-nigeria-a-curse-or-blessing-325091.html> (accessed on 24 June 2009).

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> INFO COMM: Market information in commodities area on the United Nations Conference on Trade and Development (UNCTAD) website, available at <http://www.unctad.org/infocomm/anglais/cocoa/market.htm> (accessed on 17 December 2009).

<sup>256</sup> Omotola S 'The Next Gulf? Oil Politics, Environmental Apocalypse and Rising Tensions in the Niger Delta' (2006) 1(3) *Accord Occasional Paper Series* 8-9.

<sup>257</sup> Whaley, *supra*.

<sup>258</sup> The cocoa example given above.

<sup>259</sup> Omotola (2006) 1(3) *Accord Occasional Paper Series*.

In 1971, Nigeria joined the Organisation of Petroleum Exporting Countries (OPEC). This opened up the country to foreign investors. A state-owned corporation was created in 1971, called the Nigerian National Oil Corporation (NNOC). It was later renamed the Nigerian National Petroleum Corporation (NNPC) in 1977. The NNPC was established with the purpose of overseeing the oil industry, and making sure that the returns from oil benefit the country. It had an agenda of nationalising the industry.<sup>260</sup> Thus, any company wishing to carry out oil exploration in Nigeria had to enter into a joint venture with the NNPC. This gave the State about 60 percent ownership in any oil business in Nigeria.<sup>261</sup> The discovery of oil, coupled with the spike in oil prices mentioned above, meant a huge amount of revenue for the country, which unfortunately was not used to improve the living standards of the majority of the citizens.<sup>262</sup> Rather, the revenue has been and continues to be siphoned by the elite for their own purposes. This is due to several reasons which will be discussed below.

When the oil boom began in the seventies, the then government of Nigeria did not have any proper planning for development or industrialisation. The money from oil was so much that it resulted in the arbitrary increase of the salary of public servants (government workers), without an increase in the productivity of these workers.<sup>263</sup> All of a sudden, the public service became the most beneficial place to work. The increased salaries amongst public servants also meant that they began to develop an ostentatious taste for goods, and it changed the psyche and consumption habits of the average Nigerian.<sup>264</sup> Farmers left their farms and plantations, and went to the cities in search of the easy money from oil.

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<sup>260</sup> Prior to the creation of the NNPC, oil exploration had not been well controlled by the state, and foreign interests had been better served through their companies. By seeking to nationalise the industry, the NNPC was to ensure that the interests and benefits of the state from the exploration of oil were better served.

<sup>261</sup> Whaley *supra*.

<sup>262</sup> According to Omotola, revenue from oil amounted to not less than US \$300 billion between 1970 and 2002, despite this more than 70 percent of Nigerians live in poverty. See Omotola (2006) 1(3) *Accord Occasional Paper Series* 10.

<sup>263</sup> This came to be as a result of the Udoji Commission report in 1974, alluded to in Adedipe B, *Impact of Oil on Nigeria's Economic Policy Formulation*, paper presented by the author at conference organised in collaboration with the Nigerian Economic Summit Group, on 'Nigeria: Maximising Pro-poor Growth: Regenerating the Socio-Economic Data', 16 and 17 June 2004.

<sup>264</sup> *Ibid*.

The increase in the purchasing power of people was, however, not met with an increase in the production of local goods, as the production and manufacturing sectors of the economy were not that well developed and so could not meet with the demands of the public. This resulted in the importation of goods. The ostentatious taste for goods and services developed by Nigerians meant that only imported items were good enough, not the locally produced ones. As everything began to be imported, locally produced goods were ignored to the advantage of the imported goods, ranging from consumables like chicken, sausages to petroleum products.<sup>265</sup>

One of the main problems of note around the issue of oil is the role played by military regimes over the years. Prior to the discovery of crude oil, and prior to the 1967 civil war in Nigeria, a 50 percent derivation formula was used to share the revenue accruing to the nation.<sup>266</sup> Fifty percent of the revenue from extracted materials went back to the region from which the materials came, and 50 percent was retained at the central government. This was encapsulated in the 1946 Minerals Act<sup>267</sup> passed into law by the colonial government, and retained even after independence.

The rise of military regimes, the civil war and the discovery and exploitation of oil in the Niger Delta signalled the death of this favourable policy of derivation,<sup>268</sup> and the Minerals Act was later amended by the Minerals and Mining Decree of 1999.<sup>269</sup> One of the reasons for this amendment was the threatened secession of Biafra in 1967. This would have had the implication that

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<sup>265</sup> The petroleum products were products from crude oil sourced from Nigeria. Nigeria did not and still does not have the capacity to refine the crude explored from its lands. Thus due to the lack of adequate and good enough oil refineries, Nigeria has had to import more than half of its annual total consumption of fuel. Coupled with this, the Federal government of Nigeria has over the years gradually been removing the subsidy in petroleum products prices, thus transferring the burden onto the citizens, who have not even benefitted directly from oil prices.

<sup>266</sup> Ndongko WA, 'Revenue Allocation and the Stability of the Nigerian Federation 1960 – 1980' (1981) 1 *Public Admin. Dev.* 151 at 155.

<sup>267</sup> Minerals Act (Chapter 121 of 1946).

<sup>268</sup> International Crisis Group Africa Report No 119, *supra*.

<sup>269</sup> Section 1(1) of this decree provided that

'the entire property in and control of all minerals, in, under or upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and watercourses throughout Nigeria, any area covered by territorial waters or constituency, the Exclusively Economic Zone is and shall be vested in the Government of the Federation *for and on behalf of the people* of Nigeria' (own emphasis).

much of the oil-rich eastern and southern areas would have been lost to Biafra, and not Nigeria. The military government felt that this was unacceptable, and thus in 1969 had passed the Petroleum Act of 1969. This was in a bid to ensure that in the event of future bids for succession, oil remained safely in the control of the centre, at the federal level.<sup>270</sup>

The Petroleum Act of 1969 vested the Nigerian state with ownership of all oil and gas in, under or upon any lands, anywhere in the country and even in its territorial waters and continental shelf. This differed greatly from the 1946 Act passed by the colonial powers, which basically allowed the different regions to benefit from the products of their lands. The consequence of this act was thus that all revenue from the exploration and exportation of crude oil went directly into the coffers of the federal government, which then adopted whatever derivation formula it felt was appropriate.<sup>271</sup> For instance, in 1992 only about 3 percent of the total revenue was going to the oil producing areas in the form of special allocation. About 24 percent and 20 percent of the total revenue went to the state and local governments respectively.<sup>272</sup>

The implication of this was that there was a lot of money at the centre, but less money at the different states and local government. By 1992, the federal government had control of about forty-six percent of the revenue. This huge income could be attributed as one of the factors that made government at the federal level so attractive to the military, and led to the incessant coup d'états experienced in Nigeria.<sup>273</sup> This singular activity of changing the derivation formula and concentrating power at the centre has contributed to the erosion of the rule of law in the country, because it has made political positions generally more attractive and alluring, resulting in people being willing to do anything to get into power.

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<sup>270</sup> No 51 of 1969. In the preamble, the purpose of the Act is defined as  
'an act to provide for the exploration of petroleum from the territorial waters and continental shelf of Nigeria, and to vest the ownership of all, and on all on-shore and off-shore revenue from petroleum resources derivable there from in the Federal Government and for all other matters incidental thereto'.

<sup>271</sup> Crisis Group Africa Report No 119, *supra*.

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

It appears that the modification of the law, which ended up conferring ownership of all minerals in, under or upon any lands on the federal government, was a deliberate attempt to starve the regions (especially the oil producing ones) of revenue. The military government had thought that this would prevent any further secessionist tendencies from rising, and would safeguard the sovereignty of the nation. Indirectly, however, it had the effect of denying the right to self-determination of its people. The modified law marked a substantial reduction from the colonial era's derivation figures, and did result in the starvation of the regions as intended. A similar version of this law is now enshrined in the section 44(3) of the 1999 Constitution.<sup>274</sup> Persistent agitation from the people of the oil-producing regions resulted in the derivation principle in the 1999 Constitution being raised to 'not less than 13 percent of the total revenue accruing to the Federation Account from any natural resources'.<sup>275</sup> In March 2006, a Joint Constitutional Review Committee proposed an increase of the derivation percentage to 18 percent, though this has not been approved.<sup>276</sup>

#### 4.5.1.1 Effects of the exploration of oil in the oil producing regions

The oil producing regions have suffered greatly due to the starvation of funds by the federal government. The regions have remained highly underdeveloped compared to the other regions in the country. However, apart from the problem of funds, other problems, such as mismanagement of the little funds available, lack of accountability on the part of the oil exploring companies,<sup>277</sup> greed and corruption, amongst other things, colluded to result in the present glaring discontent of the people of the region.<sup>278</sup> They have also suffered greatly from

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<sup>274</sup> Section 44(3) states that

'the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest the Government of the Federation'.

<sup>275</sup> Proviso to section 162(2) of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>276</sup> International Crisis Group Africa Report No 119, *supra*.

<sup>277</sup> Multinational oil companies have continued the environmentally harmful practice of flaring excess natural gas, despite repeated promises to phase it out. Flaring has produced one of the best-known symbols of the Delta's problems in the controlled infernos that light up the night sky for miles around them.

<sup>278</sup> Two governors from the oil rich region, Governors-Joshua Dariye and Diepreye Alamieyeseigha, were arrested in London in 2004 and late 2005 respectively, on charges of money laundering and both subsequently fled the country while out on bail; both were eventually impeached by their respective state legislatures.

the environmental degradation that comes with oil exploration,<sup>279</sup> aggravated by the fact that the government has neglected the environment.

Of all the problems mentioned above, the following problems need to be singled out:

a) Oil theft, also called bunkering, is a present problem.<sup>280</sup> The perpetrators of these illicit activities are often influential people with connections all around the country, and even in some of the oil companies. These people range from local politicians and community chiefs, to oil company staff and military officials. The fact is that large scale bunkering could not take place without the complicity of top and senior officials.<sup>281</sup>

Both the state and federal governments are seen as being in complicity with the oil companies, in the ill-treatment of oil producing regions and their people.<sup>282</sup> Government has failed over the years to enforce various environmental and also oil prospecting laws of the land. Due to the lack of proper monitoring and enforcement, the multi-national companies involved in the exploration of oil were allowed to get away with non-compliance with the necessary environmental safeguards. As one of the richest regions in Nigeria in terms of crude oil, the Niger delta region is unfortunately also one of the most under-developed, having suffered many years of political neglect.

b) Despite the huge revenue and returns it brings the nation,<sup>283</sup> crude oil exploration has had little positive impact on the Niger Delta communities from whose lands the oil is explored. Instead, it has had devastating consequences on

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<sup>279</sup> Every year the network of pipelines that crisscross the region's maze of creeks and mangrove swamps records hundreds of oil spills that often spoil farmland and waterways. The multinational company, Shell, which accounts for roughly half of the Delta's onshore infrastructure, recorded 224 spills in 2005 and 236 in 2004. Many residents of the Delta complain that these and other harmful practices have led to health problems and made it harder for them to earn a living off the land.

<sup>280</sup> 'Bunkering' as a term takes its name from the technical practice of loading crude oil in a tanker. Illegal bunkering could take place in different forms. It could even be from a cut in the pipelines to siphon some of the oil, through the illicit filling of whole tankers. The stolen oil is then sold at black market rates.

<sup>281</sup> International Crisis Group Africa Report NO 119, *supra*.

<sup>282</sup> This is due to the fact that though the legal framework exists to address all of these acts of crime, they are not being enforced by the relevant government agencies. The necessary oversight within government structures also do not function.

<sup>283</sup> An audit of the NNPC from 1999 to 2004 revealed that Nigeria profited by over \$96 billion in oil revenue.

the environment and on the people. Oil spillages have become common place in the regions. Between 1976 and 1999, there were about 3,000 oil spills formally reported by the oil companies to the NNPC.<sup>284</sup> This translated into over 2 million barrels of oil spilled into the country's terrestrial, coastal and offshore marine environment.<sup>285</sup> These oil spills, combined with decades of gas flaring, are now having serious consequences on the environment.

c) Apart from oil spills, gas flaring is another effect. It is a consequence of the extraction of crude oil from the earth. Gas is a natural by-product of the process of extraction of crude oil. Nigeria does not have the adequate facility to refine this gas that occurs whilst extracting crude oil, and to convert it for commercial use. The gas cannot be trapped and shipped off to the west to be refined like crude oil; it is therefore burnt off (flared) in the air.<sup>286</sup> This amounts to waste, especially in the light of the demand for gas all over the world and in Nigeria itself. Instead the country imports gas at exorbitant prices.<sup>287</sup>

Gas flaring is a source of continuous air pollution. The combination of the oil spills and gas flaring have resulted in serious atmospheric pollution; ground water and soil contamination; constant heat around the flare pits and abnormal salinity of the pool water. These have resulted in serious health hazards for the inhabitants of the Niger Delta region, and grave disturbances to the life cycles of plants and animals, thus constituting grave violations of the rights of the inhabitants to clean air, water and a viable environment.<sup>288</sup>

The people of the Niger Delta are predominantly fishermen, and have been badly affected by the effects of water pollution, the latter the result of the contamination

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<sup>284</sup> There were probably much more than this official figure.

<sup>285</sup> Agbu Osita, 'Oil and Environmental Conflicts' in Saliu, Hassan A (2005) (ed) *Nigeria Under Democratic Rule, 1999-2003*, vol 2, 82-83.

<sup>286</sup> Omotola notes that in 1991 when Nigeria's gross gas production was 31,500,000 standard cubic feet, about 24, 240, 000 of it was flared, amounting to about 76 percent of the total. Consequently, by 1995, about 30-35 million tons of carbon dioxide and an estimated 12 million tons/year of methane were emitted into the atmosphere. See Omotola (2006) 1(3) *Accord Occasional Paper Series* 10.

<sup>287</sup> 'Energy Information Administration: Country Analysis Briefs', available at <http://www.eia.doe.gov/cabs/Nigeria/Full.html> (accessed on 29 July 2010).

<sup>288</sup> International Crisis Group Africa Report No 113 of July 2006, titled 'Nigeria: Want in the Midst of Plenty', available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/Nigeria%20Want%20in%20the%20Midst%20of%20Plenty.ashx> (accessed on 29 June 2009).

of the waterways from the wastes of the exploration process (when it is not properly managed, this results in seepage into the waterways). All of these have had a great impact on the livelihood of the people, which revolves around rivers and the land, as they are mostly fishermen and farmers.<sup>289</sup> Many of them have been left redundant as a result of the high levels of pollution in the waters and in the soil. The health of the people is also affected. Some of the gaseous pollutants released into the atmosphere, such as carbon monoxide, chlorine, nitrogen, etc, are known to be responsible for causing headaches, heart problems, irritation, oedema and others.<sup>290</sup>

d) Another problem experienced is that of the compulsory acquisition of land, and inadequate compensation. Oil companies are empowered by legislation to acquire land for the purposes of oil exploration and for public purposes, as long as compensation (or rent when using only a portion of the land) is paid to the land owners.<sup>291</sup> However, in many instances, the rent paid is often insufficient and the compensation, if it does come after long delays, is usually less than what the farmers would have received if they worked the land themselves.<sup>292</sup> These farmers do not have a choice to refuse sale, as the different legislations empower the companies to acquire land, and pay compensation or rent.<sup>293</sup> The rate or value of the compensation to be paid is also set by the oil companies and not by independent bodies. The people end up being deprived of their fishing ponds, farming lands and other sources of income, and then do not get adequate compensation to allow them to enter into alternative businesses.<sup>294</sup>

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<sup>289</sup> International Crisis Group Africa Report No 113.

<sup>290</sup> Omotola (2006) 1(3) *Accord Occasional Paper Series* 11.

<sup>291</sup> Section 11 of the Oil Pipeline Act of 1956, together with section 8 of the Land Use Act (1978) and section 44 of the 1999 Constitution of the Federal Republic of Nigeria provide the framework for compulsory acquisition of land for overriding public purposes and for oil prospecting. In particular, section 11 of the Oil Pipeline Act empowers the license holders to take possession of or use any land to, amongst other things, construct and operate an oil pipeline. The section however provides that compensation must be paid by the license holder to the person(s) whose land is injuriously affected by such action.

<sup>292</sup> Ogedengbe PS, 'Compulsory Acquisition of Oil Exploration Fields in Delta State, Nigeria: The compensation problem' (2007) 25(1) *Nigerian Journal of Property and Investment Finance* 70. Here the author lists his findings and makes recommendations to address the different problems of adequate and timely compensation in this area.

<sup>293</sup> Section 11 of the Oil Pipelines Act of 1956 empowers the license holders to take possession of or use any land to, amongst other things, construct, maintain and operate an oil pipeline.

<sup>294</sup> *Ibid.*



Government (both at state and central levels) has failed and continue to fail the people of the Niger Delta region in this regard, as they have allowed these practises to continue unabated over the forty and odd years that the oil companies have been operating in Nigeria. There has also been little or no enforcement of the requirements of the law. For example, the law requires that on the issue of compensation, qualified estate surveyors and valuers are to be used to assess the value of the land acquired.<sup>295</sup> However, the oil companies have been making use of people they refer to as ‘Damage Clerks’, who are not professionals in the field, and who give a valuation favourable to the oil companies and not the affected indigenes.<sup>296</sup> Nothing has been done so far by government to put a stop to this.

The combination of these factors discussed above has created a high level of unemployment, which has led to high levels of frustration and listlessness amongst the youths in the Niger Delta region. The consequence of this has been high rates of violent crimes in the region and the continued militancy of the region. The situation has been further worsened by the neglect of the region by the central government, and the pervasive corruption of the government at the state levels. Government has many times been accused of colluding with the oil companies, and has failed to enforce the legal environmental standards, and the development conditions (in terms of infrastructure development, social amenities, education, countering the effects of the pollution etc) contained in the law that were made a pre-condition of the oil concession agreements. In the light of these failures, alternative means of livelihood have not been provided to the people, and the youths are not being constructively engaged at any level.<sup>297</sup> This has directly resulted in many of the youths joining the militant struggle for resource control.

The effects of these problems are long term, and have being felt for a while now. After years of suffering untold hardships, and of being ignored by the government, it is of some surprise that the armed struggle ongoing in this region did not start sooner. A culture of cynicism about government, economic stagnation and hopelessness has pervaded the region, and resulted initially in

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<sup>295</sup> Sections 19-20 of the Oil Pipelines Act of 1956.

<sup>296</sup> Ogedengbe (2007) 25(1) *Nigerian Journal of Property and Investment Finance* 71-72.

<sup>297</sup> International Crisis Group Africa Report No 113, *supra*.

low-grade violent conflicts, which later spiralled out into high grade violence.<sup>298</sup> For the people, the exploitation they have suffered in the hands of the oil companies and government works to further the alienation that exists between the citizens and the government. The confidence and optimism that people would normally repose in the law, and in the apparatus of the law is now lacking in the case with the people of the Niger Delta region. They have been failed repeatedly by the law and the Nigerian state and have thus reached a stage where they have nothing further to lose. The youths of the region are more severely affected, as they bear the brunt of the scourge of unemployment, continuous pollution and the stark reality that they are not being catered for by the Nigerian state.

All of these have boiled over into the intense violence that is seen in the region, and evident in the cases of kidnappings of foreign and local citizens (for ransom and as a form of political posturing); armed attacks against oil installations; increased armed robberies, and increased bunkering activities amongst others.<sup>299</sup> Next addressed are some aspects of the continued struggle of the people of the Niger Delta region, and how this situation and the inability of the Nigerian government to tackle it continue to undermine the rule of law.

#### 4.5.1.2 Struggle for resource control

Different groups and organisations of civil society have emerged over the years from the different ethnic groups and communities, making up the Niger Delta people. They have actively agitated for the rights of the communities to justice in all areas of their lives. Over time, ‘resource control’ has been the operating mantra of some of these groups (that is the right to control the oil that is exploited in their region, as opposed to the Federal government). One of the first of these groups was the Movement for the Survival of the Ogoni People (MOSOP), a non-violent group formed in 1990.<sup>300</sup>

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<sup>298</sup> Global Security website ‘Nigeria – Niger Delta’, available at <http://www.globalsecurity.org/military/world/war/nigeria-2.htm> (accessed 22 April 2010).

<sup>299</sup> Hazen JM *et al*, (2007) ‘Small Arms, Armed Violence, and Insecurity in Nigeria: The Niger Delta in Perspective’, *Occasional paper* of the Small Arms Survey Group: Geneva Institute of International Studies: Geneva.

<sup>300</sup> ‘The Ogoni Struggle’, available at <http://remembersarowiwa.com/background/the-ogoni-struggle/> (accessed on 7 August 2009).

The Ogoni ethnic group is one of the largest ethnic groups in the area. The late human rights activist and freedom fighter, Ken Saro-Wiwa, an author and a businessman from Ogoni, was the leader of MOSOP. He worked through the organisation to raise the level of awareness of the rights of his people and of other groups that were being violated by the oil companies exploring oil within the area.<sup>301</sup> This was due to the fact as indicated above, that the necessary environmental law standards and requirements were not being observed by the oil companies, leading to huge levels of environmental pollution.

In 1992, Ken Saro-Wiwa canvassed the position of the people of the Niger Delta before the United Nations Working Group on Indigenous Peoples in Geneva.<sup>302</sup> In 1993, MOSOP organised peaceful protests and demonstrations, directed at Shell and other oil companies all over Ogoniland, and marked the 4<sup>th</sup> of January of that year as Ogoni day.<sup>303</sup>

Shell Petroleum Development Company of Nigeria (SPDC) is one of the multinational companies operating oil fields all over the oil producing areas of Nigeria. The company dominates Nigeria's oil sector, as its operations cover the largest area in the oil industry. Its parent company is Royal Dutch Shell, based in the Netherlands.<sup>304</sup> SPDC started operating in Nigeria as early as 1936, and has since been a major player in Nigeria's oil industry. Shell is one of the oil companies that has been accused of illegal, environmentally crippling practices, and various breaches of the law.<sup>305</sup>

The peaceful protests of MOSOP and other organisations did not go down well with the oil companies. The companies were averse to such publicity and to the negative international exposure, and they began to look for ways to frustrate the efforts of the protesters. They demanded that the Federal Government of Nigeria provide security from the protesters for their various installations. The army troops were called in to ensure that the demonstrations were curbed, thus leading

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<sup>301</sup> *Ibid.*

<sup>302</sup> He was also able to appeal to various other international organisations like Greenpeace, Amnesty International, and International Pen organisation.

<sup>303</sup> 'The Ogoni Stuggle', *supra*.

<sup>304</sup> It has British and Dutch origins.

<sup>305</sup> There are quite a number of multinationals operating joint venture agreements with the Nigerian government (via the NNPC) in the oil sector. These include Chevron and ExxonMobil. Another company involved in the sector is Agip,

to a military crackdown on the peaceful protests and demonstrations. These army troops were funded by Shell.<sup>306</sup> Protesters sustained serious injuries and some died as a result of the response of government troops to the marches.<sup>307</sup> Around the same time, towards the end of 1993, General Sani Abacha came into power after a coup d'état, and his government intensified the crackdown on the Ogoni people. Their villages were attacked, trashed and burnt. The death rate increased as a result of these activities.<sup>308</sup>

It was during this crackdown on the peaceful protests that four Ogoni chiefs were brutally murdered, and Ken Saro-Wiwa and ten others were arrested by the military government, allegedly in connection with the death of chiefs, even though there was no evidence linking them to the deaths. An international outcry against the actions of the military government followed, because the actions were regarded as a ploy to quell the agitation of the people.<sup>309</sup> In October 1995, Ken Saro-Wiwa and eight others were found guilty by a military court and sentenced to death by the then military Provisional Ruling Council (PRC).<sup>310</sup> Despite several pleas for clemency from both international and local sources, on the 10<sup>th</sup> of November, the judgement of the PRC was carried out and the men were executed.<sup>311</sup> They were executed in defiance of international appeals for leniency by members of the Commonwealth, the United States and various other international organisations.<sup>312</sup>

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<sup>306</sup> These facts became public knowledge as a result of a dispute between Shell Nigeria and another company before the Federal High Court in Lagos. An array of documents which implicated Shell in the crackdown on the Ogoni people were tendered before the court, an example of which is a letter to the Inspector General of Police from Shell requesting arms and ammunitions for its operations in the Niger Delta region. This evidence is referred to by Lock C 'Ken Saro-Wiwa or The Pacification of the Primitive Tribes of the Lower Niger' in McLuckie & McPhail *et al* (2000) *Ken Saro-Wiwa: writer and political analyst* 6-7.

<sup>307</sup> The Ogoni Struggle, *supra*.

<sup>308</sup> The Ogoni Struggle, *supra*.

<sup>309</sup> Amnesty International (1994), 'Ken Saro-Wiwa, Writer and President of the Movement for the Survival of the Ogoni People (MOSOP)', *Urgent Action*, 24 May; Amnesty International (1994) 'Nigeria: Military Government Clampdown on Opposition', 11 November; Human Rights Watch/Africa (1995) 'The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria', *Human Rights Watch/Africa*, July, 7(5) 14.

<sup>310</sup> The remaining two men were acquitted.

<sup>311</sup> The Ogoni Struggle, *supra*.

<sup>312</sup> International pleas came from many world leaders, including President Bill Clinton of the US, Prime Minister John Major of Britain, President Nelson Mandela of South Africa.

Their execution evoked a lot of outrage internationally and led to Nigeria's immediate suspension from the Commonwealth and the imposition of sanctions by other countries.<sup>313</sup> The then Prime Minister of the United Kingdom, John Major, was quoted referring to the trial and murder as, 'a fraudulent trial, a bad verdict, and an unjust sentence, now followed by judicial murder'.<sup>314</sup> The military government, it seemed, had hoped that the executions would quell the agitations of the people of the Niger Delta. What it in fact did, was to increase the fervour and desperation of the people, by signalling to them that the Nigerian government was not ready or willing to defend their rights.

On the continental front, there was little or no reaction to this outrage. The community of African leaders (under the auspices of the OAU) did not make any attempt at meaningful intervention in the situation in Nigeria during this time, even though it had adopted the Mechanism for Conflict Prevention, Management and Resolution in 1993. This mechanism remained an aspirational instrument, rather than an effective mechanism.<sup>315</sup>

Shell was implicated in the killings for its complicity and for its human rights violations in the Niger Delta. In 1994, Shell was sued in New York by the Ogoni who had suffered losses as a result of the company's actions in the region. After the Saro-Wiwa executions, the pleadings before the court were amended to include allegations against Shell for its involvement in the killings.<sup>316</sup> After fifteen years of legal battle and appeals, this case was eventually settled by Shell in June 2009, with a payout of \$15.5m to the plaintiffs.<sup>317</sup> The struggle of the

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<sup>313</sup> Inamete UB (2001) *Foreign Policy decision-making in Nigeria* 277.

<sup>314</sup> Quoted by Bill Kovarik of the Society of Environmental Journalists in his article, 'Remembering Ken Saro-Wiwa', available at <http://www.radford.edu/wkovarik/misc/blog/17.wiwa.html> (accessed on 29 of November 2009).

<sup>315</sup> Cases related to the plight of the Ogoni, their arrest, trial (and subsequent execution), were filed by civil organisations before the African Commission for Human and Peoples Rights before the execution of the nine Ogoni. The Commission delayed and postponed its processes and failed to deliver decision until much after the execution.

<sup>316</sup> 'Shell to pay \$15.5m to Settle Nigerians Claims', available at <http://edition.cnn.com/2009/WORLD/africa/06/08/nigeria.shell/index.html> (accessed on 8 of August 2009).

<sup>317</sup> *Ibid*. This settlement amount is considered small compared to the damage that Shell has left in the region, and compared to the millions of dollars that Shell has made operating out of the region.

Niger Delta people continues till date, as the Federal Government has not found any solution to the crisis.

#### 4.5.1.3 Interplay of the military

The above exposé on the challenges of the Niger Delta people leads to another angle that has to be explored. This is the issue of the manner in which oil and the existence of military regimes has influenced, to a certain degree, the interaction of the international community with Nigeria. It is felt that the international community have acquiesced to the different military regimes that Nigeria has had.<sup>318</sup> The abundance of hydrocarbon resources in Nigeria (in terms of oil and gas) has contributed to this acquiescence. In order to maintain the world production levels and to maintain prices in the world oil market, the international community has had to maintain a wide array of sources of hydrocarbons, Nigeria being one of them. This ‘maintenance’ showed in the way that the international community did not outrightly condemn Nigeria’s military regimes. Instead, there was a general silence (acquiescence) regarding the multiple coup d’états that continued to take place in Nigeria and the actions of those military regimes.<sup>319</sup> The military regimes in Nigeria allowed transnational oil companies virtually unfettered access to reserves in exchange for petroleum income from the 60 percent of the joint venture agreements owned by Nigeria. This income has been described as petroleum rents (money accruing from the exploration of crude, seen as form of rent taking), also called petro dollars.<sup>320</sup>

The access granted to the oil companies is said to be unfettered in the sense that although there are rules and regulations governing the exploration of crude in Nigeria as seen above, a culture of corruption and lack of will to enforce the law has seen these rules being blatantly jettisoned in favour of the trans- and multinational companies.<sup>321</sup> An example of this is the acquisition of lands for oil exploration, described above. In this case the rules governing compensation are

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<sup>318</sup> White G. & Taylor S. ‘Well-Oiled Regimes: Oil & Uncertain Transitions in Algeria & Nigeria’ (2001) *Review of African Political Economy* 323-344.

<sup>319</sup> White (2001) *Review of African Political Economy* 323-344 at 325; in relation to the execution of Saro-Wiwa and others, Shell rationalised its inaction on the basis of respect for Nigeria’s sovereignty.

<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

provided for in the legislation, but blatantly ignored by the multinational companies.

Another example is the continued practice of gas flaring by the multinational companies even though legislation exist that make such practice illegal.<sup>322</sup> Gas flaring was made illegal (with certain exceptions) in Nigeria by virtue of an act passed in 1979.<sup>323</sup> The act gave the oil companies five years to affect a plan of action to stop gas flaring by 1984, except in instances where ministerial consent had been obtained. For such consent to be granted, the Minister is required, under the act, to be satisfied that the utilisation or the reinjection of the gas is not appropriate or feasible in particular oil fields.<sup>324</sup> Regulations published in 1984 pursuant to the 1979 act made those conditions more stringent.<sup>325</sup> Even after the passing of the law, oil companies continued with gas flaring under the excuse that they had not had the time to put alternative processes in place. There has also not been any evidence of any special consent granted to any of the oil companies by the Minister to justify the continued gas flaring.<sup>326</sup>

In an attempt to address the situation of gas flaring, the Nigeria Liquefied Natural Gas Company Limited (NLNG) was incorporated in 1989, with the purpose of harnessing Nigeria's abundant gas reserves to produce liquefied natural gas, and other gas products. The company is a joint venture owned by the NNPC with a 49 percent stake, Shell with a 25.6 percent stake, and other oil companies also. The operation of the company's plant in Bonny Island, Port

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<sup>322</sup> Umukoro BE, in his article, 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy Environment: The Case of the Niger Delta', available at <http://www.scribd.com/doc/17914659/Gas-Flaring> (accessed on 8 August 2009), describes the flares as being, 'very loud, dangerously hot, which gratingly ascends to the heavens, twenty-four hours a day, thereby depriving the surrounding area of natural light, it emits thin, black, dense, cloudy smoke containing several harmful and poisonous gases'.

<sup>323</sup> Associated Gas Reinjection Act of 1979, Chapter A25 Laws of the Federation of Nigeria (LFN) 2004.

<sup>324</sup> Section 3 of the Associated Gas Reinjection Act.

<sup>325</sup> Associated Gas Re-injection (Continued Flaring of Gas) Regulations 1984. These more stringent conditions included that before the Minister allows continued gas flaring, more than 75 percent of the total gas produced should have been effectively utilised or conserved; and the produced gas must contain more than 15 percent impurities which would make it unsuitable for industrial use.

<sup>326</sup> Some of the oil companies have invested in projects which they claim have reduced the gas flared. 'Gas gathering' projects for the purpose of gathering and diverting the gas as production have been implemented by Shell, and the gas is now diverted to supply domestic customers, produce some electricity, and to supply the Nigeria Liquefied Natural Gas plant.

Harcourt, has helped to reduce the volumes of gas flared in the country, though not completely. About 60 percent of gas flared is able to be diverted to the NLNG for further production.<sup>327</sup> Forty percent of the gas produced is therefore still being flared in contravention of the Associated Gas Re-injection Act and Regulations. Shell, for its own part, has blamed this situation on the unrest in the Niger Delta which prevented the proper implementation of the mandate of the NLNG, also on the lack of funding from the government owned NNPC (which owns a majority of the joint venture).<sup>328</sup>

The continued flaring of gas in whatever quantities constitutes a disregard for the laws of the host country; an indication that the oil companies seem to be the ones dictating the rules in their various joint venture relationships with the Nigerian government. The Federal High Court of Nigeria, sitting in Benin in 2005, declared continued gas flaring by the oil companies unconstitutional and a breach of the right to life and or dignity of the human person enshrined in Sections 33(1) and 34(1) of the 1999 Constitution.<sup>329</sup> This case will be discussed later in the chapter.

Dealing with the issue of the silence and acquiescence of the international community to the atrocities in these regions, White explains that such acquiescence is evidence of a desire not to ‘rock the boat’ in a way that will impact on international oil prices. Rocking the boat, he says, will adversely affect the economies of developed countries, as they are largely dependent on oil.<sup>330</sup> He argues also that the fact that there are a limited number of actors in the oil extractive industry made it even more delicate for the international community to pressurise the non-democratic governments that ruled Nigeria at the time. This might have led to erratic behaviour from these governments, resulting in a drop in oil production.<sup>331</sup> As a result, few key actors in the international community have had the incentive to facilitate or encourage democratic processes, due to the

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<sup>327</sup> Shell Nigeria – ‘Gas Flare Out’ Shell website, available at [http://www.shell.com/home/content/nigeria/about\\_shell/issues/gas\\_flaring/gasflare.html](http://www.shell.com/home/content/nigeria/about_shell/issues/gas_flaring/gasflare.html) (accessed on 15 August 2009).

<sup>328</sup> *Supra*.

<sup>329</sup> *Jonah Gbemre v Shell Petroleum Development Company (Nigeria) Limited & Ors*. Suit No FHC/B/CS/153/05 (unreported), delivered on the 14<sup>th</sup> of November 2005.

<sup>330</sup> White (2001) *Review of African Political Economy* 323-344 at 337.

<sup>331</sup> *Ibid*.



benefits they get under the military regime. This, together with the natural wealth of the country, has produced a situation in which oil companies and military regimes become mutually dependent.<sup>332</sup>

White further explains that the claim of sovereignty and territorial integrity is also another factor that contributes to this dynamic relationship. The proclaimed ‘inviolability’ of sovereign states has been used by the international community to explain their unwillingness to interfere in the domestic affairs of Nigeria.<sup>333</sup> These situations have worked to erode the rule of law in the country, and to further delegitimise the already questionable legal system and laws of the country.

#### 4.5.1.4 Effects of oil on Nigeria

It has been described as a paradox that despite the huge revenues coming in from oil in the past thirty odd years, Nigeria still remains to some extent at a stunted stage of development, and is still referred to as an under-developed economy. The explanation for this is said to be evident in the analysis of the effect that the focus on one export commodity has had on other sectors of the economy. Oil bonanza has also created a situation of political authoritarianism, and the propensity for corruption.<sup>334</sup> As stated by White, ‘the existence of a lucrative lead sector not only prompts dependency in the sense of “vulgar dependencistas” but it also engenders, “a paradox of plenty”’.<sup>335</sup>

The term ‘paradox of plenty’ is one that has been used by Karl<sup>336</sup> to explain why despite massive revenue from oil, different oil-exporting countries (like Venezuela, Iran, Nigeria, Algeria and others) have suffered disappointing developmental outcomes over the years. Karl explains that ‘*dependence on a particular export commodity shapes not only social classes and regime types ... but also the very institutions of the state, the framework for decision-making, and*

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<sup>332</sup> White (2001) *Review of African Political Economy* 323-344 at 324. He feels that this scenario applies to Algeria also, which has been under military rule for many years.

<sup>333</sup> White (2001) *Review of African Political Economy* 323-344 at 325.

<sup>334</sup> White (2001) *Review of African Political Economy* 323-344 at 327.

<sup>335</sup> *Ibid.*

<sup>336</sup> Karl TL (1997) *The Paradox of Plenty: Oil Booms and Petro-States* (Studies in International Political Economy, no 26).

*the decision calculus of policy makers.*<sup>337</sup> It would appear that the corrupt military regimes in Algeria and Nigeria had historically rejected developmentalist agendas in favour of their own personal objectives and agendas, which usually included securing access to oil rents, making the countries ‘rentier states’.

The theory of the ‘rentier state’ explains that countries that receive substantial amounts of oil revenues from the international community on a regular basis, tend to become autonomous from their societies, unaccountable to their citizens, and autocratic. The theory is used to help explain why these states with abundant resource wealth perform less well than their resource-poor counterparts.<sup>338</sup> Omeje clarifies this definition further when he says that ‘a rentier state is a state reliant not on the surplus production of the domestic population or economy but on externally generated revenues or “rents”, usually derived from the extractive industry such as oil’.<sup>339</sup>

Karl contends further that in these oil-exporting states (which are also under-developed or developing), oil revenue makes it unnecessary for the states to depend on domestic production or domestic taxation to finance development or to finance the running of government. In such situations, governments are not forced to formulate their goals and objectives under the scrutiny of citizens who pay taxes and the bills. They are rather permitted to distribute funds (oil funds) among sectors and regions on an *ad hoc* basis.<sup>340</sup> Thus, these states generally lack a productive outlook in this sense, as revenues from natural resource rents contribute a significant proportion of the gross domestic products and are distributed at the expense of the real productive sectors of the economy.<sup>341</sup> This distribution of rentier revenues, in the absence of stable and well-developed legal, political and bureaucratic institutions, is what is said to encourage corruption.<sup>342</sup>

Omeje goes further to explain that corruption in rentier states is further enhanced by the presence of what he refers to as a ‘patrimonial political culture’. This he adduces, describes what is observed in the ‘values, norms and networks of

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<sup>337</sup> Karl (1997) *Studies in International Political Economy* 7 (own emphasis).

<sup>338</sup> *Ibid.*

<sup>339</sup> Omeje K (2006) *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria* 2.

<sup>340</sup> Karl, (1997) *Studies in international Political Economy* 190.

<sup>341</sup> Omeje (2006) 3.

<sup>342</sup> *Ibid.* Nigeria is a perfect example.

inherited traditional patterns of politics in most African and post-colonial states', which outwardly appear to be institutionalised administrative states, but are really operating on the basis of 'patron-client networks and trajectories rooted in historical patterns of authority and social solidarity'.<sup>343</sup> The effect of this is that it blurs the distinction between secular and sacred, and more importantly, between public and private resources.<sup>344</sup> Further, he posits that it blurs the contemporary statutory distinction between public office, the office holder, public resources and private purposes.

In the 'rentier' state of Nigeria, this is the situation, as those in authority accumulate public funds for their own personal purposes, without regard to the purpose and state of the funds, and to the illegality of their actions. Corruption has therefore become an institutionalised practice of both the state and the society. The income ('rent') derived from oil has not only been used to provide infrastructure and social amenities, but it has mainly found its way into private pockets, as a tool for political and economic patronage. This has created distortions on the Nigerian economy. Purchasing loyalties have taken on a predatory quality giving rise to 'pirate capitalism', as described by Schatz.<sup>345</sup> Cronyism and corruption thus have become the order of the day. A wide range of actors, both internal (the politicians, public servants, the private sectors of the society) and external (the international community comprising of donors, aid workers, World Bank officials, transnational corporations), are seen now as the contributors and beneficiaries (directly and indirectly) to the corruption that deforms economic and political life in Nigeria.<sup>346</sup>

The instances of corruption in Nigeria are varied and overwhelming. From the corruption at the highest levels of political authority (usually referred to as 'grand' corruption), to the corruption at the state system ('petty' corruption), all of these have resulted in a situation in which corruption has become pandemic in Nigeria.<sup>347</sup> A few instances are provided below for the purposes of clarity.

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<sup>343</sup> *Ibid.* He refers to Grugel (2002) *Democratization: A Critical Introduction*.

<sup>344</sup> *Ibid.*

<sup>345</sup> Schatz SP 'Pirate Capitalism and the Inert Economy of Nigeria' (1984) 22(1) *J. of Modern African Studies* 45-57.

<sup>346</sup> White (2001) *Review of African Political Economy* 323-344 at 328.

<sup>347</sup> Dike V 'Corruption in Nigeria: A New Paradigm for Effective Control', available at

An instance of ‘grand’ corruption with international actors’ involvement is the recent indictment of KBR Incorporated and Halliburton Company by the US Securities and Exchange Commission, on charges related to the bribery of the then Nigerian president and government officials over a period spanning 10 years.<sup>348</sup> KBR Incorporated was then in the early 1990’s a subsidiary of American based Halliburton Corporation. A United States Department of Justice investigation had discovered this bribe scheme in which amounts totalling \$180 million were paid in instalments to then President General Abacha and other government officials, in order to ensure that the company secured a \$6 billion contract to build a liquefied natural gas facility in the Niger Delta.<sup>349</sup> Abacha, who ruled the country from 1993 to 1998, is accused of having amassed over £5 billion from the Nigerian treasury through various schemes. With these proceeds of ill-gotten wealth, he and his family were able to deposit in foreign accounts all over the world.<sup>350</sup>

Another example is what is referred to as the ‘Globacom affair’, which boiled over in 2005. In this scandal, then Vice President Abubakar was accused by the Economic and Financial Crimes Commission (EFCC) of Nigeria, of using his position as the vice president and chairperson of the Petroleum Technology Development Funds (PTDF)<sup>351</sup> to divert funds meant for the national treasury to himself and to secure his interests in other foreign companies. These cases are rampant in Nigeria, and unfortunately, criminal charges are rarely brought against the beneficiaries of such misappropriation.<sup>352</sup>

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<http://www.africaneconomicanalysis.org/articles/gen/corruption-dike/htm.html> (accessed 22 April 2010).

<sup>348</sup> Litigation Release No. 20897A / February 11, 2009 - *Securities and Exchange Commission v. Halliburton Company and KBR, Inc.*, 4:09-CV-399, S.D. Tex. (Houston), available at <http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm> (accessed on 22 April 2010).

<sup>349</sup> *Ibid.*

<sup>350</sup> The Guardian, ‘London Slow to Act over Missing Billions’ 4<sup>th</sup> October 2001, available at <http://www.guardian.co.uk/uk/2001/oct/04/london> (accessed on 26 April 2010).

<sup>351</sup> This fund was set up with the purpose of empowering and equipping young Nigerians with the skills and knowledge needed in the oil and gas industry, i.e. to qualify Nigerians as graduates, professionals, technicians and craftsmen in the field of engineering, geology, science and management in the oil and gas industry. Contributions to the fund were from the government and oil companies etc.

<sup>352</sup> Edozie RK, ‘Nigeria’s 2007 Elections in Comparative Perspective: Democratic Capitalism and the Crisis of Democracy in Africa’ in Okafor VO (ed) (2007) *Nigeria’s Stumbling Democracy and its Implications for Africa’s Democratic Movement* 148.

Transparency International, an international non-governmental organisation, which focuses on how governments over the world deal with issues of accountability and transparency in the running of the state, has recently released its Corruption Perception Index (CPI).<sup>353</sup> This is an annual survey of levels of perceived public sector corruption in countries all over the world, which has attained a great level of international integrity. In the past ten years, Nigeria has ranked as one of the most corrupt countries on the CPI surveys. In the year 2000 in particular, the country was ranked as one of the countries with the highest levels of corruption, out of ninety countries surveyed, with a rating of 0.6 (where 0 is the highest level of corruption and 10 the lowest).<sup>354</sup> By 2009, Nigeria's ranking had improved by rising to the 130<sup>th</sup> position out of 180 countries surveyed, with a rating of 2.5.<sup>355</sup>

These actors have contributed in varying degrees to the endemic corruption that has now beset the country. This has considerably crippled the effectiveness of the rule of law in the country, as all the actors of society, whilst not identifying with the present 1999 Constitution due to its lack of legitimacy, have become gripped by the pandemic of corruption and mismanagement that have characterised the rentier state that Nigeria has become. The abundance of petrodollars had a beclouding effect on the reasoning of Nigerians. Oil wealth insulates authoritarian (military or civilian) states pretty well, enabling the state to shun a balanced development of the national economy, and to ignore societal objectives. In relation to this, Clapham has stated that

*'it was symptomatic of the relationship between the rentier state and its population that despite the wave of democratisation sweeping Africa in the early 1990s, no African oil producing state - from Algeria south*

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<sup>353</sup> Transparency International Corruption Perception Index (CPI) Survey, 2009, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009](http://www.transparency.org/policy_research/surveys_indices/cpi/2009) (accessed on 26 April 2010).

<sup>354</sup> Transparency International CPI survey, 2000, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/previous\\_cpi/2000](http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi/2000) (accessed on 26 April 2010).

<sup>355</sup> Transparency International CPI survey, 2009, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table) (accessed on 26 April 2010). See table 2 in the annexure.

*through Nigeria and Gabon to Angola – achieved a successful democratic transition’.*<sup>356</sup>

Clapham’s observation is very poignant in relation to Africa. A look at other oil producing countries shows that there are other oil-producing nations outside of Africa, that have been able to proceed on the development path, despite having had military rule experiences. In the bureaucratic-authoritarian experience of Latin America, for example, economic development did occur to a degree. Countries such as Chile, Venezuela and even South Korea, have experienced significant economic development under military regimes. However, in the case of Nigeria, as well as other African oil-producing countries, little or no development occurred during such comparative military domination.

The reason for this has been said to be the utter dependence on oil – to the detriment of the development of other economic sectors, as well as to political liberalisation.<sup>357</sup> Coupled with this, however, is the fact that the legal systems in African countries are mainly forced and foreign, and as a result, the countries and societies do not have an inherent value based legal system which would counter the effects and lure of corruption and other vices. This scenario is what led Diamond to observe that, ‘without question, both for democracy and development, oil has been more of a curse than a blessing for Nigeria’.<sup>358</sup>

The outcome of all of this is that in Nigeria, the facilitators of state power and the suppliers of the rents essential to military domination had been the transnational corporations, and consumers in advanced-industrialised countries respectively. Even in the case of the ‘democratic’ governments in Nigeria, the situation has remained the same. Politicians still depend a lot on the rents from transnational corporations. This creates an abnormal situation. A situation in which a social contract can be said to exist, not between those in government and the society; but between those in government and the multinationals that provide the state with resources, through the continued purchase of oil.<sup>359</sup> Oil rents continue to be

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<sup>356</sup> Clapham C (1996) *Africa in the International System: The Politics of State Survival* 71 (own emphasis).

<sup>357</sup> White (2001) *Review of African Political Economy* 328.

<sup>358</sup> Diamond L (1997) ‘Postscript and Post-mortem’ in Diamond L, Kirk-Greene A and Oyediran O (eds) *Transition without End: Nigerian Politics and Civil Society under Babangida*.

<sup>359</sup> White (2001) *Review of African Political Economy* 323 at 328.

paid, and is embezzled by those in government and the elite with their connections. The law is therefore rendered ineffective against these parties. In the absence of the necessary social contract between the government and the society, little can happen in terms of economic or social development, and ultimately in terms of the entire society working towards entrenching the rule of law in the nation.

The main point to note here is that authoritarian regimes, whether military or civilian, provide a certain ‘cloak’ for the operation of and profit-taking by transnational corporations in return for compensation.<sup>360</sup> This situation can only be changed by the people if they are no longer willing to accept the *status quo* as it is.

#### 4.5.1.5 Change through the power of the people

The 1995 execution of Ken Saro-Wiwa and the continued degradation of the Niger Delta environment, amongst other things, have resulted in Shell and other companies operating in the region suffering a loss of reputation amongst the people of the oil producing areas and Nigerians generally.<sup>361</sup> Consequently, the Niger Delta communities have withdrawn their social licence for the oil companies to operate in their lands. This has resulted in protests, demonstrations and violence against these companies which have escalated and turned deadly. An era of militancy has emerged in which heavily armed militants (mostly the youths of the regions who have been rendered redundant by the pollution and environmental degradation of the area), have taken up the battle against the oil companies and the Nigerian government. They have turned to sabotaging and blowing up oil fields, oil pipelines and structures; kidnapping expatriates working with the oil companies for ransom; as well as also kidnapping locals if they are associated with the oil business, politics or wealthy people. Heavy ransoms have been paid and continue to be paid by both the oil companies and the federal government.<sup>362</sup> These monies are then used to further arm the militants (and not

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<sup>360</sup> White (2001) *Review of African Political Economy* 323 at 335.

<sup>361</sup> President Yar’Adua was quoted in the *Punch* of 5<sup>th</sup> of June 2008, while explaining the possibility of the government withdrawing Shell’s licence to operate in the Niger Delta, as saying that there was ‘a total loss of confidence between Shell Petroleum and the Ogoni people’.

<sup>362</sup> This is despite the federal government’s denial of ever having paid any monies to the militants. Various cases of kidnapping have occurred: Pa Simeoun Soludo, father of the former

for the development of the area). High-handed attempts by the Nigerian law enforcement agencies to enforce law and order in these regions have ended up in deadly battle between the militants and the law enforcement agencies, and even the Nigerian army. All of these have made the region very volatile and have affected the production of the oil companies, resulting in the cutting of Nigeria's oil production by about a third.<sup>363</sup>

After various failed attempts to impose law and order in the regions without addressing the real demands of the people and the militants,<sup>364</sup> in July 2009, the Federal Government of Nigeria offered amnesty from prosecution and punishment to the militants in exchange for their laying down their arms and ceasing all activities aimed at disrupting the operations of the oil companies.<sup>365</sup> Militants who took up the offer were given a monthly stipend. The amnesty offer ended in October 2009, and seems to have achieved relative success, as a good number of militants laid down their arms in exchange for non-prosecution.<sup>366</sup> On the 15<sup>th</sup> of April 2010, Acting President Jonathan in a CNN interview with CNN Anchor, Christiana Amanpour, mentioned the rehabilitation programs that were under way in the Niger Delta, to provide skills and knowledge to those of the militants who had taken up the amnesty offer of the Federal Government.<sup>367</sup>

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Central Bank of Nigeria governor was kidnapped for ransom. It is alleged that ransom of between 200 and 500 million naira was paid. Many more instances are regularly reported in the daily newspapers. In 2009, the then Minister for Police Affairs, Ibrahim Yakubu Lame, reported that 512 people had been kidnapped in Nigeria in that year, compared to 353 people who were kidnapped in the year 2008. See '512 Kidnappings in Nigeria this Year', available at <http://www.naijafed.com/naijafed/2009/7/23/512-kidnappings-in-nigeria-this-year.html> (accessed on 18 June 2010); THISDAY newspaper, 11/01/09 – A Deputy Director in the Federal Ministry of Agriculture and Water Resources, Alhaji Abubakar, was kidnapped by gunmen, available at <http://www.thisdayonline.com/> (accessed on 13 June 2010).

<sup>363</sup> Hanson S, *MEND: the Niger Delta's Umbrella Militant Group* Council on Foreign Relations website, available at <http://www.cfr.org/publication/12920/> (accessed on 1 December 2009). In 2009, Nigeria's oil production has reduced from about 2.6 million bpd in 2006 to about 1.7 million bpd in 2009.

<sup>364</sup> Which included greater appropriation to the regions of the rents of oil; compensation for the costs of environmental degradation; provision of social amenities; provision of schools and sponsorship for the children; and employment opportunities being made available to the youths.

<sup>365</sup> 'Nigeria begins Amnesty for Niger Delta militants', available at <http://www.guardian.co.uk/world/2009/aug/06/niger-delta-militants-amnesty-launched> (accessed on 24 April 2010).

<sup>366</sup> 'Top Militants Accept Nigeria's Amnesty Offer', available at the Wall Street Journal website: <http://online.wsj.com/article/SB125461198947462111.html> (accessed on 1 December 2009).

<sup>367</sup> Interview, titled 'Rehabilitation for Niger Delta Militants', available at



It is necessary to note that despite the fact that the actions of the militants in vandalising infrastructure, blowing up pipelines and others constitute breaches of the law under the Nigerian legal system, there is a dearth of any cases of enforcement of the law against these perpetrators. Section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria vests all minerals (oil and gas inclusive) in the control of the Federal government, to be used only as permitted by the National Assembly. Oil extraction and oil possession outside an agreement with the Federal government is therefore illegal. Another law regulating this matter is the Petroleum Production and Distribution (Anti-Sabotage) Act,<sup>368</sup> section 1, which defines ‘sabotage’ and ‘saboteur’.<sup>369</sup> This Act covers activities such as oil bunkering, pipeline vandalism, fuel scooping and oil terrorism. It criminalises all these activities and any person(s) or company found involved in such activities would be guilty of economic sabotage.<sup>370</sup>

The enforcement of these and other related laws have been a dismal failure, as the various law enforcement agencies have not been effective (or perhaps willing) in bringing the perpetrators of these acts of sabotage and terrorism against the nation to book. This failure on the part of law enforcement agencies and state security agencies may be attributed to the inability and unwillingness of the state, in good faith, to enforce its own laws. It could also be attributed to the ‘disconnect’ that exists between the people and the law due to the lack of legitimacy of the law. Thus, even at such levels of law enforcement, there appears to be no determination on the part of the officers to enforce the law as a manifestation of an innate desire to uphold values and norms. This is one of the challenges facing the enthronement of the rule of law in the country. The crisis in the Niger Delta did not happen suddenly. As this chapter has shown, the

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<http://edition.cnn.com/2010/WORLD/africa/04/14/nigeria.jonathan/index.html?iref=allsearch> (accessed on 15 April 2010).

<sup>368</sup> Act 353 of 1990.

<sup>369</sup> The section defines oil pipeline sabotage as concerning the illegal or unauthorised act of destroying or puncturing of oil pipelines so as to disrupt supply or to siphon crude oil or its refined products for the purposes of appropriating it for personal use or for sale on the black market or any other outlet.

<sup>370</sup> Petroleum Production and Distribution (Anti-Sabotage) Act of 1990.

discontent of the communities there had been festering and had built up over a number of years.<sup>371</sup>

Despite the rampant nature of these breaches of the law in the Niger Delta, only Asari Dokubo (the leader of one of the groups operating in the region known as the Niger Delta People's Volunteer Force (NDPVF)), has been charged. He was arrested and charged with treason for making public statements declaring war on the Nigerian state in 2005. He was however later released from detention in June 2007 by the Federal High Court in 2007 on grounds of ill-health.<sup>372</sup> This sends out the wrong message to the citizenry and confirms to them that people can easily get away with any kind of wrongdoing, as the law is ineffective.

Corruption has been said to play a major role in this inability or unwillingness to enforce the law. In describing corruption as the root cause of this problem, Onuoha says the following:

‘It is behind the rise in poverty and unemployment in the country, resulting in increasing numbers of young people without hope of making a living, which in turn makes it easy to recruit them for criminal activities. Just as corrupt government institutions over the years have allowed oil bunkering to take place on a larger scale, the lack of a comprehensive preventive program by the Federal *and State* governments to arrest the situation has contributed to the persistence of the illegal business.’<sup>373</sup>

This gives an indication of the state of the rule of law in Nigeria, and how badly encroached it has become. It furthers the psychological notion in the society that people can get away with anything in Nigeria, thereby encouraging the deviant actions of the militants in the Niger Delta. This is however not limited to the Niger Delta only; it is a reflection of what goes on in other aspects of national life, where the law has been turned into an ornament for the purpose of gracing

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<sup>371</sup> A great deal has been written on the crises in the Niger Delta and even other oil producing areas in Nigeria. See Omotola (2006) 1(3) *Accord Occasional Paper Series* 11 (above); Obi CI ‘The Oil Paradox: Reflections on the Violent Dynamics of Petro-Politics and (Mis) Governance in Nigeria’s Niger Delta’ (2004) *African Institute Occasional Paper* No 73; Omeje (2006) chapter 3.

<sup>372</sup> ‘Asari-Dokubo Arrives PH, vows to Continue Struggle’, available at <http://allafrica.com/stories/200706170006.html> (accessed on 30 July 2010).

<sup>373</sup> Onuoha FC ‘Oil pipeline Sabotage in Nigeria: Dimensions, Actors and Implications for National Security’ (2008) 17(3) *African Security Review* 99-115 at 113 (own emphasis).

our statute books. In every area and sphere of life, there is a blatant disregard for the law, and also a blatant inaction on the part of the enforcement agencies, persons and institutions.<sup>374</sup>

For the militants in the Delta, there is no sense of ownership or belonging to the notion of ‘Nigeria’. Their feelings of frustration and being let down by the Nigerian government and the injustices to which the government has turned a blind eye, have obliterated any sense of belonging or ownership they may have had to the ‘Nigerian’ nation and concept.

Apart from the internal influences affecting the rule of law in Nigeria, as discussed in chapter three, there are also various external influences that impact on the rule of law. Principal amongst these is the influence of globalisation. Globalisation is the lingo of the 21<sup>st</sup> century. Starting in the 20<sup>th</sup> century, globalisation as a phenomenon has impacted greatly on nations with either positive or negative effects. The following sections will take a look at globalisation in Nigeria, its effects and how it has impacted on the rule of law in the country.

#### **4.5.2 Globalisation and its impact on Nigeria (especially on democracy)**

Globalisation, as has been defined in chapter three, is the process of advancement or increasing interaction between and amongst the countries, peoples and economies of the world, facilitated by progressive technological change in locomotion, communication, political and military power, knowledge and skills, as well as interfacing of cultural and value systems and practices.<sup>375</sup> It is a phenomenon propelled by recent developments in science and technology, which

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<sup>374</sup> The nation continues to be rocked by scandals of embezzlement, fraud, misappropriation of public funds, corruption and others. This is prevalent in all sectors and all sorts of people are involved. The latest of such scandals is the arraignment of the chairman of the ruling party, the Peoples Democratic Party (PDP), on charges of N100 million fraud – ‘Ogbulafor faces N100m fraud charge’, available at

<http://234next.com/csp/cms/sites/Next/Home/5560273->

[146/ogbulafor\\_faces\\_n100m\\_fraud\\_charge.csp](http://234next.com/csp/cms/sites/Next/Home/5560273-146/ogbulafor_faces_n100m_fraud_charge.csp) (accessed on 27 April 2010).

<sup>375</sup> Nsibambi A ‘The Effects of Globalization on the State in Africa: Harnessing the Benefits and Minimizing the Costs’, United Nations General Assembly Second Committee Panel Discussion on Globalisation and the State, 2 Nov 2001.

in practice cuts across four aspects, namely trade, capital movements, movement of people, and the spreading of knowledge and technology.<sup>376</sup>

African countries also experienced this in the 70's and 80's, when prior to this time, inward-oriented policies led to a decline of their economies, high inflation and rise in poverty levels. However, a change to pursue outward-oriented (a necessity of globalisation) policies has led to a rise in their incomes, and a slow recovery of their economies, as a potential for growth, development and poverty reduction is emerging.<sup>377</sup> There are many dimensions to globalisation, one of which is the influence it has had on democratisation across the world. As discussed in the previous chapter, globalisation and democracy are inextricably interlinked.<sup>378</sup> Globalisation has enabled democracy as a system of government to spread rapidly around the globe in the past three decades.<sup>379</sup> It has resulted in a situation whereby demands from ordinary citizens along with increased pressures and inducements from international communities have made democratisation a truly global phenomenon.<sup>380</sup> This interaction between globalisation and democracy is what has been referred to as 'global-democratisation'.<sup>381</sup>

The focus of this section is to examine the impact of globalisation in Nigeria, especially as it relates to democracy and the enthronement of the rule of law and broader political dimensions.

In Nigeria, global-democratisation in all its fullness can be said to have begun in the mid 1980s<sup>382</sup> when the then military regime of General Ibrahim Babangida introduced and implemented the IMF (International Monetary Fund) and World Bank economic restructuring Structural Adjustment Programme (SAP) as a pre-

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<sup>376</sup> *Ibid.*

<sup>377</sup> Okoye SE, 'Globalisation and the Political Future of Nigeria', Nigeriaworld Feature Article available at <http://nigeriaworld.com/articles/2004/oct/131.html> (accessed on 2 July 2009).

<sup>378</sup> Kura SY (2005) 'Globalisation and Democracy: A Dialectical Framework for Understanding Democratization in Nigeria' *Globalisation*, available at <http://globalization.icaap.org/content/v5.1/kura.html> (accessed on 2 July 2009).

<sup>379</sup> Shin DC & Tusalem RF 'The Cultural and Institutional Dynamics of Global Democratization: A Synthesis of Mass Experience and Congruence Theory' (2007) 3(1) *Taiwan Journal of Democracy* 1-28 at 2.

<sup>380</sup> *Ibid.*

<sup>381</sup> Shin (2007) 3(1) *Taiwan Journal of Democracy* 1 at 3.

<sup>382</sup> See Kura (2005) (*ibid*) for a concise explanation of the links between globalisation and democratisation.

condition for lending.<sup>383</sup> Even though there were elements of globalisation prior to the introduction of SAP, the introduction of SAP marked a turning point in Nigeria's interaction with the international community. This type of economic restructuring program was introduced all over Africa, and usually manifested under different acronyms such as structural economic reforms, economic adjustment policies, and economic reform programmes.<sup>384</sup> They are basically designed in such a way as to open up the economy to international market forces of aggregate demand and aggregate supply to determine the direction of that economy. Such projects form part of the pillars of contemporary globalisation.<sup>385</sup>

SAP became necessary in the country, not only because it was demanded by the international financial institutions, but more importantly, because Nigeria as a country was going through a period of economic crisis, marked by a heavy debt burden, and a crisis of production (local production had earlier been affected by the introduction of oil dollars in the 70's that made it cheaper for people to import goods).<sup>386</sup>

Stabilisation of the Nigerian economy was necessary before SAP could be properly implemented. Thus, in the late seventies and early eighties, the Economic Stabilisation Act<sup>387</sup> was implemented. SAP involved amongst other things, cuts in public expenditure, privatisation and commercialisation of public utilities and services, devaluation of the currency and deregulation of the exchange rate.<sup>388</sup>

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<sup>383</sup> Okoye, *supra*.

<sup>384</sup> Referred to in Chapter 3 under sub-heading, 'Democratisation in Africa'.

<sup>385</sup> Okoye, *supra*.

<sup>386</sup> Kura, *supra*. The IMF felt that Nigeria's economic crisis was the result of the structural economic distortions being experienced in the country then. These were namely overvalued exchange rate (due to oil); import regulation; huge public sector expenditure; poor investment management and low returns on capital; high wage structure and low productive labour; and over-extended, inefficient and unproductive public enterprises. All of these, coupled with high rates of inflation and huge growth of foreign and domestic debts, meant that the economy was in a critical shape at the time of the implementation of the SAP. This was documented in the National Centre for Economic Management and Administration (NCEMA), Technical proposal titled, 'Structural Adjustment Programme in Nigeria: Causes, Processes and Outcomes' 2-4.

<sup>387</sup> Economic Stabilisation Act of 1982, passed into law during the Shagari regime in early 1980's. It enabled the implementation of policies such as sharp restriction of domestic demand through monetary and fiscal measures, and longer term adjustment instruments.

<sup>388</sup> Okoye *supra*.

There are different thoughts as to the effects of SAP in Nigeria. Some feel that it has had a totally negative effect, whilst others feel otherwise. It has been said that instead of developing the economy, SAP rather inflicted more hardship on the crisis-ridden economy of the nation, and on the citizens of the country as well. Inflation and unemployment increased, living conditions of the working class deteriorated due to the devaluation of the currency, and manufacturing industries nearly all closed down.<sup>389</sup> The GDP stagnated and foreign debt rose exponentially.<sup>390</sup> This led to a further degeneration of the Nigerian economy.<sup>391</sup> The introduction of SAP was said to be the beginning of Nigeria experiencing the negative consequence of globalisation.<sup>392</sup>

It is also believed that SAP made positive contributions to the Nigerian economy, despite the fact that the gains of SAP have now practically been eroded by the lack of policy consistency, graft and corruption, mismanagement in all spheres and primarily the lack of commitment to democracy and democratic values.<sup>393</sup>

Ihonvbere has stressed some of the gains of SAP as follows:

- SAP helped to bring to light the magnitude of the economic problem and challenges in Nigeria. The false sense of security and the inviolability of the Nigerian economy that prevailed after the discovery and exploration of oil were dispelled with the challenges of SAP. SAP brought about the realisation that the boom days of waste were over, and that there was need to plan and be prudent in the use of resources and materials.<sup>394</sup>
- Another occurrence that SAP helped to facilitate, whether directly or indirectly, is the emergence of political opposition parties. The implementation of the program without consideration of the hardship and suffering it imposed on the people; the growing and continuing disparity

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<sup>389</sup> Onyeonoru I, 'Globalisation and Industrial Performance in Nigeria' (2003) 28(3 & 4) *Africa Development* 33-66 at 38. The author gives the example of the Food Beverage and Tobacco industries, where there was a great contraction as their numbers in operation reduced from about 80 companies in 1986 to 69 surviving in 1992. Out of the 69, however, only 26 were thriving on the basis of their after tax profits.

<sup>390</sup> Onyeonoru (2003) 28(3 & 4) *Africa Development* at 38; also Ihonvbere JO (1994) *Nigeria: The Politics of Adjustment and Democracy* 111-115.

<sup>391</sup> Kura, *supra*.

<sup>392</sup> Kura, *supra*.

<sup>393</sup> Kura, *supra*.

<sup>394</sup> Ihonvbere (1994) 123-124.

in the society; the grossly unequal distribution of the pains of adjustment; the arrogance of military power; the blatant affluence displayed by the rich (even when such riches was a product of corruption) in the face of deep levels of suffering amongst the populace, all led to the resurgence of opposition groups and civil liberties organisations.<sup>395</sup>

- SAP can also be said to have created a better appreciation of the need for resource management, savings and investment in productive activities.<sup>396</sup>

The economic restructuring policies of the Breton Wood institutions (which were introduced in Africa, and particularly in Nigeria), however, were unable to change the political terrain of governance in Nigeria.<sup>397</sup> This has been explained to be due to the fact that SAP was introduced into Nigeria during two consecutive decades of military regimes (with a brief interval of four years, from 1979 to 1983, when a civilian regime was in place). These military regimes had little or no pressure from global partners to return the country to democratic rule due to the hugely unfettered access to oil that they provided to the global actors, and so the global partners were not interested in the proper implementation of the policies. Also, there was insufficient background work done as to the mode of implementation of the program in the country.

The question can rightly be asked whether Nigeria's entrance and participation in globalisation has improved the political situation or the rule of law in the country. One would have thought that with Nigeria's entrance into the global market, more attention would be paid by her global partners to the state of things within the country, especially in relation to her maintenance of the rule of law. However, global trade with Nigeria by international partners continued, despite the undemocratic state of things within the country and amongst the people. It is however to be noted that some of these international partners (like the OAU) are hindered by their constitutive laws (which prohibit any type of interference in the political affairs of any member state) from insisting on democratic governance within the Nigerian state. Such constitutive acts also prohibit the partners from being influenced in their decisions by the political character of the host states

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<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> Kura, *supra*.

concerned.<sup>398</sup> The OAU especially, did not act based on the principles of ‘non-intervention’ and ‘sovereignty’ contained in its charter.<sup>399</sup>

Kura has pointed out that as part of the consequence of globalisation, the events within the country became of international note, to the effect that some aid and donor organisations worked in concert with Nigeria’s re-energised civil society to mount pressure on the government to return the country to civil rule, and to introduce the necessary political reforms that will see the country striving and being successful as a democratic project.<sup>400</sup> Accordingly, in this sense, globalisation contributed immensely to the spread of democracy in the contemporary international system, however, its impact in individual states’ democratisation processes differ (in degree and scope).<sup>401</sup>

As part of the impact of globalisation, the Nigerian state finds itself caught with having to share its decision-making powers with international forces of production and finance. For example, due to the country’s huge foreign debt, Nigeria’s budget formulation and implementation are designed to conform to provisions and directives from the IMF and International Financial Institutions (IFI).<sup>402</sup> This erodes the sovereignty of the nation, and has negative consequences on employment creation and poverty reduction strategies.<sup>403</sup> This is so as government seems to have jettisoned its role in service delivery, and shifted focus from satisfying public demands, to simply removing market barriers and thereby loosing the necessary powers of distributive capabilities.

The adherence by government to the policies of the international community usually translates into failure to fulfil its electoral promises, and disappointment in the populace. This has resulted in highly confrontational incidents between the

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<sup>398</sup> In the constitutive acts of some of the partners, only economic considerations were considered relevant to their decisions, not political or social factors. See, for example, article 10, section 10 of the World Bank Act. This is either indicative of an attempt on the part of these partners not to interfere with the sovereignty of a state, or a complete focus on the benefits of trading with the country concerned.

<sup>399</sup> See articles 2, 3 and 6 of the OAU Charter.

<sup>400</sup> Kura, *supra*.

<sup>401</sup> *Ibid*.

<sup>402</sup> *Ibid*.

<sup>403</sup> United Nations Public Administration Network *The Challenges of Globalization in Africa: what Role for Civil Society and Other Stakeholders* 2002, available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008264.PDF> (accessed on 27 April 2010) 5.



government and the people (in the form of strikes, change of voting patterns at election and others),<sup>404</sup> and amongst the people as well (religious and ethnic violence, stemming from the competition for scarce resources).<sup>405</sup> Unfortunately, government has not been able to fashion out a good enough solution to these myriad of problems, as new programs and initiatives that were designed have not been able to address the needs and concerns of the people.

An indication of globalisation having caught up with Nigeria for a good number of years is evident in the presence and dominance of foreign investors in the telecommunications field. In 2001, then president Obasanjo's government de-regulated the telecommunications industry by removing NITEL's (Nigerian Telecommunications Limited) monopoly and granting the Global System for Mobile Communication (GSM) licenses to interested parties.<sup>406</sup> The South African company, MTN, was one of the licensees, along with Globacom, Celtel, MTel and Etisala (of Middle Eastern origins).<sup>407</sup>

Another indication of the interplay that globalisation brings about is the effect that local happenings within Nigeria sometimes have on the international plane. For instance, volatile actions taken by any of the groups involved in the Niger Delta struggle usually pan out to have an effect on the prices of oil in the international market, causing spikes and hikes in the prices of oil internationally.<sup>408</sup> For example, when Alhaji Mujahid Asari-Dokubo issued a

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<sup>404</sup> A very pertinent example is the strikes that have hit the education sector over the years. The Academic Staff Union of Universities (ASUU) in November 2009 called off an indefinite strike action it had taken over non- payment of salaries, non-improvement of tertiary education infrastructure, and many others.

<sup>405</sup> Kura, *supra*. The spate of ethnic and religious violence breaking out in different parts of the nation over the years has been high indeed. Between February and May 2000, serious religious riots broke out in Kaduna (a northern state), in which over 1000 people were killed. Hundreds of ethnic Hausa were also killed in inter-religious rioting in Jos, Plateau State. In October 2001, hundreds were killed and thousands were again displaced in communal violence. See report available at

<http://www.globalsecurity.org/military/world/war/nigeria-1.htm> (accessed on 1st May 2010). Recently, in January 2010, fresh religious and ethnic riots broke out in Jos. This area has been plagued with ethnic and religious riots for over twenty years. Police put the estimate of people who lost their lives to about 326, whilst thousands were displaced in the fighting.

<sup>406</sup> Taiwo R, 'The Thumb Tribe: Creativity and Social Change Through SMS in Nigeria' (2010) 35(1) *California Linguistic Notes* 2.

<sup>407</sup> *Ibid.*

<sup>408</sup> Imomoh EU 'The Global Effect of Supply Disruption on Crude Oil', paper presented at the Nigerian Extractive Industry Transparency Initiative (NEITI) Workshop in Abuja, Nigeria on the 17<sup>th</sup> February 2005, available at

statement in 2005, declaring the intention of the group to blow up oil installations in the Niger Delta, oil prices spiked to over \$50 per barrel mark.<sup>409</sup> Thus the fluctuations in oil prices experienced over time usually have their roots in the developments in one or more of the oil producing countries.<sup>410</sup>

In view of the above, it is worthy to note that any outbreak of conflict in Nigeria's oil rich region has the likelihood of impacting negatively on an already beleaguered world peace and affect other countries indirectly (especially Nigeria's trading partners, such as the US, UK and other western countries). A rise in the prices of crude oil on the international market would also bring about a rise in the prices of their derivative petroleum products, which would have a corresponding effect on the Nigerian domestic market, and will ultimately affect the standard of living of Nigerians.

Therefore, the fact that the unrest in the Niger Delta of Nigeria has an impact on her western trading partners,<sup>411</sup> explains the interest that western countries (especially Nigeria's trading partners), have shown in events occurring in the Niger Delta. In some instances, they actually exert some kind of pressure on the leadership of Nigeria to ensure a containment of the situation in the Delta. This may be a probable explanation for the change seen in the way and manner the government of Nigeria has dealt with the Niger Delta crises.

It has been said that such interplay implies that the concept of an 'independent' country is a myth in an age of globalisation and that countries all over the world can no longer be referred to as strictly independent.<sup>412</sup> This observation is true to an extent. The degree of independence of countries in the world had changed and

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<http://www.neiti.org.ng/publications/The%20Global%20Effect%20of%20supply%20disruptions%20on%20prices1.pps> (accessed on 26 April 2010). This has been seen persistently for some years now, as events in the Niger Delta (be it the kidnapping of people, blowing up of oil installations or pipelines, engaging in gun battle with the Nigerian police), have all at various times led to hikes in the price of oil internationally.

<sup>409</sup> Okoye, *supra*.

<sup>410</sup> During the Gulf war, oil prices almost doubled as a result of Iraq's invasion of Iran. The ongoing conflict in Iraq and other oil producing states have also translated into a spike in oil prices. The disputed presidential elections in Iran in June 2009, and the prolonged demonstrations that followed saw oil prices increasing. These fluctuations may at times not be more terribly felt due to the intervention of OPEC (Organisation of Petroleum Exporting Countries). OPEC is tasked with the regulation of oil prices in the international market, through measures such as production quota fixing for the different member countries.

<sup>411</sup> Imomoh, *supra*.

<sup>412</sup> *Ibid*.

lessened drastically with the advancement of globalisation and all that goes with it.

With the influence of globalisation, one may go as far as to say that presidents are no longer free agents; and that they must not only be accountable to their citizens, but their actions are also monitored by other foreign leaders who closely trace those actions to the degree they impact on their respective countries.<sup>413</sup> The rule of law within countries is thus impacted by international events and laws. This is the working of International law which has gone a long way towards influencing the way nations behave. It follows thus that happenings and events in Nigeria's political, social and economic world, in as much as they are of particular interest to other countries and players in the international community, are also to an extent a product of those countries and players in the international community. To this situation, international law has played a great role in impacting on nations, and on the development of the rule of law in Nigeria. The question to be examined here is how much of a role international law has played in the development of the rule of law in Nigeria.

#### **4.6 International Law Impact in Nigeria**

International law impacts on Nigeria through its different sources<sup>414</sup> and nature. As is the case in other jurisdictions, the Constitution of the Federal Republic of Nigeria sets the framework for the application and enforcement of international law within the Nigerian legal system. Section 19(d) lists 'respect for international law' as one of the foreign policy objectives of the country.<sup>415</sup> By broader definition, this means that the country would strive towards the observance and enforcement of international law when it is applicable in Nigeria. In terms of the application of international law in the Nigerian legal system, like most commonwealth countries, Nigeria operates what is termed as a dualist

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<sup>413</sup> *Ibid.*

<sup>414</sup> The sources of international law have been extensively discussed in chapter 3.

<sup>415</sup> Section 19 states as follows:

'The foreign policy objectives shall be –

(d) respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; ... .'

system.<sup>416</sup> By this is meant that treaties cannot be domestically applied unless they have been incorporated into the legal system through domestic legislation.<sup>417</sup> Nigeria endorses acts of incorporation whereby international law (treaties) is granted full effect by municipal law.<sup>418</sup> Section 12 of the 1999 Constitution provides the framework for the enforcement and application of treaties in Nigeria. It states as follows:

- (1) ‘No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty’.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.’<sup>419</sup>

This means that any time the Nigerian government ratifies or accedes to a treaty, for such to be enforceable in Nigeria, it would first have to be legislated into law by the National Assembly, which is the federal legislative arm of government in Nigeria. Such a treaty therefore requires an enabling act of the country’s legislative body.<sup>420</sup> This has been further reinforced by the Supreme Court of Nigeria in the case of *Abacha v Fawehinmi*.<sup>421</sup>

Customary international law does not get the same treatment as treaties in the 1999 Constitution. The Constitution is silent on its application and the effect it has in the Nigerian legal system. As noted, section 12 of the constitution only refers to ‘treaties’ and not to ‘international law’ in general. This omission has

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<sup>416</sup> Egede E ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ (2007) 51(2) *JAL* 249-284 at 250.

<sup>417</sup> Egede (2007) 51(2) *JAL* 249 at 250.

<sup>418</sup> Okeke CN ‘International Law in the Nigerian Legal System’ (1997) *California Western International Law Journal* 311-356 at 338.

<sup>419</sup> Section 12 of the 1999 Constitution.

<sup>420</sup> Okeke (1997) *California Western International Law Journal* 311 at 337.

<sup>421</sup> (2000) 6 *NWLR* 228, pt 660.

been cleared up by the Supreme Court in the case of *Ibidapo v Lufthansa Airlines*,<sup>422</sup> in which the learned justice of the Supreme Court, Wali JSC, is quoted as saying, ‘Nigeria, like any other commonwealth country, inherited the English common law rules governing the municipal application of international law’.<sup>423</sup> Under the English common law rules, customary international law has automatic application in the municipal setting,<sup>424</sup> thus customary international law automatically applies as an enforceable part of Nigerian laws.

This position of the law relating to international law in Nigeria means that treaties are only applicable upon the act of an enabling legislation, whilst customary international law is automatically applicable in Nigeria.<sup>425</sup>

Turning now to international law and how it affects the rule of law in Nigeria, a few of the international law treaties that have been domesticated in Nigeria by way of Acts of law will be examined in order to determine the manner in which the provisions of these Acts are implemented.

#### **4.6.1 Human rights treaties in Nigeria**

Nigeria is signatory to a significant number of international and regional human rights treaties. As a member of the UN and party to the UN Charter, the country is obliged to promote ‘the ... respect for and observance of human rights, and fundamental freedoms for all, without distinction as to ..., sex, language or religion’.<sup>426</sup> Article 56 of the UN Charter imposes an obligation on all members of the UN to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in the previous article.<sup>427</sup>

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<sup>422</sup> (1997) 4 NWLR (pt 498) 124.

<sup>423</sup> (1997) 4 NWLR (pt 498) 150.

<sup>424</sup> See the English cases of *JH Rayner v Department of Trade and Industry* (1990) AC 418 at 550; Shaw LJ in the English Court of Appeal case of *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) *Queens Bench* 529 at 578.

<sup>425</sup> See generally Egede E, ‘The New Territorial Waters (Amendment) Act 1998 – Comments on The Impact of International Law on Nigerian Law’ (2000) 12 *AJICL* 84-104.

<sup>426</sup> Article 55 of the UN Charter.

<sup>427</sup> Article 56 UN Charter.

Chapter IV of the 1999 Constitution provides for fundamental human rights.<sup>428</sup> These provisions are essentially the same as in the other different constitutions that have preceded the 1999 Constitution (though they may be in different sections). Section 46 of the Constitution vests in any aggrieved person the right to seek redress in a competent court of law in cases when their fundamental human rights were infringed upon.<sup>429</sup>

However, it appears that Nigeria has not been able to live up to these obligations, either under the UN system or as provided in its Constitution. Events in Nigeria in relation to the violation of human rights have over time focused the attention of the world on Nigeria. This was most glaring during military regimes, when the respect for human rights was lacking and military governments used the might of their weapons to obtain compliance with their laws from the citizenry.<sup>430</sup> The greatest onslaught on human rights protection in Nigeria during the military were the decrees that had no regard for constitutions as they suspended the operation of pertinent parts of constitutions. They came in the form of Constitution (Suspension and Modification) Decrees.<sup>431</sup> This was usually the first act of a military regime when it took over power. These decrees removed the supremacy of the constitution; ousted the jurisdiction of the courts,<sup>432</sup> and suspended the application of the chapter on fundamental human rights in the constitution (chapter IV in the 1999 Constitution).<sup>433</sup>

The situation is a bit different under democratically elected governments, as Nigerians are able to approach the courts according to section 46 (of the 1999 Constitution) whenever they feel their right is being violated under chapter IV of

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<sup>428</sup> Section 33 to 46 of the 1999 Constitution.

<sup>429</sup> Section 46 of 1999 Constitution.

<sup>430</sup> Cases of human rights violations were rampant, such as arbitrary arrests, detention without trial, illegal occupation by government of private property (without compensation), denial of freedom of movement, freedom of association or to gather, and many others.

<sup>431</sup> Okeke (1997) *California Western International Law Journal* 311 at 340. See also other writings on the detrimental effects of ouster clauses, Sagay I 'The Constitutional and Legal Framework for the Protection of Human Rights in Nigeria' (1992) 2(3) *JHRLP* 60 at 78-79

<sup>432</sup> This was done through what is referred to as "ouster clauses". For example, Decree No 1 (1966) provided that 'no question as to the validity of this or any other Decree or any Edict shall be entertained by any Court of law in Nigeria.'

<sup>433</sup> See for example, section. 6 of the State Security (Detention of Persons) Decrees Nos 1-15 of 1966; the State Security (Detention of Persons) (Decree No. 2 of 1984), the Supremacy and Enforcement of Powers (Decree No. 13 of 1984).

the Constitution or under any of the human rights treaties that the country is a party too.<sup>434</sup> Two international human rights treaties will be examined below.

a) Nigeria is a party to the African Charter on Human and Peoples' Rights. The African Charter is domesticated in Nigeria by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,<sup>435</sup> which makes all the provisions of the charter enforceable in Nigeria. The question, however, is how effective have the application of these laws been in Nigeria? As seen from case law, in some respect there has been satisfactory compliance, however, in certain other respects, the ability to enforce these rights is limited (especially where there is a conflict with the constitution, or where the government lacks the resources and capacity, or even the will).<sup>436</sup> This has been observed by Egede who states as follows:

'[W]hile is it easy to implement the traditional civil and political rights in the African Charter, which are similar to the rights contained in chapter IV of the constitution ..., problems may arise regarding the implementation of economic, social and cultural rights, as well as solidarity rights. Certain provisions of the charter dealing with socio-economic rights, which are obviously intended to be justiciable, would have to be reconciled with similar provisions under chapter II of the 1999

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<sup>434</sup> There are quite a plethora of cases, some of which are *Abacha v Fawehinmi* ((2000) 6 NWLR 228, pt 660); *Comptroller of Nigerian Prisons & Oths v Adekanye & Oths* (1999) 10 NWLR (pt 623) 400 (in which the Court of Appeal held that during a military regime, which had ousted the jurisdiction of the courts, the court still had jurisdiction under the African Charter to hear a case involving an application for a writ of *Habeas Corpus* for unlawful detention); *Ubani v Director of State Security Services* (1999) 11 NWLR (pt 625) 129 (another case of unlawful detention by a military regime, in which the respondents claimed that the jurisdiction of the court had been ousted by Decree; the Court held that it had jurisdiction to hear the case under the African Charter of Human and Peoples Rights (Ratification and Enforcement) Act); also in *The Registered Trustees of the Constitutional Rights Project v The President of the Federal Republic of Nigeria & 2 Ors* Suit No M/102/93 in the Lagos High Court, where the defence of ouster clauses was again raised by the federal government. The Court held that since the African Charter was an international convention which imposes an international legal obligation on Nigeria, any domestic legislation in conflict with it, would be invalid; see also *Oshevire v British Caledonian Airways Limited* Suit No NGSHC/NB/07/94 before the High Court of Niger State (in which the court held that any domestic legislation which is in conflict with an international convention is void), and others.

<sup>435</sup> Chapter 10 Laws of the Federation of Nigeria 1990.

<sup>436</sup> As in the case of the infringement on the Niger Delta people's right to a life and human dignity. See also cases referred to in n 433 above.

Constitution dealing with the fundamental objectives and directive principles of state policy, which are *not* justiciable'.<sup>437</sup>

Another limitation mentioned above, is where the government lacks the capacity to enforce the rights, whether in terms of the resources needed or in terms of the human capital needed.<sup>438</sup> The South African case of *Government of South Africa & Others v Grootboom & Others*<sup>439</sup> is a case in point here. The South African Constitutional Court held that the government had a positive obligation to take reasonable steps within its available resources to implement the respondents' socio-economic right to adequate housing, which was granted by section 26 of the 1996 Constitution of South Africa.

The African Commission on Human and People's Rights (ACHPR) has also passed a resolution on Economic, Social and Cultural Rights in Africa, requiring state parties to adopt legislative and other measures (might be through international cooperation) to give full effect to the economic, social and cultural rights in the African Charter.<sup>440</sup> This resolution further imposes the obligation on state parties to ensure the satisfaction, at the very least, of the minimum levels of each of the rights contained in the African Charter.<sup>441</sup> It is very poignant to note that the resolution of the African Commission lists factors which it considered to be limitations to the full realisation of economic, social and cultural rights in Africa. Amongst these are: lack of good governance and planning; failure to allocate sufficient resources to implement the rights; lack of political will; corruption and the misuse and misdirection of financial resources.<sup>442</sup> In particular, these limitations are very apposite with the different problems of the entrenchment of the rule of law identified above.

So far there has been no decision of the Nigerian court dealing with the obligation of the government with respect to socio-economic rights under the African Charter Act.<sup>443</sup> When this does happen, it will be interesting to see what

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<sup>437</sup> Egede (2007) 51(2) JAL 249 at 262 (own emphasis).

<sup>438</sup> *Ibid.*

<sup>439</sup> 2001 (1) SA 46.

<sup>440</sup> ACHPR/Res. 73 (XXXVI) 04.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid* paragraph 3.

<sup>443</sup> Egede (2007) 51(2) JAL 249 at 265.



the Nigerian courts will say about whether the government is, within its available resources, and through well-directed and reasonably implemented policies, fulfilling its obligations under the Charter.<sup>444</sup>

In relation to other rights, the African Commission in *SERAC* and *CESR v Nigeria*, upheld solidarity rights by finding the Nigerian government guilty of the failure to guarantee a clean and safe environment under article 24 of the Charter.<sup>445</sup> This decision has been endorsed by the Nigerian court in the 2005 case of *Jonah Gbemre v Shell Petroleum Development Corporation & 2 Oths*,<sup>446</sup> in which the court found that gas flaring of the respondents in the community constituted an infringement of the applicant's constitutionally guaranteed right to life and dignity of the human person.<sup>447</sup> As stated above in section 4.5.1.3, the court held, amongst other things, that certain legislation and provisions of legislation that allowed continued gas flaring<sup>448</sup> were 'inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the 1999 Constitution, and articles 4, 16 and 24 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act. These provisions allowing continuous gas flaring were therefore declared null and void.<sup>449</sup> The court ordered the Attorney-General of the Federation to set in motion the process to introduce a bill to the National Assembly to amend the existing law and to criminalise gas flaring.<sup>450</sup>

The decision of the court is in line with the decisions and resolutions that have come out in the international plane. The UN Human Rights Committee in its

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<sup>444</sup> The African Commission has, however, in its decision in the case of *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria* (Communication 155/96, case no ACHPR/COMM/A044/1) held Nigeria to be, amongst other things, in breach of Article 16 of the charter, by permitting oil companies to engage in mining activities in the Niger Delta, which have caused serious environmental degradation and affected the health of the Ogoni people.

<sup>445</sup> Egede (2007) 51(2) JAL 249 at 266.

<sup>446</sup> Suit No FHC/B/CS/153/05 (unreported).

<sup>447</sup> For an analysis of the correlation between fundamental human rights and environmental harm, see Emiri F & Deinduomo G (eds)(2009) *Law and Petroleum Industry in Nigeria: Current Challenges* 54-57.

<sup>448</sup> Example of such legislation such as the Associated Gas Re-Injection Act A25, LFN 2004; the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, which permitted gas flaring.

<sup>449</sup> Suit No FHC/B/CS/153/05 (unreported), para. 4.

<sup>450</sup> Suit No FHC/B/CS/153/05 (unreported), para 6.

comment on the right to life<sup>451</sup> has warned against a narrow interpretation of the right; it instead advocated a broad interpretation that would include positive measures being taken by the state to protect life.

It is interesting to note at this point that up until 2009, no action was taken by the Nigerian state to comply with the court order. This is an indication that the Nigerian government itself lacks the willingness to rectify the situation.<sup>452</sup> In July 2009, the Nigerian senate passed the Gas Flaring (Prohibition and Punishment) Bill of 2009. The bill sets a cut off date of December 31, 2010, to stop all gas flaring in the country, and seeks to penalise companies which continue to flare gas after the cut off date.<sup>453</sup>

There are also international law treaties applicable to the problem of gas flaring, as it is a source of greenhouse emissions. The Kyoto Protocol to the UN Climate Change Convention is one of such, and Nigeria is a party to it.<sup>454</sup> The protocol came into force in February 2005.<sup>455</sup> It is a further attempt of the international community to fight global warming. In the treaty, member parties commit themselves to different levels of greenhouse gas emission reductions. Even though as a non-Annex 1 member party to the protocol (Annex 1 member parties are those with specific targets), Nigeria has no specific reduction targets it has to meet; the country is however obliged to implement the general provisions of the treaty.

From the above analysis of the enforcement of international and regional obligations in Nigeria, it is apparent that Nigeria has not necessarily given adequate attention and consideration to the obligations that bind it at both the international and regional planes. The responsibilities of being a part of the international community and ratifying international treaties go beyond the mere act of ratifying them and domesticating them. It is imperative that these laws must be applied and enforced in Nigeria as they are expected to be, in order to

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<sup>451</sup> UN Human Rights Committee, General Comment No. 6: The Right to Life, UN.Doc.HR/GEN/1/Rev1 at 6 (1994) at para 1 and 5.

<sup>452</sup> Umukoro, *supra*.

<sup>453</sup> 'Gas Flaring – Senate Passes Prohibition Bill' ThisDay 3<sup>rd</sup> of July 2009, available at <http://allafrica.com/stories/200907030119.html> (accessed on 22 April 2010).

<sup>454</sup> Nigeria ratified the protocol on the 10<sup>th</sup> December 2004.

<sup>455</sup> 2005 Kyoto Protocol to the United Nations Framework Convention on Climate Change can be accessed at <http://unfccc.int/resource/docs/convkp/kpeng.html>

safeguard the rule of law in the country. The Federal High Court in the *Gbemre* case has shown courage in confronting the ubiquitous problem of gas flaring, and in declaring certain legislation in the country inconsistent with the Constitution. The National Assembly and the executive arm of government have eventually followed suit in obeying the order of the court in revising and amending the necessary legislation. It now remains to be seen how the new law will be enforced against the oil companies found to be in default.

b) Another important international treaty for consideration is the UN Convention on the Rights of the Child (CRC),<sup>456</sup> and its African Union equivalent, the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>457</sup> Nigeria ratified these instruments on the 19<sup>th</sup> April 1991, and 23 July 2001 respectively, and domesticated them through the Rights of the Child Act (RCA) of 2003. However, out of the 36 states of the federation, only 18 states have so far implemented the Act.<sup>458</sup> The Act defines the age of majority as 18 years, and thus anyone under the age of 18 is considered a child.<sup>459</sup> Section 21 of the RCA prohibits child marriage,<sup>460</sup> and section 23 criminalises the breach of section 21. It imposes a fine or a period of imprisonment.<sup>461</sup>

The provisions of the Rights of the Child Act; and Nigeria's international obligations under the two treaties on children's rights were called to question in a recent matter which unfolded in the country. Senator Ahmed Sani Yerima, (former Governor of Zamfara State, one of the northern states in Nigeria, which practise Sharia as a system of law), was reported to have taken a 13-year old

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<sup>456</sup> Adopted in 1989, and containing the basic human rights to which children are entitled.

<sup>457</sup> Adopted by the former Organisation of African Unity (OAU) in 1990. It came into force in 1999.

<sup>458</sup> APRM Country Report on Nigeria, 2009, available on the APRM website at <http://www.nepadaprmnigeria.org/> (accessed on 14 March 2010) 6.

<sup>459</sup> Adopting Arts 1 and 2 of the CRC and ACRWC respectively.

<sup>460</sup> Section 21 of the RCA states:

'No person under the age of 18 is capable of contracting a valid marriage and accordingly, a marriage so contracted is null and void and of no effect whatsoever'.

<sup>461</sup> Section 23 states:

'A person who marries a child or to whom a child is betrothed, or (who) promotes the marriage of a child, or who betroths a child, commits an offence and is liable on conviction to a fine of N500,000 or imprisonment for a term of five years or both.'

Egyptian girl as a fourth wife.<sup>462</sup> Admittedly, his Islamic faith and African culture allow him to take more than one wife.<sup>463</sup> However, the act of marrying a 13-year old constitutes a breach of the CRC and RCA. This meant that the country would be in breach of its international obligations if it did nothing to penalise the crime committed by the distinguished senator.

Petitions against Ahmed Yerima were laid before the Senate by the National Human Rights Commission in coalition with 10 other groups.<sup>464</sup> The coalition sought the suspension of the senator for violating the Rights of the Child Act.<sup>465</sup> The petition was finally accepted by the senate after it initially attempted to refuse it on the basis that the Senator had not broken any rules of the Senate.<sup>466</sup> The matter was referred to the Senate Ethics Committee for investigation, but nothing eventually came of it.<sup>467</sup>

Ahmed Yerima is not alone in his recent act, and this is allegedly not the first time he is committing the same offence.<sup>468</sup> Ordinarily, in a country where the rule of law prevailed, law enforcement agencies would have begun investigations into the alleged crime immediately. The fact that a serving Senator, sitting in the highest law making body in the country, willingly and wilfully decided to commit a breach of the law is definitely a matter of serious concern. It shows the level of respect for the rule of law even amongst the leaders. It also indicates again the de-linking and de-legitimation of the law that has occurred between Nigerians and the state, where there is no allegiance by the people to the state.

Another interesting pointer to the influence of international law and the international community on the rule of law within the country is the APRM

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<sup>462</sup> Guardian Newspaper Editorial of 30<sup>th</sup> April 2010, available at [http://www.ngrguardiannews.com/editorial\\_opinion/article01/300410?pdate=300410&ptitle=Yerima's%20alleged%20marriage%20to%20girl-child](http://www.ngrguardiannews.com/editorial_opinion/article01/300410?pdate=300410&ptitle=Yerima's%20alleged%20marriage%20to%20girl-child) (accessed on 30 June 2010).

<sup>463</sup> Though polygamy is not legal under Nigerian civil law, it is legal under Sharia law, and also under African customary law.

<sup>464</sup> 'Senate may 'bury' Yerima matter' 234next on Thursday 29<sup>th</sup> April 2010, available at [http://234next.com/csp/cms/sites/Next/Home/5561460-146/senate\\_may\\_bury\\_yerima\\_matter\\_.csp](http://234next.com/csp/cms/sites/Next/Home/5561460-146/senate_may_bury_yerima_matter_.csp) (accessed on 30 June 2010).

<sup>465</sup> *Ibid.*

<sup>466</sup> 'Senate muzzles opposition to Yerima's marriage', available at [http://234next.com/csp/cms/sites/Next/News/National/5560909-146/senate\\_muzzles\\_opposition\\_\\_to\\_yerimas.csp](http://234next.com/csp/cms/sites/Next/News/National/5560909-146/senate_muzzles_opposition__to_yerimas.csp) (accessed on 30 June 2010).

<sup>467</sup> Guardian editorial, *supra*.

<sup>468</sup> 'Senate muzzles opposition to Yerima's marriage', *supra*.

process. The review measures the performance of the country in line with the guidelines and principles in the base documents, which more or less are a reflection of international standards of governance. Through these, the state of the enthronement of the rule of law in Nigeria, amongst other things, has been surveyed. Nigeria, along with South Africa, was one of the founding members of the APRM, having acceded to the mechanism in March 2003.<sup>469</sup> The country's APRM review commenced in 2005 but was only concluded in 2009, due to delays suffered as a result of changes in the national government. The review was the first of such in Nigeria, in which the different sectors of the nation would be examined to see if they are meeting with set objectives of improving the standards of the society. The success of the review would be an indication of the sincerity of the government towards accountability and good governance. However, for this to be truly the case, the checks and balances provided by the peer review process must be adhered to, in terms of civil society participation, public and private sector involvement in the process. The extent of this and other challenges faced in the review of Nigeria will be examined below. Also the impact (if any) of the APRM process on good governance and the rule of law in Nigeria will be examined.

#### **4.6.2 The Impact of the APRM on the rule of law in Nigeria**

As mandated by the APRM Base Documents, Nigeria appointed a National Focal Point (NFP) in the person of the Secretary to the Government of the Federation (SGF). A National Working Group (APRM-NWG) was appointed to oversee the self review process, and to sensitise the country on the review. According to the country guidelines, the APRM-NWG is designed to be autonomous, made of 'a diverse ensemble of stakeholder groups, representing a wide range of interest'.<sup>470</sup> This group was initially dominated by members of the government and was not representative at all. A national APRM secretariat was also set up and located

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<sup>469</sup> At the 6<sup>th</sup> Summit of the NEPAD HSGIC meeting, held in Abuja, Nigeria, on the 9<sup>th</sup> of March 2003.

<sup>470</sup> Jinadu A 'The African Peer Review Process in Nigeria' July 2008, available at <http://www.uneca.org/aprm/Documents/Guidelines%20for%20Countries%20to%20Prepare%20for%20and%20Participate%20in%20APRM.pdf> (accessed on 6 August 2010).

within the presidency, feeding suspicions that the review process was going to be government controlled.<sup>471</sup>

Lead research organisations were appointed in 2006 to lead the assessment into the different areas of the APRM principles. These domesticated and adapted the APRM master questionnaire to the context of the country. They made use of computer research, household surveys, interviews and focus group discussions. At the end of 2006, the draft Country Self-Assessment Report (CSAR) and the National Program of Action (NPoA) were ready.<sup>472</sup> In validating the self assessment report, stakeholder workshops were held, sessions were also held with non-stakeholders in order to hear their view, the CSAR was printed and serialised in the national newspapers and magazines, summaries of the report were printed in the three major languages and mass circulated, and state governments were also encouraged to print and distribute the copies in local dialects.<sup>473</sup>

A two-phase nationwide validation of the CSAR was held in centres covering the 36 states of the federation, and the outcomes were considered in preparing a four year NPoA (2009-2012).<sup>474</sup> The final CSAR and NPoA were submitted to the APR Panel in July 2008. The Country Review Mission (CRM) of the APRM then embarked on a month long validation of the report submitted by the country. Based on the documents submitted to the APRM Panel, the Country Review Report (CRR) was produced by the APRM.<sup>475</sup>

Of the thematic areas of self-assessment, Democracy and Political Governance is the one which is relevant to this discussion. The NEPAD/Heads of State and Government Implementation Committee had said of this thematic area that

‘the overall objective is to consolidate a constitutional political order in which democracy, respect for human rights, the rule of law, separation of

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<sup>471</sup> *Ibid.*

<sup>472</sup> APRM Country Review Report on Nigeria 2009, 2.

<sup>473</sup> *Ibid.*

<sup>474</sup> APRM Country Review Report on Nigeria 2009, 3.

<sup>475</sup> *Ibid*; the CRR focuses on three areas: accuracy of the CSAR in identifying major problems faced by the country, the extent to which the NPoA addresses the problems identified, and the nature of civil society participation in the production of the CSAR and the NPoA.

powers and effective, responsive public service are realised to ensure sustainable development and a peaceful and stable society'.<sup>476</sup>

The CRR, while acknowledging that the nation had made progress in the fields of treaty ratification and implementation and the promotion of peace in Africa, also highlighted various areas of challenge to the state. Most notable of these are the various ethnic, religious and state conflicts caused by pervasive social and economic inequality, distribution of wealth, religious intolerance and other causes.<sup>477</sup>

Amongst other issues raised was the endemic corruption which has plagued the country. This was seen as hindering the development of constitutional democracy in Nigeria and undermining the principles of good governance. The over-concentration of power in the central government was another issue identified as inhibiting true federalism in Nigeria. On this issue, even though the Constitution provides for a federal structure, with distribution of powers and resources, these provisions (especially the exclusive and concurrent lists in the annexure to the Constitution) are not in themselves truly representative of a federal structure of government. They confer much power on the central government. This was identified in the report as a legacy of military rule. *'The excessive powers of the executive vis-à-vis the legislature and judiciary – a legacy of the long period of military rule – curtail the realisation in practise of the principle of separation of powers with its inherent checks and balances'*.<sup>478</sup>

Nigeria is in the first year of implementing the NPoA, and is thus yet to submit a Progress report on the implementation.<sup>479</sup> It is expected that when the first progress report is submitted, there will be signs and evidence to show that the country is making efforts to deal with the issues that have been raised in the CRR.

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<sup>476</sup> NEPAD/Heads of State and Government Implementation Committee (HSGIC)-03-2003/African Peer Review Mechanism (APRM)/Objectives, Standards, Criteria and Indicators for the APRM, 9 March 2003.

<sup>477</sup> APRM Country Review Report on Nigeria 2009, 5.

<sup>478</sup> APRM Country Review Report on Nigeria 2009, 5-6 (own emphasis).

<sup>479</sup> Bing-Pappoe A (March 2010) 'Reviewing Africa's Peer Review Mechanism: A Seven Country Survey' available at [http://www.pacweb.org/Documents/APRM/APRM\\_Seven\\_countries\\_March2010-E.pdf](http://www.pacweb.org/Documents/APRM/APRM_Seven_countries_March2010-E.pdf) (accessed on 12 August 2010) 6.

#### 4.7 Conclusion

Nigeria is a country that has undergone various dramatic changes at different times during its lifetime. The pre-colonial history (slavery included), colonial history and years of military rule that followed independence, have impacted on the society, the structures and systems of the nation. It has affected the psyche of the people and diminished the need and demand of the people to participate in the affairs of state. This history cannot however be solely blamed for the current problems with the rule of law in Nigeria. The failure of leadership over the years (epitomised in the selfishness, greed and corrupt practices that have become the norm) has further compounded the situation in the country.

The past and present constitutions of the country (despite the many attempts at review) have not been able to encapsulate the totality of the hopes and desires of the people. This is as a result of the fundamentally wrong constitution making processes that have been adopted, that do not properly engage with the people. At different times, the constitutions have been tinkered with to suit the needs of those doing the tinkering, for example, the politicians and the military.<sup>480</sup> This has resulted in a situation whereby the constitutions are more or less impositions by either the colonial authorities, or impositions of the elite on the people, and thus affecting the legitimacy of the constitutions, and consequently of other actions and decisions emanating from these constitutions,<sup>481</sup> the 1999 Constitution inclusive. This lack of legitimacy is translated into the way law is viewed, the allegiance of the people and compliance to the law. It has resulted in a situation in which the allegiance which the people should have to each other and to the State has gradually ebbed away, as the State has shown itself not to be interested in the wellbeing of its citizens. What prevails currently is therefore

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<sup>480</sup> In 1966, the military regime of Major-General Aguyi-Ironsi suspended the 1963 Constitution by decree, reversing the federal system, and imposed a unitary system of government; in the same year a counter coup saw a reinstatement of federalism by decree also (with the constitution still suspended); in 1979, a constitutional drafting process was concluded that was more inclusive and participatory than any other seen in the country, however, just before the document was passed into law as the 1979 Constitution, the military regime of General Obasanjo unilaterally included seventeen new sections into the document and passed it into law as the 1979 Constitution of the Federal Republic of Nigeria. The current 1999 constitution is also no exception to these acts of 'tinkering', see section 4.2.3 above.

<sup>481</sup> Thus actions of the state and statutes passed by the legislature are all affected by this anomaly.



fractionalisation along regional, religious and ethnic lines. In such an environment, it is difficult for the rule of law to be vibrant or enthroned.

On the other hand, there appears to be no attempt by the State and leadership of the nation, to build the confidence of its citizens in its ability to lead and abide by the law. The citizens on their own part, in the absence of true leadership, and seeing those meant to be leading them engaged in grand corruption, theft of state funds, and self-enrichment, have adopted various forms of social ills like bribery and corruption as their own a way of life. As discussed above, there appears to be a very limited sense of nation-building or nationhood, or even ownership of the Nigerian state by Nigerians. Rather, what persists is the feeling that everybody has to do whatever it takes to survive on his or her own.

Law is meant to be a unifying norm that enables people within a particular society to identify together in working towards the attainment of their goals. However, in a situation in which the law lacks the input of the people and thus lacks legitimacy; in a situation in which the law is not effectively enforced, and there is the lack of will to make it effective; in a situation in which the rule of the law is fundamentally skewed and faulty, it will be very difficult to get to the level of the attainment of the goals of nationhood.

In order to reverse the state of affairs, there would need to be concerted attempts to deal with these challenges from the root. These attempts should be aimed and directed at steps that would foster a positive sense of nationhood, and inclusion. A proper, fully participatory review of the constitution making process is a very important step towards this. Such a process would need to be ‘wide-spread’, reaching to local communities and villages, debates would need to be held all over the country in the different languages prevalent in a particular area. It is important that the outcomes and recommendations of these processes be carried through into whatever document is produced at the end of the day, in order to foster a sense of ownership of the outcome of that process. Such would reflect the wishes of the people in relation to contentious issues of power-sharing, federalism and how it would work, ethnicity issues, derivation processes and formulae and others. The norm in the past whereby the elite or the military decide what goes into the constitution should be avoided. If the constitution

process is inclusive and public participatory oriented, this would immediately address the scepticism and reservations of the people towards the constitution.

Another step necessary to reverse the state of affairs with the rule of law in Nigeria is that of ensuring that elections are conducted in a clean, fair and transparent manner. This has not been the case in Nigeria. January 2011 heralds another elections year, wherein the country would conduct its presidential, state and local government elections. The National Assembly in the second half of 2010 adopted an amended 1999 Constitution. Amongst the proposed amendments are the electoral clauses and executive power transfer clauses.<sup>482</sup> There are, however, different opinions as to what is required for the amendment to take effect. The assembly is of the view that the amendments would be effective if they are approved by two-thirds of the State Assemblies (i.e. 24 out of the 36 state assemblies) and would become law.<sup>483</sup> There is the opposing view that the amended constitution required presidential assent for it to become law.<sup>484</sup> This is now before the law courts, and whatever the decision of the courts, it should be noted that these amendments are still not extensive enough, and the process was still not participatory. There was no evidence of the public hearings or consultations to sample what the population desires.

Addressing the Niger Delta crises requires political will. It requires the commitment of the government and the politicians to a peaceful and lasting resolution. Such commitment that is carried through in actions would signal an indication that the Nigerian government is serious with complying with the law (as it would be reflected in the Constitution). Section 4.5.1 above has alluded to the fact that the problems of managing oil as a resource for Nigerians, to be benefited from by Nigerians, is not so much the result of a lack of sufficient legislation; it is in fact the lack of enforcement, there is also a 'disconnect' or alienation that exists between the people and the government. This is due to the 'kick-backs' and corruption that are prevalent within the country and particularly within the minerals sector.

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<sup>482</sup> 'Lawmakers approve harmonised constitution amendment', 4<sup>th</sup> of June 2010, available at <http://234next.com/csp/cms/sites/Next/Home/5576192-146/story.csp> (accessed on 12 August 2010).

<sup>483</sup> In the event that the court decides that it does not need Presidential assent.

<sup>484</sup> There are currently law suits challenging the need or otherwise of such assent.

The way ahead is embedded in a return to the principles of true democracy. For the Niger Delta (and possibly for the entire country), a thorough process of trust-building has to be embarked upon. A decentralised form of government is also necessary. The principles of federalism have to be adhered to and practised properly. Ultimately, it is only when the democratic and citizenship rights of the people of Nigeria are underpinned by a socially just and participatory social contract between them and a popular democratic state,<sup>485</sup> that one would be able to see the rule of law at play in the country.

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<sup>485</sup> Obi CI 'Resource Control in Nigeria's Niger Delta' 2007 (2) *Global Knowledge*.

## CHAPTER 5

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### Regional Case study: South Africa

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## 5.1 Introduction

The previous chapter investigated the Nigerian situation as regards the constitutional system of governance, the way in which the country has evolved over the years, and the extent to which the many excursions by the military into governance have characterised the country presently. The damage that military rule has caused the society, structure and path of the country was also considered, as well as the resultant ethnic and religious solidarities that have concretised and continued over the years; including the impact and influence of international law (international community) on the exercise of its sovereign powers, in particular, the way in which globalisation continues to extend its reach into the operation of the rule of law in the country; and also its own history with the many resource control agitations over the years.

In this chapter, the focus is turned to South Africa. South Africa is regarded as having one of the biggest economies in Africa and is grouped as an emerging economy in the world.<sup>1</sup> It is the other of the two states to be examined in this thesis. This examination will be carried out using similar criteria as used in the case of Nigeria, to the extent that this is possible and appropriate. There is copious work on the history and origins of South Africa. Given its multi-ethnic, multi-cultural and multi-racial composition, and the peculiar history of the country, it is a country of immense interest to people all over the world. A lot has been documented by historians, archaeologists, social scientists and others, both within and outside the region. The purpose of this chapter is to examine South Africa as a country, its history, and the different ideologies that have operated to shape the rule of law of country presently.

This chapter will further look at international law and the rule of law in South Africa, and the ways in which either has influenced each other or been influenced by the other. This chapter will however not discuss globalisation again, as its

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<sup>1</sup> 'Africa's Ten Largest Economies in 2007', ClickAfrique.com, available at <http://www.clickafrique.com/Magazine/ST014/CP0000002788.aspx> (accessed on 1 May 2010). With a Gross Domestic Product (GDP) of \$467.6 billion in 2007, South Africa is a middle-income emerging market with abundant supply of natural resources. Its economy is listed as ranking 27<sup>th</sup> in the world.

impact on Africa has been extensively discussed in chapters three and four. Even though South Africa has not escaped the effects of globalisation, as a topic, it is viewed to be more directly relevant to the state of the rule of law in Nigeria. This is especially because of the way in which the structural adjustment programs were used by international partners to force the country to face the effects of globalisation.

## **5.2 History**

In this section, special emphasis will be placed on the historical development of law and forms of governance in the region now referred to as South Africa. It is therefore not an attempt to re-write the full history of the region, but only to emphasise how law has developed and been used as a tool of governance over the years and the impact this has had on the region itself.

Although there is copious documentation of the historical antecedents of South Africa, one is hard pressed as to the relevant and objective sources. One of the main pitfalls of any historical account is the tendency to be subjective (written from the authors point of view and stressing those points the particular author wants to buttress), and this has been observed in a number of the sources, books and documentation consulted on this topic. In this work, every attempt has been made to avoid this major pitfall, and as a result certain sources and books will not be used as it is observed that they tend to align more with subjective historical accounts. The ones used are those that appear to give a more balanced and objective account of the history of South Africa.

South Africa as it is known today is a country with a history of pre-colonial inhabitation by people, colonisation (during which there was massive movement of peoples from the 16<sup>th</sup> century), and apartheid (which enforced forced movement of people). These influences have resulted in a multi-racial, multi-ethnic society. The influence of apartheid in itself is far reaching in Africa and has led to the tensions, wars and struggles between the races over the years. These influences have given South Africa its distinctly peculiar history. The discussion will be started by taking a look at pre-colonial South Africa.

### 5.2.1 Pre-colonial South Africa and the people of the land

As the name implies, South Africa is situated on the southern part of the African continent. It covers a land mass of an area of 1,210,912 sq km. It is bordered on the left by the Atlantic Ocean and on the right by the Indian Ocean; on the northwest by the tropical grasslands and on the northeast by the Limpopo River.<sup>2</sup> Its coastline stretches more than 2,500 km from the desert border with Namibia on the Atlantic coast, southwards around the tip of Africa, then north to the border with subtropical Mozambique on the Indian Ocean.<sup>3</sup> It was an isolated region before humanity's technological advances of the past few centuries,<sup>4</sup> brought about by the successive waves of European expansion.<sup>5</sup> The region has different environments; the coastline and its hinterland; the highlands rising to the escarpment; the grasslands of the eastern plateau; the area of good winter rainfall in the southwest; the arid lands of the Karoo and the Kalahari and Namib deserts.<sup>6</sup>

The climate in the southern part of the region is similar to that of northern-most parts of Africa. The climate of certain areas in the western part of the region is also similar to the climate in northern African countries, like Morocco.<sup>7</sup> This makes it suitable for Europeans to survive in both these regions more easily than they could in the tropical hinterlands. Therefore, these two regions of Africa became the regions to receive the densest immigrations by European settlers. They acquired the largest colonies of people of European origin.<sup>8</sup> Southern Africa was further attractive due to the fact that the region is rich in mineral deposits, like copper, tin, iron, coal, diamonds, gold and uranium.<sup>9</sup>

There were quite a number of different groups of people who were indigenous to the region. Although, their ways of life varied greatly in the different environments of the region, there were, however, certain general similarities to be

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<sup>2</sup> Thompson L 'Southern Africa to 1795' in Curtin P et al (1995) *African History: From Earliest Times to Independence* 241.

<sup>3</sup> See SouthAfrica.Info, South Africa's geography, available at <http://www.southafrica.info/about/geography/geography.htm> (accessed on 26 January 2010).

<sup>4</sup> Thompson L (5<sup>th</sup> ed) (2000) *A History of South Africa* 3.

<sup>5</sup> Beinart W (2001) *Twentieth-Century South Africa* 1.

<sup>6</sup> Thompson (2000) 7.

<sup>7</sup> North Africa is the closest to Europe, and has similar weather patterns.

<sup>8</sup> See generally Thompson (1995) 242-250. The initial purpose of the settlement of Europeans was because it served a strategic importance to them in their trade further in the east. This will be explored in more detail later in this chapter.

<sup>9</sup> *Ibid.*



found amongst them. Language is one of such similarities. Though different ethnic groups spoke different languages; it has become increasingly clear to linguists and anthropologists that the languages are distantly related.<sup>10</sup> The peoples also operated socially in nuclear family units, which then formed bands numbering from about twenty to eighty people. They were very mobile, moving to wherever they found food, occupying caves and camps and moving from one foraging, watering and hunting area to another as the seasons dictated. They were also very adept in making tools, clothing and musical instruments from the materials they found, like wood, stone, animal hides, catgut, and even had their bows and arrows with tips smeared with poisons extracted from snakes, scorpions or plants.<sup>11</sup> Evidence of these skills has been detected in rock paintings and engravings that have survived over the thousands of years.<sup>12</sup>

Another trait than ran through these different groups of indigenous people was the oral tradition that guided their way of life. Communication was oral, expressed in words or through music. Law and order was interwoven with their traditions, customs and religious practices. These all existed together as one package as there were no separations or distinctions that we now see in the current civilisation. All of these were passed down (from generation to generation) and communicated through oral tradition.<sup>13</sup>

The indigenous people of the southern part of the country around the sixteenth century AD are reportedly the Khoikhoi and the San people (Khoisan). The Europeans referred to them as the 'Bushmen' and 'Hottentots'. It is believed that their ancestors had lived on the lands as early as the first millennium. The distinction between these two groups of people is said to be artificial, relating more to their modes of life than to any more fundamental difference.<sup>14</sup> The Khoikhoi were essentially pastoralists (who only cultivated dagga), while the San people (Bushmen) were hunter-gatherers of edible plants for consumption, and with an intimate knowledge of the land.<sup>15</sup> The Khoisan people are believed to have

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<sup>10</sup> Thompson (2000) 7.

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

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

<sup>13</sup> See Chapter 2 for a comprehensive discussion of the life of indigenous African peoples and how law existed within these communities and how it was preserved by way of oral tradition.

<sup>14</sup> Welsh F (1999) *South Africa: A Narrative History* 16.

<sup>15</sup> *Ibid*; see also Thompson (2000) 6.

contributed a high proportion of the genes of the so-called ‘coloured’ people (who constitute about 9 percent of the population of modern South Africa).<sup>16</sup>

In the western part of the region, where pastures were plenty (especially in the reliable winter-rainfall area in and near the Cape peninsula), people were herding sheep and cattle. These people were referred to as the pastoralists, and they were genetically similar to the hunter-gatherers.

To the northeast were the people who not only owned cattle and sheep, but also grew cereal crops (they started agricultural practices) and used spears and digging tools with iron tips. This earned them the name ‘mixed-farmers’. They were not migratory people, but had semi-permanent villages throughout the year and their social and political organisations were stronger and more complex. These spoke what is referred to as Bantu languages, had dark brown skins and robust physiques. They are known as the Bantu people, reportedly the ancestors of the majority of the inhabitants of present-day Southern Africa, who had descended from central Africa.<sup>17</sup> They were negroids (blacks) who spoke the Bantu languages, and are believed to have later intermingled and inter-married with the Khoisan people.<sup>18</sup> A pattern of mixed farming developed, as these settlers acquired livestock and lived as a rule in small villages.

The southward penetration of pastoralists brought about the moving of the Khoikhoi stock farmers to the Western Cape, where sheep can be traced to the early Christian era, and cattle to about the end of the first millennium AD.<sup>19</sup> By A.D 1000, the mixed farmers had spread to much of the areas later known as Natal, the Cape Province, the Transvaal, Swaziland and eastern Botswana. They were very skilled in the production of pottery and metallic implements, and in most areas, they also integrated crop cultivation and pastoralism, as stated above. The mixed farming population then increased rapidly after this and expanded into the higher areas that their predecessors had neglected. This was due to the ability of

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<sup>16</sup> Thompson (2000) 6.

<sup>17</sup> Thompson (2000) 10.

<sup>18</sup> Welsh (1999) 68.

<sup>19</sup> Davenport TRH *et al* (2000) *South Africa, A Modern History* 9.

these farmers to adapt to the specific opportunities and challenges of whatever environment they found themselves in.<sup>20</sup>

It is believed that this expansion was part of a process of cultural transmission and gradual territorial expansion deriving ultimately from West Africa and from the area around Lake Victoria, where people began to adopt the iron-working, mixed farming way of life a few centuries before the Christian era.<sup>21</sup> It is said to stand as an explanation for the way in which the Bantu languages spread widely.<sup>22</sup> This is supported by the British archaeologist, David Phillipson, who surmised from the evidence at archaeological sites and evidence from artefacts, that

‘[t]he fact that so many important aspects of culture were introduced together over such a wide area and so rapidly makes it highly probable that the beginnings of iron-using in subequatorial Africa were brought about as a result of the physical movement of substantial numbers of people ....most likely the speakers of Bantu languages.’<sup>23</sup>

This gives a lucid explanation for the movement and occurrence of the Bantu speaking people around AD 1000, and their continued dominance of the region. It has however been cautioned that the movement was not due to massive waves of migration into the southern African region, but perhaps filtration into the region in small groups, best described as a migratory drift, or a gradual territorial expansion.<sup>24</sup> Another caution is that this is not the comprehensive story, and many aspects of the origins and spread of the indigenes of sub-Saharan Africa remain unresolved.<sup>25</sup> There exist many postulates by archaeologists as to the changes in the waves of immigration or movement of the peoples across the continent.

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<sup>20</sup> Thompson (2000) 12. See also Thompson (1995) 243.

<sup>21</sup> *Ibid*; Kopytoff I (ed) (1987) *The African Frontier: The Reproduction of Traditional African Societies*.

<sup>22</sup> Thompson (2000) 12.

<sup>23</sup> Phillipson D (1993) *African Archaeology* 171.

<sup>24</sup> Thompson (2000) 13; Jones PA (1984) ‘Mobility and Migration in Traditional African Farming and Iron Age models’ in Hall M *et al* (eds) *Frontiers: Southern African Archaeology Today* 289-296.

<sup>25</sup> *Ibid*.

### 5.2.2 Colonial South Africa: arrival of the Europeans

The second influence mentioned above is colonialism. This spanned over a longer period of almost three centuries, from the late seventeenth century to the mid-twentieth century. The people of the southern African region had remained undiscovered by the west until the end of the fifteenth century. The Portuguese on their explorations and excursions from Europe had been moving further and further along the western coast of Africa.<sup>26</sup> During the sixteenth century, they set up fortified bases in India in order to enhance their trade. They engaged in the nefarious export of slaves to the Americas from West Africa, and parts of East Africa, namely Mombasa and Mozambique, in the eighteenth century. Their activities, however, barely touched the territory of South Africa, as they were fearful of the navigational hazards of the Cape of Good Hope.<sup>27</sup> It was their activities that opened up the area to the Dutch traders who landed at the Cape in 1652. By the end of the sixteenth century, European merchant mariners<sup>28</sup> were using the sea route to Asia. They would intermittently land at the Cape peninsula to refresh their supplies of water and food, and to barter animals from the local Khoikhoi pastoralists in return for iron and copper goods.<sup>29</sup>

The Dutch East India Company, the *Vereenigde Oost-Indische Compagnie* (VOC), was a trading establishment formed in 1602 by Dutch merchants, with a charter from the government of the Netherlands. It was actually the result of a merger of smaller companies that had pioneered the first voyages to the East Indies.<sup>30</sup> The company was given a monopoly to trade from the Cape of Good Hope eastward. They decided to establish a fort at the Cape of Good Hope, in order to supply their fleets with water, fruit, vegetables and meat and to land their sick to recuperate on their way to and from Asia, where they had established an eastern empire. Thus, their initial intention was for the Cape station to serve as a stop-over, a refreshment centre, a victualling station and trading post.<sup>31</sup> In furtherance of this, in 1652, Jan van Riebeeck arrived as the commander of an expedition of eighty company

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<sup>26</sup> Thompson (1995) 257.

<sup>27</sup> Tempestuous seas, strong currents and perilous shoals had earned the area the name of the Cape of Storms.

<sup>28</sup> Mainly the Dutch, English, French and Scandinavian.

<sup>29</sup> Thompson (200) 32; Thompson (1995) 258.

<sup>30</sup> Welsh (1999) 12.

<sup>31</sup> Welsh (1999) 20.

employees to settle in Table Bay in order to fulfil this purpose. However, through various processes of settlement of the employees of the company (who happened to come from all over Europe), the Cape began to grow as a colony with a degree of autonomy and also unfortunately as a racially stratified society.<sup>32</sup>

The company in 1657 released nine of its employees from their contracts and gave them land to establish private farms at certain areas of the Cape to produce fruits, vegetables and goods that were needed by the ships that would make the stop-over for re-supplies. These were given the status of ‘free burghers’.<sup>33</sup> Further in 1679, more settlers were granted land in the area that became the district of Stellenbosch. This granting of land to private European citizens encouraged the migration of more women and more settlers generally from large areas of Europe, including France and Germany. The Dutch settlers were more dominant, and settlers from other parts of Europe were required to learn, worship and communicate through the Dutch language.<sup>34</sup> They married Dutch women and their children were brought up to imbibed the Dutch way of life and religion. Thus an originally European settler population was coaxed into conformity with the language and religion of the Netherlands. This amalgam of European nationalities in the Cape came to be known as the ‘Afrikaner people’.<sup>35</sup>

The company also relied heavily on ‘slaves’ to do the manual work of creating the infrastructure of the colony. They thus started the importation of slaves by sea to Cape Town in 1657, with the first consignment of slaves arriving from Angola.<sup>36</sup> The slaves came from the eastern countries where the company already had footing, such as Indonesia, India, Malaysia, Sri Lanka and even Madagascar.<sup>37</sup> The company used slaves for their purposes and sold them to the free burgher community as well. By the 1780s, French and English vessels were allowed in, and they brought in slaves from mainly Madagascar and East Africa. The economy of the Cape and its surrounds (wherever the Afrikaner people spread to) thus became dependent on slave labour. Slaves worked as everything from

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<sup>32</sup> Thompson (1995) 257-262; see generally Welsh (1999) 21-50.

<sup>33</sup> Thompson (1995) 258.

<sup>34</sup> Davenport (2000) 22.

<sup>35</sup> Davenport (2000) 22.

<sup>36</sup> Welsh (1999) 35.

<sup>37</sup> Thompson (1995) 260.

domestic servants, artisans, farm workers, to manual labourers and so on.<sup>38</sup> The combination of these peoples of European, Eastern, Asian and black races (including the Khoikhoi) was the start of the coloured population of the region.<sup>39</sup>

### 5.2.3 Inward spread of the Europeans

As more and more settlers arrived at the Cape, they engaged in agriculture, with stock rising on the side. This resulted in a situation by the end of the seventeenth century, in which they were producing more wheat and wine than the company needed for the garrison and its passing ships.<sup>40</sup> Supply began to outstrip demand, and this affected the livelihood of the people. In a bid to make a better life for themselves, some of the settlers then began to move further inland, taking possession of land from the indigenes and spreading away from the Cape. They specialised in cattle and sheep raising, became more self-sufficient, as they traded their sheep and cattle for whatever goods they needed with their black counterparts for hides and ivory. This early dispersion started the spread of the settlers (referred to as 'voortrekkers/trekboere' due to their nomadic way of life) northward towards the Orange River. Other factors that will be discussed below led to the major spread of the settlers eastward on either side of the arid Great Karoo and Little Karoo.<sup>41</sup>

#### 5.2.3.1 Consequential disintegration of the Khoikhoi

The Khoikhoi, who were the indigenous people of the Cape, noticing the incursion of the settlers; the taking over of their lands, cattle, building of the fort, planting of the crops and other activities of the settlers, realised with displeasure that they were facing a challenge to their very essence. Conflict ensued between the indigenes on the one hand, and the company officials and free burghers on the other hand. The conflicts quickly degenerated into military campaigns against the

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<sup>38</sup> *Ibid.*

<sup>39</sup> Welsh (1999) 35.

<sup>40</sup> Thompson (2000) 46.

<sup>41</sup> Thompson (2000) 46.

Khoikhoi, resulting in the disintegration of the Khoikhoi chiefdoms during the eighteenth century in the Cape colony.<sup>42</sup>

Many of the Khoikhoi were incorporated into the colonial society as slaves and servants working on the herds, and in the fields of the colonialists. Some of the Khoikhoi joined forces and became mixed bands that traded on the fringes of the area occupied by the trekboere (white nomadic stock farmers who had moved there by the beginning of the eighteenth century).

The outbreak of smallpox epidemics in 1713, 1755 and 1767, dealt a big blow to the Khoikhoi<sup>43</sup> and further decimated their numbers, thus making it easier for the incursion of the trekboere recorded above, as they moved deeper and deeper into the interior, to edge more and more of the indigenous people out of control of their land. They encountered very little resistance from the Khoikhoi and the indigenous people, and whatever resistance there was, they were able to quell with their superior weapons and ammunition.<sup>44</sup> The progression of the years saw the trekboere spread out thinly over a vast area extending in 1745 in the north-eastern direction beyond the current Graaff-Reinet. In this process, they drew more and more people from the indigenous pastoralists, hunting and gathering communities into their service as slaves.<sup>45</sup>

For more than a century, the trekboere were left to their own devices as they spread inland.<sup>46</sup> They established their own communities and very rarely concerned themselves with the officials at the Cape.<sup>47</sup> They had large families (sometimes with ten or more children), and ownership of land for farming was regarded as a birthright for each of the children, and a measure of social equality. This meant that they continued to occupy more and more land both to the east and the north as their families increased.<sup>48</sup>

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<sup>42</sup> Van Jaarsveld FA (1975) *From Van Riebeeck to Vorster 1652 – 1974: An introduction to the History of the Republic of South Africa* 19.

<sup>43</sup> Welsh (1999) 62. Smallpox was a foreign disease brought to the region by the colonials. It thus found room to flourish in this region as there was no immunity to it at that time. This was the situation of the Khoikhoi, who had never experienced it and thus who had no inbuilt resistance to it.

<sup>44</sup> Davenport (2000) 24.

<sup>45</sup> *Ibid.*

<sup>46</sup> Welsh (1999) 64.

<sup>47</sup> Only for purposes such as marriage solemnisations, baptisms and death records did they have to do this.

<sup>48</sup> Welsh (1999) 65.

Law and order, over the colony in the form of formal authority, was exerted by the Dutch officials through the Dutch East Indian Company, receiving orders from the highest echelon in Amsterdam. The judiciary and other administrative bodies were made up of officials of the company, and even the religious establishment was controlled by the company. The ministers and members of the clergy were employees of the company, drawing a salary.<sup>49</sup>

Senior officials of the VOC also engaged in agriculture and stock-owning. They possessed large portions of the best lands,<sup>50</sup> slaves and even exploited their positions to control access to the ships and external markets by making sure that their produce was first bought up by the fleet ships before those of the free burghers and colonial farmers could be considered. This was in breach of company policy, as officials were prohibited from owning land or partaking in the economy. They were meant to survive on the goodwill of the substantial colonial farmers.<sup>51</sup> This level of corruption was evident in the Cape colony all through the period of dominance of the company. The colonist farmers were highly dissatisfied with this position and made several attempts to get the directors of the company to curb the excesses of its officials. Their efforts, however, yielded little if any results, due to the fact that the company itself was slowly drifting into bankruptcy at that time. The lack of action or inadequate action taken by the company to put an end to the corrupt practices of its officials furthered the discontent felt by the colonist farmers and the free burghers and paved the way for the lack of great resistance that the British encountered when they captured the Cape from the Dutch in 1795.

#### 5.2.3.2 Further colonial incursion and conquest

In 1795, during the time of the French Revolution when the whole of Europe was thrown into turmoil, Great Britain became dominant and easily took over control of the Cape from the Dutch. The Dutch were not done away with, but were engaged on salaried basis. The control of the British in the Cape continued, except for a

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<sup>49</sup> Thompson (2000) 41.

<sup>50</sup> Welsh (1999) 34 records that company officials feathered their own nests and neglected the farmers' interests, as even Van Riebeeck was recorded to have the richest farm in the whole settlement.

<sup>51</sup> Thompson (2000) 42.



brief spell during 1803 to 1806, when the Cape returned to the Dutch briefly.<sup>52</sup> For the British, it initially was to be a stepping stone to Asia, where the English East India Company was conducting a highly profitable trade. They later realised that regardless of their intent in taking possession of the Cape, they would have to introduce measures to effect law and order on the society at the Cape.<sup>53</sup>

Law and order was stepped up by the new British authorities. Amongst these were: the abolition of slave trade; the introduction of circuit courts<sup>54</sup> (through which judges travelled regularly on circuit to bring justice nearer to the people), which came about between 1807 and 1811;<sup>55</sup> the appointment of British magistrates to replace the Dutch district courts which had been controlled by the colonists; the introduction of English trial procedures (including the jury system); the introduction of government schools in towns and villages;<sup>56</sup> and the introduction of ‘perpetual quitrent title’ in land (aimed at restricting expansion that had prior to then been at the pleasure of the trekboere).<sup>57</sup> They also abolished many of the Dutch concessions and monopolies and registered private property in land.<sup>58</sup>

The steps taken by the British affected the place of Dutch law in the Cape because it took on second place (for a period), as it was increasingly replaced by British laws and modes of justice. Roman-Dutch law, however, survived this onslaught and actually thrived over the years. It became a reasonable, well-compacted, elastic and adaptable system. In the early eighteenth century, it was noted that in South Africa, the tradition of Roman-Dutch law was ‘continuous, its pre-eminence unchallenged’.<sup>59</sup> Even though the adaptability of Roman-Dutch law is seen in its development through the years, it still maintains its uniqueness as a legal system.<sup>60</sup>

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<sup>52</sup> Davenport (2000) 41.

<sup>53</sup> *Ibid.*

<sup>54</sup> These courts enabled black employees to formally lodge complaints against ill-treatment from their white employers.

<sup>55</sup> In 1807, Britain passed the Promulgation of the Abolition of the Slave Trade Act in Britain, which amongst other things, banned slave trading which included the importation of slaves to the Cape.

<sup>56</sup> These schools had English as a medium of instruction and had syllabi that taught and emphasised British history and culture.

<sup>57</sup> Davenport (2000) 43.

<sup>58</sup> Thompson (1995) 274.

<sup>59</sup> Lee RW ‘The Fate of Roman-Dutch Law in the British Colonies’ (1906) 7(2) *J Soc. Comp. Legis. n.s* 356-370 at 370 (Cohen A. commented on this inaugural lecture in the journal).

<sup>60</sup> Lee (1906) 7(2) *J Soc. Comp. Legis. n.s* 356 at 369.

One is careful to say that this is still the position, as Roman-Dutch law still has a great deal of influence in the South African legal system.<sup>61</sup>

A British character was further promoted throughout the Cape and beyond, as numbers of British merchants began to move through the region. These numbers were not very high, as only a small fraction of the number of emigrants who left the British Isles before 1870 chose to settle in the Cape colony. This, however, boosted the white population to an extent. The white population that was already in the region were primarily the descendants of the early settlers who had left Europe in the Dutch period, many of whom were of French and German origin.<sup>62</sup> With time, they began to be referred to as the 'Afrikaners'. They were distinct in their language called 'Afrikaans', which had emerged from the interaction amongst the diverse inhabitants of the colony. It has a core Dutch vocabulary and syntax and included elements from the languages of the Asian slaves and the Khoikhoi people.<sup>63</sup> This is how the language 'Afrikaans' developed, has survived still the present day and remains the language of the Afrikaner people. The two white communities, the Afrikaners and the English people chose to maintain their ethnic dichotomy, sustained by linguistic and cultural differences. This situation has persisted right into the twenty-first century white South Africa.<sup>64</sup>

The author Thompson notes that the British regime introduced laws and rules to alleviate the lot of the slaves and the lower class Khoikhoi and ultimately to set them free.<sup>65</sup> A strong reform movement seeped in evangelical religion and morality had risen in Britain during the industrial revolution. It exerted pressure on the parliament for reform, including reform of the slave trade. The repeal of the Corn Laws in 1846 brought agitation to the fore to put an end to the slave trade (which, even though it had been declared illegal by virtue of the 1807 Act of the British banning slave trade, was still practised); to 'ameliorate' the institution of slavery and finally to outlaw it.<sup>66</sup>

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<sup>61</sup> This will be discussed later in this chapter.

<sup>62</sup> Welsh (1999) 105.

<sup>63</sup> Thompson (1995) 274.

<sup>64</sup> *Ibid.*

<sup>65</sup> Thompson (2000) 57; Davenport (2000) 43. He comments that these were initially normative changes introduced by the British.

<sup>66</sup> Thompson (2000) 57.

The 1807 Act of the British Parliament banning British participation in the slave trade (which was at that time an international trade conducted by all of the international powers) was not welcomed by the colonial farmers in the Cape. This was because they had built their fortunes on the labour of the slaves. They responded by increasing the workload of their existing slaves, since they could not get fresh supplies of labour. In 1823, in an attempt to improve the lot of those who were serving as slaves, the British government introduced a law in the colony, prescribing minimum standards of food and clothing and maximum hours of work and punishments. By this, they tried to control the behaviour of slave-owners and to eliminate their grave abuses of power.<sup>67</sup> In 1833, the British parliament passed a law emancipating the slaves throughout the British Empire, effective from the 1<sup>st</sup> of December 1834. This law provided for a four-year apprenticeship period after which the slaves became legally free in 1838.

Prior to the 1833 Act of parliament, the 50<sup>th</sup> Ordinance had been promulgated in 1828. This repealed previous legislations relating to the Khoikhoi and made ‘Hottentots and other free people of colour’ equal with whites before the law. They thus enjoyed ‘all the rights of law ... to which any other of His Majesty’s subjects was entitled.’<sup>68</sup> They were free from the obligation to carry passes; given a legal right to own land, and their employers were required to grant only short-term contracts, for up to a month if oral, and for up to a year if written, so that coloured employees and their children could break free from intolerable work situations.<sup>69</sup> In the light of this, the emancipation of the slaves in 1833 gave them the same legal status of freedom won by the Khoikhoi people in 1828.<sup>70</sup>

This ‘freedom’, however, was more legislative than anything else. It freed them from overtly discriminatory legislation, but did not translate into better conditions of living for them; neither did it elevate them from their poverty, which was as a result of an entrenched domination of the economy by the white population. Economic and political power in those preindustrial times revolved around and was bound in land ownership. Land was an essential basis for individual and group autonomy, and by 1828, whites were the legal owners of nearly all the productive

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<sup>67</sup> *Ibid.*

<sup>68</sup> Welsh (1999) 133.

<sup>69</sup> Davenport (2000) 48.

<sup>70</sup> Thompson (2000) 60; quoting Marais, *Cape Coloured People*, chap 5.

land in the colony. Thus the emancipated Khoikhoi and the slaves had very few alternatives but to continue working for the whites.<sup>71</sup> The few attempts to help the Khoikhoi people and the ex-slaves were choked and frustrated by the actions of the burghers and other Europeans (who made up the white establishment), and who ensured that the Khoikhoi and the ex-slaves did not succeed in their private ownership of land.<sup>72</sup>

Davenport notes that British conceptions of justice were not necessarily superior to that of the Dutch; just that the English common law system was more adapted to liberal interpretation than the Roman-Dutch system was.<sup>73</sup> This made the difference in the modes of law and justice as it appeared.

By this time in the mid-nineteenth century, Great Britain was divesting itself of its colonies and was devolving power to the people of the colonies. This was due partly to the desire and sentiments expressed by British colonists in the empire (New Zealand, Australia, North America and even South Africa), to have the fullest possible control over the colony and its internal affairs. White businessmen in the Cape Colony had also begun to question the rationale for their colonial dependency and why their payments in terms of tax had to go to administering and policing overseas territories, when they could very well determine with whom and how they did business. The British divestment was also due to the fact that the economic cost of continuing to run the colonies was no longer justifiable. Based on these sentiments, the British government was at a dilemma as to the form of government to adopt in the Cape Colony.<sup>74</sup> It had the option of adopting the Canadian system of self-government, which had become precedent in other British settlement colonies, or adopting the Indian system, which remained a dependency

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<sup>71</sup> *Ibid.*

<sup>72</sup> Thompson (2000) at 62 reports that in 1829, about 400 square miles of fertile land (formerly occupied by the Xhosa, who had been dispersed as a result of the *Mfecane*), on the upper end of the Kat River was granted as a settlement for the Khoikhoi and ex-slaves. Almost 2114 Khoikhoi and mixed settlers ended up on the land in 1833. Initially, things went well and the Khoikhoi were flourishing. However, the effects of the frontier wars in which the settlement was caught, the raids carried out by the Xhosa and other tribes from across the border rendered the chances of prosperity impossible. The British immigrants had also set their sights on the Kat River land because it was fertile, and all the while the Khoikhoi and ex-slaves held the land, they continued to agitate for portions of the land. Eventually, the British government yielded to the pressures of the British immigrants and opened up the fertile Kat River valley to white settlement. Whites flocked into the area, and with official support and relatively easy access to capital, they gradually edged the Khoikhoi people out of the land.

<sup>73</sup> Davenport (2000) 115.

<sup>74</sup> Thompson (2000) 63.

with a preponderance of alien inhabitants to be ruled autocratically for the foreseeable future.<sup>75</sup>

The Canadian model was followed and in 1853, the colony was granted a representative government through a revised draft constitution which provided for a bicameral parliament (a legislature with two houses, both consisting entirely of elected members).<sup>76</sup> It was empowered to legislate on domestic matters subject to British veto, and in 1872, it acquired a responsible government with a cabinet responsible to the legislature.<sup>77</sup>

Election to both houses of the Cape bicameral parliament was open to all races and all ethnic backgrounds, based on a minimum level of either property ownership or employment.<sup>78</sup> This was significant as it built on the constitutional theory of non-racialism. However in practice, it was entirely different. Most Africans did not qualify based on these criteria as they were handicapped by poverty. They were too poor to meet the requirements for eligibility into the parliament.<sup>79</sup> They were also hindered by the white control and domination of the press and the voting machinery to register voters and conduct elections.<sup>80</sup> They were also disenfranchised in the implementation of the system that continued to be manned by whites, and were never able to become members of the Cape cabinet or parliament; these were made up of whites only. Thus, even though the British government had the best of intentions in insisting on equality and everyone of whatever colour having access to enjoy the exercise of political rights, the criteria for qualification had the effect of restricting the participation of the Africans. The parliament elected in 1854 was thus a good mix of Afrikaners and English, easterners and westerners, liberals and conservatives, young and old.<sup>81</sup>

In 1856, the Cape parliament passed a Masters and Servants Act, which criminalised breach of contract and refusal to work or insulting of an employee.<sup>82</sup> This was a big step back for the Khoikhoi and former slaves who had been granted

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<sup>75</sup> Thompson (1995) 276.

<sup>76</sup> Welsh (1999) 200.

<sup>77</sup> Thompson (1995) 276.

<sup>78</sup> Welsh (1999) 201.

<sup>79</sup> *Ibid.*

<sup>80</sup> Thompson (2000) 65.

<sup>81</sup> Welsh (1999) 202.

<sup>82</sup> *Ibid.*

same rights as the whites by Ordinance 50. It signified that the passing of Ordinance 50 had not been sufficient to redress the inhumanity shown to the Khoikhoi and other slaves. As long as the white colonists continued to have the economic power, they were guaranteed political power and thus could continue to lord it over the other people. Even though emancipation had come to the other coloured people, the facts still spoke of exploitation. Soon after emancipation, the Khoikhoi and the former slaves began to be referred to together as the ‘Cape Coloured People’. This term has stuck right through to twenty-first century South Africa. The traditional culture and social networks of the Khoikhoi had been destroyed over the years by the process of conquest and subjection; they thus had no means of contesting the new social order.

As Thompson has espoused, the Afrikaners conceived of themselves as a superior race, and this led to the Dutch-Reformed church of the colony separating the coloured from white congregations, and the coloured were provided with a distinct and subordinate mission church by 1861. Furthermore, coloured children were banned from the public schools, and only a few had access to the mission schools to receive an education.<sup>83</sup> Thus, despite the non-racial terminology in the constitution, the coloured people were treated as an inferior and distinct community of people, dependent on white employers.<sup>84</sup> This stratification in the Cape appears to be the basis on which the apartheid laws in the second half of the twentieth century were built.

#### 5.2.3.3 Resistance from the Xhosa to white expansion

At the same time during the operation of the Cape as a British colony, the British colonists decided to expand the borders of the colony, but it was confronted by one of the Bantu-speaking mixed farming communities, the Xhosa chiefdoms along Algoa Bay (about four hundred miles east of Cape Town). Conflict and fighting ensued as the Bantu-speaking Xhosa refused to give up their land without a fight, and up until 1811, the Xhosa and the colonists were evenly matched. The Xhosa chiefdoms managed to impede the expansion of the colonists through the interior to the east up until 1811. Thereafter, the colonists with the aid of their superior

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<sup>83</sup> Thompson (2000) 66.

<sup>84</sup> *Ibid.*

power in the form of horses, guns and military troops, gradually began to conquer the Xhosa, until all the southern Nguni (comprising of the Swazi, Zulu and Ndebele people) was under White administration.<sup>85</sup> 'Nguni' represents a collective name for the group of African people of the negroid racial group.

The conquest of the Xhosa marked the destruction of their traditional society. As they were confronted with the influences of the whites, in terms of law and justice, trade and religion, they were unable to hold onto their traditional way of life, culture, values, customs that were so fundamental to the African social solidarity. Foreign commodities like sugar, tea, iron pots; mission churches and schools (which taught western education and Christian theology together with British values, and also introduced literacy, but condemned African cultural practices such as initiation, polygamy and others) had been introduced.<sup>86</sup> The change opened up new divides amongst the Nguni people, as some decided to reject the white's way of life, while others had accepted it whole-heartedly. Mostert reports that by 1856, following

'the longest, cruellest, and most penalizing of all the frontier wars, the frontier Xhosa were in a severe state of spiritual, political and economic crisis after a century of progressive land loss, strenuous assault upon their traditions and customs, and military defeat.'<sup>87</sup>

The total destruction of the way of life, traditions and values of the Africans, led many of them to seek employment for labour with the white settlers. Ultimately by 1872, when the Cape had responsible government, the division in the society was one along racial and class criteria. The White population - both the British settlers and Afrikaners - were already seeped in the racist ideology.<sup>88</sup>

Despite the fact that they were the members of the white community who had the upper hand, the Afrikaners, (especially those in the eastern parts) were still unsatisfied with the changes made in the society by the British government. This was considerably different to what was obtained during the time of the Dutch East

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<sup>85</sup> Thompson (1995) 278.

<sup>86</sup> *Ibid.*

<sup>87</sup> Mostert N (1992) *Frontier: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* 1177.

<sup>88</sup> Thompson (1995) 280.

India Company. The British government had imposed new laws<sup>89</sup> and changed existing ones,<sup>90</sup> which all had the effect of curtailing the ‘freedom’ the Afrikaner community previously had. As stated above, the introduction of circuit courts by the British moved legal justice closer to the oppressed slaves and natives. By 1834, the district administrative system also started to change and the British began to introduce their own system. Magistrates without any local affiliation were appointed to replace the Dutch officials.<sup>91</sup>

#### 5.2.3.4 The great trek

As indicated earlier, factors arose which led to the inland spread of the Afrikaner community. The changes by the British government in particular made the Afrikaner community uneasy. A large number of the farmers in the eastern region of the colony decided to leave the colony for the hinterlands in the hope that they would find land on which they could settle. They were those mostly affected by the new laws concerning slaves and the Khoikhoi, as they were more heavily dependent on slave labour. They left with their families, wagons, cattle, sheep, slaves and all moveable property, and began to journey inwards into the interior in a remarkable exodus that has now come to be known as the ‘Great Trek’.<sup>92</sup> They were in search of a place where they could regulate their own affairs with each other and with their servants, and not have to be dictated to by the British policies and government which were alien to them. As indicated above in section 5.2.3, these Afrikaner immigrants came to be known as the *Voortrekkers* (pioneers).

The *Voortrekkers* had a number of violent encounters with African kingdoms of the Zulu, Xhosa, Ndebele and others on their journey which spanned many years.<sup>93</sup> Some of them settled in Natal, whilst others went on across the Drakensberg, from

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<sup>89</sup> Laws, such as Ordinance 50 in 1828 and the Emancipation Law in 1834 strongly curbed the rights that the Afrikaners had apportioned to themselves.

<sup>90</sup> Under the Dutch dispensation, Afrikaners were free to expand into new areas on payment of a nominal fee. This was changed to the quitrent system by the British, which meant that land ownership was more secure, and also much more expensive.

<sup>91</sup> Thompson (2000) 68.

<sup>92</sup> Thompson (2000) 69.

<sup>93</sup> These encounters were reported to be violent. The structure of the African communities and chiefdoms in those days was one in which they were loosely tied together with no proper cohesion. There were mainly pastoralist and mixed farmers, and so remained semi mobile, moving from area to area, land to land. In a bid to retain and repossess their lands, they led many attacks against those they perceived as white invaders. However, the *Voortrekkers* were able, due to their superior gun power, horses, machines and ammunitions, to overcome them and take over their livestock and lands, leaving just the survivors to flee.



the Orange River in the southwest to the foothills of the Soutpansberg Mountains near the Limpopo River in the north, an area referred to as the Transvaal.<sup>94</sup> These lands had been heavily populated by the African communities of northern Nguni, and the Sotho-Tswana communities respectively prior to the *Voortrekkers* arrival; however, the unrest (*Mfecane*) caused by King Shaka of the Zulus had caused these communities to disperse.<sup>95</sup> The land that the *Voortrekkers* met was sparsely populated at the time, and they had little difficulty in overcoming the inhabitants. They were able to take possession of the lands and to settle in these areas.<sup>96</sup>

In 1852, British government entered into a convention with the *Voortrekkers* that settled in Transvaal, recognising their independence. The same was done two years later with representative of the *Voortrekkers* that settled in Bloemfontein (now the Orange Free State). These two settlements became republics: the Orange Free State (between the Vaal and Orange Rivers) and the South African Republic, also called the Transvaal (between the Vaal and Limpopo Rivers). The Natal settlement had been able to run itself until 1843, when it was annexed by Britain, thus marking an end to the *Voortrekker* republic there, and transforming it into a British colony. Surrounding these colonies and republics were independent territories inhabited by Africans that had been displaced, from the Tswana chiefdoms in the northwest, the Venda in the north, and the Swazi, Zulu and Mpondo in the east. These were able to exercise effective control over their own lives and to produce enough grain for their own subsistence. Wherever the Afrikaners settled, they practiced their scarce tolerance of any social interaction with black people, except as masters and servants, thus preserving the patriarchal relationships that had originated in the seventeenth century. This was followed by the British settlers in the region, who merely copied and followed these established mores.<sup>97</sup>

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<sup>94</sup> Thompson (1995) 285.

<sup>95</sup> *Mfecane* refers to a period of unrest, of dispersion caused by chaos. King Shaka of Zulu, a mighty warrior of his time, had his own men trained in the art of warfare, compared to other Bantu-speaking people. The Zulu's had waged war against other African communities in an attempt to expand their lands. This had resulted in chiefdoms, villages and people fleeing from their homes in a bid to escape the wrath of Shaka's murderous army.

<sup>96</sup> Thompson (2000) 81-87 and Davenport (2000) 14-15 and 16-20 have written extensively about the *Mfecane*, its causes and its effects on the African communities that were in those areas.

<sup>97</sup> Thompson (2000) 108.

Under British rule in Natal, there was a substantial influx of British immigrants, soon outnumbering the *Voortrekkers* who had remained in Natal. Nevertheless, the entire white population only counted for about 7 percent of the total population, the rest were Africans. By 1870, sugar was being produced in Natal on a commercial scale for export, and there was need for more labourers to work on the sugar plantations. The refusal of the then administrator of the region to force the Africans to work on the plantations for next to nothing, led to the importation of labourers from India. Many of these never returned to India at the end of their work contracts. They settled in Natal and became engaged in the work force and ended up effectively excluding the Africans from such occupations.<sup>98</sup> This explains the way in which Indians came to dominate in Natal, especially Durban and Pietermaritzburg.

Various discoveries of natural minerals led to rounds of influx of people from all over the world to dig for precious stones.<sup>99</sup> Alluvial diamonds found near the confluence of the Vaal and the Harts Rivers in arid country west of Bloemfontein in 1867 led to the birth of Kimberley, the diamond city. Most of the people digging were white, while nearly all their assistants were black. The manual way of digging for the precious stones soon gave way to huge machinery and industrial processes being erected at the different venues of exploitation, and led to the establishment of mines. The influx thus began the migrant labour system in South Africa. Even on the mines, racial segregation continued. African men were denied training to acquire skills to work more efficiently.

Law was used during this period to further racial segregation that had already been underlying. In Kimberley in 1872, proclamations were made to the effect that any black person was *de facto* excluded from owning diamond or trading in diamonds and was liable to imprisonment or corporal punishment if found 'in precincts of the camp without a pass signed by his master or by a magistrate'.<sup>100</sup> African men who looked for employment in these mines were detached from their families in the homelands, as they were housed in hostels under tight discipline, and stayed there

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<sup>98</sup> Thompson (1995) 288.

<sup>99</sup> Particularly in 1867 in Kimberley and in 1886 in Pretoria.

<sup>100</sup> Worger WH (1987) *South Africa's City of Diamonds: Mine Workers and Monopoly Capitalism in Kimberley, 1867 – 1895* at 116.

for the duration of their contracts, usually spanning from six to twelve months.<sup>101</sup> The migrant labour had not only physical implications on the African families, by virtue of the absence of the men, but also social and economic effects. Family life was disrupted for long periods, and women became responsible for the economic and social management of households, thus causing a breakdown of family life amongst the Africans.<sup>102</sup> This can be linked as part of the root cause of the dysfunctionality seen in the African societies and families of South Africa till date.

Between 1870 and the end of the century, African societies of Southern Africa came under intense pressure from both white farmers and business people, traders and missionaries, to British regiments, colonial militia and Afrikaner commandos. They were all unified by one common goal of subjecting the Africans, appropriating their remaining lands, exploiting their labour and dominating their markets. Thus by the end of the century, all the indigenous peoples of Southern Africa were incorporated into states under the domination of the whites. This marked the completion of the process of conquest which begun with Van Riebeeck centuries earlier.<sup>103</sup>

The discovery of gold, diamond and other minerals; and the competition the British government was encountering from other economic and military powers, especially Germany, prompted the colonial government to begin the annexation of the mineral fields, along with the annexation of the other republics (Transvaal, Orange River, Natal and Cape Colony), with the aim of forming the Union of South Africa. This was achieved in 1910 when the colonies and republics joined to form the Union of South Africa by virtue of the South Africa Act of 1909.<sup>104</sup>

This act (which served as the constitution for the new Union of South Africa) was an adoption of the Westminster system, like the constitutions of other African countries with British colonial history. It provided for the executive government of the Union to be vested in the King of the United Kingdom, to be administered

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<sup>101</sup> Thompson (2000) 119.

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

<sup>103</sup> Maylam P (1986) *A History of the African People of South Africa.*

<sup>104</sup> Thompson (2000) 115.

by a representative referred to as a Governor-General.<sup>105</sup> The legislative power of the Union was vested in the Parliament of the Union, which comprised of the King, Senate and House of Assembly.<sup>106</sup> The judicial power of the Union was vested in the courts, headed by the Supreme Court of South Africa.<sup>107</sup> By this act, the supreme courts of the different colonies became provincial divisions of the Supreme Court of South Africa.<sup>108</sup>

The preceding paragraphs have attempted to explain the history and origins of South Africa and its many diverse and multi-racial, multi-ethnic, and multi-coloured peoples. As stated at the beginning, South Africa's history is peculiar and unique in Africa. White power (colonial and settler power) in South Africa was more efficient and often more uncompromising than in many other colonial contexts. It had deep foundations in the region, but, even at its height in mid-century, the settler state was shaped by its African context. In Africa as a whole, colonial rule, though far-reaching in its consequences, was a relatively short-lived historical moment. In South Africa this phase was longer, and more radical social transformations (industrialisation, urbanisation, and agricultural expansion) took place.

Part of what made this phase longer in South Africa, as stated above, can be attributed to the fact that its climate, its diseases, and natural resources allowed for substantial early European settlement, despite the fact that there was no vacant land, as the Khoikhoi and other African peoples had populated the areas known today as South Africa. However, the Khoikhoi and other Africans were weak and naïve in the face of the armoury and cunning of the white man, and were unfortunately susceptible to foreign diseases like smallpox which they had never encountered before, and had not built resistance to it. It wrecked havoc on their numbers, and paved the way for the appropriation of the land by the white population and for the domination of the whites.<sup>109</sup>

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<sup>105</sup> Part III, sections 8 and 9 of the 1909 Act.

<sup>106</sup> Part IV, sections 19 to 20 of the 1909 Act.

<sup>107</sup> Part VI of the 1909 Act.

<sup>108</sup> Section 98(1) of the 1909 Act.

<sup>109</sup> Beinart (2001) 3-4.

This part of the history shows how the foundations for the next stage of influence in South Africa were laid. In the early twentieth century after the National Party came to government (predominantly Afrikaners), a deliberate crackdown on Africans and their rights began. This is the era usually referred to as the apartheid era.

### 5.3 Apartheid South Africa

The third influence indicated at the beginning of this chapter is ‘apartheid’. *Apartheid* is an Afrikaans term for ‘separate-ness’ or ‘apart-ness’. It refers to the system of racial discrimination and white political domination adopted by the National Party while it was in power from 1948-1994.<sup>110</sup> It depicts the process by which Africans were separated from the white population and made to live their daily lives in separation. It is important to note the role that the ‘law’ as promulgated played in enabling the apartheid system. Segregation was implemented first by way of promulgation of laws that restricted the rights of the African population. The discussion on how apartheid operated in South Africa, will illustrate how law was used as an instrument of oppression, and was used to set the stage for apartheid.<sup>111</sup> This use of law was abhorrent and illegitimate because it stripped a group of people of their inalienable rights.<sup>112</sup>

Apartheid was an elaboration of earlier segregationist traditions derived partly from the thinking of the Broederbond in the 1930s.<sup>113</sup> Apartheid in South Africa was enforced by laws and legislation, which sought to reconstruct South African society on the basis of race distinctions. Apartheid was a policy of the government from the 1940’s. Apartheid laws determined who could vote, who could receive an education and whom one could marry.<sup>114</sup> In the practice of apartheid, the state also established a racial register of the population, prohibited sexual intercourse between the races, and restricted ownership of land, property and businesses. All

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<sup>110</sup> Beck RB (2000) *The History of South Africa* 125.

<sup>111</sup> See Abel RL ‘Legality without a Constitution: South Africa in the 1980s’ in Dyzenhaus D (ed) (1999) *Recrafting the Rule of Law: The Limits of Legal Order* 66-80.

<sup>112</sup> *Ibid.*

<sup>113</sup> Davenport (2000) 373. The ‘Broederbond’ was an Afrikaner organisation that aimed to further Afrikaner nationalism, interests, culture and ultimately aimed to gain control of the South African economy.

<sup>114</sup> Hali CRD & O’Meara ‘South Africa’ in Martin & O’Meara (ed) (1995) *Africa* 395.

of these steps were taken in a bid to preserve the supremacy of the whites. In this process, the law was used to define and enforce apartheid, and fundamental human rights violations (such as detention without trial, carrying out searches without a warrant) became the norm of the day.<sup>115</sup>

Prior to the adoption of apartheid as state policy, the foundations of apartheid had been laid in the racial segregation and discrimination that had been evident and was being practised right from the time Van Riebeeck landed at the Cape.<sup>116</sup> The state, under the leadership of President Louis Botha and Jan Smuts as Minister for the Interior, (both of the South African party which was dominated by Afrikaners) continued its policy of racial segregation and discrimination by passing various laws which limited and prevented the interaction of the African population with whites. This had the effect of principally stripping the African population of all its land, and resources and making it dependent on the work it found with white farmers or white industrialists on the mines. For instance, in 1913 the Natives Land Act was enacted.<sup>117</sup> This Act created areas for Africans which it called 'African reserves'. It prohibited Africans from purchasing or leasing land outside the reserves from people who were not Africans, and also prohibited sharecropping in certain places. The effect of the act was to give the black population about 7 percent of the land area of the Union of South Africa. This was later increased to 11.7 percent in 1939.<sup>118</sup> The Act thus had the effect of converting the black population into a great labour pool.<sup>119</sup>

Over-cropping (due to the large numbers of the African population) meant that the land allocated to Africans failed to yield after a while. This increased the already existing levels of poverty amongst the African population. Death due to

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<sup>115</sup> *Ibid.*

<sup>116</sup> As indicated in the discussion of the history above, the Europeans (comprising mostly of the Dutch, with some of French indigene, British and otherwise) felt they were superior to the indigenes of the land and they implemented policies to keep the indigenes apart, and to keep them in servitude. After South Africa became a Union in 1910, with the South African Party as the party in government, it continued its racist practices, by applying a comprehensive program of racial segregation and discrimination and gained control over the African peasantry. Laws limited land ownership by Africans to demarcated reserves, transformed blacks who lived in rural areas outside the African reserves into wage or tenant labourers for white farmers, and ensured white dominance in the industrial cities and rural townships, thus reducing the African population to a proletarian status in their own lands. These laws will be discussed later.

<sup>117</sup> Black (or Native) Land Act No 27 of 1913.

<sup>118</sup> The Black (Native) Laws Amendment Act No 46 of 1937.

<sup>119</sup> Welsh (1999) 376.

malnutrition became common place especially amongst the children. The African population was then forced to seek jobs with the whites. Many left for the cities to look for work on the mines or as domestic workers in white homes or on the farms to work as labourers. The situation in the reserves forced the African population to greater levels of servitude to the whites. Thus, the South African economy developed the unique characteristic of a complex racial segregation that met white economic needs by making a high proportion of the African people labour for whites.<sup>120</sup>

The huge influx of Africans into the cities looking for jobs led to the introduction of measures to curb the influx by the government. As a result, various laws were introduced to stem the flow of Africans into the cities.<sup>121</sup> These laws required that an African needed a document of identification, ‘a pass’, allowing him to enter into the city (which were predominantly white) for the purposes of work.<sup>122</sup> It also limited the time interval within which they could be in the cities. Any breach of the ‘pass’ conditions resulted in expulsion from the cities (if they were lucky) or jail time. These laws, however, did not necessarily reduce the number of Africans seeking work in the urban areas. Further, laws also attempted to separate ‘native’ from European administration, with separate legislative bodies and administrations for blacks. This was the recipe for what fully later became known as the system of apartheid.<sup>123</sup>

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<sup>120</sup> Thompson (2000) 165.

<sup>121</sup> This is similar to what happened with the phenomenon of the ‘poor white question’ that arose in South Africa in the early decades of the 20<sup>th</sup> century. From about 1886 to about 1932, this question came out in the public domain, as concerns arose about the existence of ‘very poor’ white families. There was a lot of concern about this as it was thought to be a bad reflection on the white race that had considered themselves superior. A Commission of Inquiry (the Carnegie Commission) set up to look into the phenomenon, recommended steps to be taken to address the problem in 1932. However, some commentators have opined that the problem was never as severe as was made to be, as it was more a case of rural poverty (which had existed all along) being brought into the open. See also, Fourie J ‘The South African poor white problem in the early 20<sup>th</sup> century: Lessons for poverty today’ *Stellenbosch Economic Working Papers*: 14/06. Fourie notes that even though there are many causes that have been adduced for this problem of poor whites (amongst which includes the colonial exploitation of the British, the Anglo-Boer war and others), the problem developed due to a multitude of different exogenous and endogenous factors and cannot be pinned to one cause in itself. Amongst the possible factors are educational attainment, labour policies, environmental and demographic changes, culture, and political development, to name a few.

<sup>122</sup> The origin of the pass laws can be traced to the Transvaal and the Orange Free State, which had passed discriminatory pass, trading and property laws as early as the 1880s, when strict limitations had been enforced on Indian immigration and enterprise.

<sup>123</sup> Welsh (1999) 384.

Between 1910 and 1924, more and more segregation laws were implemented, with the specific purpose of separating black and white lives and development. Strikes by African labour was prohibited; categories of work were reserved for white people;<sup>124</sup> skilled trades were made more accessible to white youths;<sup>125</sup> and in labour relations, collective bargaining machinery was restricted to whites and coloureds only.<sup>126</sup>

By 1923, the Natives (Urban Areas) Act<sup>127</sup> was enacted, which authorised the establishment of African ‘locations’ within urban areas. By this Act, government could then order all Africans in the town or city to reside in the locations. This gave rise to the ‘locations’ which now exist in South Africa. Thus over the years, South African towns developed a characteristic dual form. The modern town with its business sector and suburbs owned by white families and served by black domestics on the one hand, and the ‘locations’ where mud, clapboard, or corrugated iron buildings, with earth latrines, stood on tiny plots of land.<sup>128</sup>

Economically, the mining industry was the backbone of South African. In the mines, the largest group of workers were the Africans both from within South Africa, and from neighbouring countries like Swaziland, Tanganyika (now Tanzania), Northern Rhodesia (Zambia), South West Africa (Namibia), Angola and other countries. Racial discrimination was practiced also. There was a huge disparity in the conditions of employment of the Africans and the whites in the mines. Mine labour was split on a hierarchical and racial basis, with the white miners being better paid by up to eleven times more than the Africans; they were also entitled to paid leave, pension and other benefits which Africans were not entitled to.<sup>129</sup> This practice of racial discrimination was extended by the state to the manufacturing industries and public works sector also.

With the electoral victory of the National Party (NP) in 1948, D. F. Malan became the Prime Minister of South Africa. His government was the first to consist of

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<sup>124</sup> Mines and Works Act of 1911.

<sup>125</sup> Apprenticeship Act of 1922.

<sup>126</sup> Industrial Conciliation Act of 1924.

<sup>127</sup> No 21 of 1923.

<sup>128</sup> Thompson (2000) 170.

<sup>129</sup> Thompson (2000) 167.



Afrikaners only in the history of the Union.<sup>130</sup> The legal entrenchment of white privilege and racial domination thus became the guiding principle of public policy in South Africa.<sup>131</sup> Apartheid was formally introduced as a government policy and it was applied in a plethora of laws and executive actions.<sup>132</sup> It became evident in the National Party's creation of unequal and separate education, job reservation for the whites and residential segregation. The NP in seeking to safeguard the interests of the whites, who only formed about 17 percent of the population used the so-called pass laws to control the movement of the black people. It began a systematic process of eliminating any vestige of black participation in the central political system. In 1956, it placed the coloured voters in the Cape Province on a separate roll and gave them the right to elect whites to represent them in Parliament.

The NP used its influence and control of government to fulfil its Afrikaner ethnic goals. All state institutions were 'afrikanised'. Afrikaners were the only ones being appointed to the civil service, army, police and state corporations.<sup>133</sup> The Population Registration Act of 1950<sup>134</sup> led to the racial categorisation of every person, resulting in the breaking up of homes in cases where one parent was classified as white and another as coloured. It was preceded by the Prohibition of Mixed Marriages Act of 1949<sup>135</sup> and the Immorality (Amendment) Act of 1950,<sup>136</sup> which made marriage and sexual relations across the colour line illegal.

The legal system that existed under the apartheid system was designed to cater to the white minority. This minority made laws for themselves and others in the society, without any participation by the others in the society in the lawmaking

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<sup>130</sup> Davenport (2000) 377.

<sup>131</sup> Martin & O'Meara (1995) 395. Various laws were passed in furtherance of legally entrenching apartheid, and suppressing any uprising amongst the people. These include the Suppression of Communism Act of 1950, the Riotous Assemblies Act of 1956, the Unlawful Organisations Act of 1960, the General Laws Amendment Act of 1962 (Sabotage Act), and the Terrorism Act of 1967.

<sup>132</sup> For a list of apartheid legislation passed by the Nationalist Party Government, see 'Apartheid Legislation in South Africa', available at <http://africanhistory.about.com/library/bl/blsalaws.htm> (accessed on 4 May 2010).

<sup>133</sup> This practise of favouring one racial group over the other in employment and other areas has been replicated in the economic empowerment laws that are now in force in South Africa. The effectiveness of these laws in re-dressing the wrongs of the past will need to be assessed over a longer period of time.

<sup>134</sup> Act No 30 of 1950.

<sup>135</sup> Act No 55 of 1949.

<sup>136</sup> Act No 21 of 1950.

process.<sup>137</sup> These laws were for the purpose of enforcing the system and thus lacked legitimacy due to the disenfranchisement of a majority of the society in the process of law-making. As a result, the rule of law (as we know it) became one of the greatest and most serious casualties of the apartheid system.<sup>138</sup> The principle of Parliamentary sovereignty was in practice then in the country and the courts had little or no say in the legislation that parliament passed and in the actions of government.<sup>139</sup> This meant that there was no constitutional authority to check the dictatorial, arbitrary and draconian legislation passed by a Parliament which saw itself above the law.<sup>140</sup>

This meant that the courts did not have the power or option to review or reverse unjust laws; rather they had to implement and administer the laws as they were. Thus, the majority began to view the courts as instruments in the hands of the government to enforce its laws. Despite this, the attitudes of judges when confronted with cases of discrimination varied, as some were sympathetic to the plight of those suffering human rights abuses, whilst others epitomised the state in their judgements.<sup>141</sup>

In 1953, the South Africa parliament passed the Reservation of Separate Amenities Act<sup>142</sup> in response to an Appellate Division's critique that segregation was not lawful if public facilities for different racial groups were not equal.<sup>143</sup> The court's criticism was not received well by the government and prompted the overhauling

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<sup>137</sup> Madala J 'Rule Under the Apartheid and the Fledging Democracy in Post-Apartheid South Africa: The Role of the Judiciary' (2000-2001) *N.C.J. Int'l L & Com. Reg.* 743 at 745.

<sup>138</sup> Madala (2000-2001) *N. C.J. of Int'l L & Com Reg.* 743 at 748.

<sup>139</sup> Dyzenhaus (1999) 75.

<sup>140</sup> Madala (2000-2001) *N.C.J of Int'l L & Com Reg* 743 at 756.

<sup>141</sup> Spiller PR 'Race and Law in South Africa in the Nineteenth and Twentieth Centuries' in Watkin TG (ed) (1989) *Legal Record and Historical Reality* 215. In what he refers to as 'the tension between race and law', the author discusses how the courts in the then Natal responded to the discriminatory legislation of the apartheid system. He noted that the contrary pull operating on the courts by the two issues have resulted in a confusing and sometimes uneven record of judicial attitudes towards race. Madala (2000-2001) *N.C.J. of Int'l L & Com Reg* 743 at 750, while writing as one who experienced the rawness of apartheid as a black lawyer, mentions how the courts were used to further enforce and give a semblance of 'legitimacy' to the system. He cites instances in which judges went as far as to sanction discrimination in their courthouses even in the absence of laws compelling them to do so.

<sup>142</sup> Act No 49 of 1953.

<sup>143</sup> This was in direct response to the decision of the Appellate Division in the case of *Abdurahman* 1950 (3) SA 136 (A), which emphasised the need for equality of facilities, following the earlier decision of the court in the case of *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, where the Appellate Division had enshrined the doctrine of 'separate but equal' development in its response to the issue of racial segregation of public facilities.

of the judiciary, by an act of parliament to increase the number of appellate judges from five to eleven, the additional six judges being Afrikaners with the same separatists' ideology.<sup>144</sup>

By 1954, more restrictions were imposed through the 'pass laws', as black women were then required, together with their men, to carry a 'comprehensive identity book' (pass/permit), which sought to provide details of their residential and employment status, and which set a time limit within which they could remain in the urban areas.<sup>145</sup> Failure to comply with these restrictions resulted in imprisonment.

The policy of apartheid and its implementation has been referred to as more than a mere system of racial repression; it was designed to prevent black economic competition and to ensure the supply of cheap black labour to farms, mines, and industry.<sup>146</sup> Africans were barred from skilled mining jobs with the passage of the Mine and Works Act as far back as in 1911. This left the white mine workers to gain the economic advantages that rose from the enactment of racial privilege, especially in the gold-mining industry.<sup>147</sup> Black trade unions were prevented from operating and thus the low wages and the exclusion of blacks from health, training and unemployment benefits could not be challenged by the individual workers. After 1948, under the premiership of Verwoerd, apartheid intensified as a system and became a tool for social engineering. It was exercised with a great deal of precision and determination on the part of the government. It extended to the control of the educational system, as better facilities were provided for the education of the whites as opposed to the education of the Africans, which suffered immensely.<sup>148</sup>

Beinart notes that apartheid became so dominant a feature of life in South Africa over the next forty years that for one to understand South Africa in this period, one

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<sup>144</sup> Thompson (2000) 190-191.

<sup>145</sup> Martin & O'Meara (1995) 395; Davenport (2000) 401.

<sup>146</sup> Martin & O'Meara (1995) 396.

<sup>147</sup> Martin & O'Meara (1995) 397.

<sup>148</sup> The government spent ten times as much *per capita* on white students as on African students, and African classes were more than twice as large as white ones, with most of the teachers in African schools less qualified than the teachers in white schools. Even when they did have the same qualifications, African teachers were paid less than Whites, and they had to teach African school children from text books and to prepare for examinations that expressed the government's racial views.

must understand the system also.<sup>149</sup> Apartheid gave South African society a distinctive profile and a bad reputation amongst the international community. He notes that though there were other segregationist and authoritative regimes in the world, the intensity of the apartheid system, the commitment of the government to pursue it with every resource available to it, and the timing of apartheid (it was happening in an era of decolonisation and majority rule all over the world) made it an anathema in the post-holocaust and post-colonial world.<sup>150</sup>

In 1950, the Group Areas Act<sup>151</sup> was introduced to empower the government to proclaim and designate certain areas as residential and business areas for particular race groups.<sup>152</sup> This allowed the government to carry out forced removals, in which Africans and other races were forced out of their lands and relocated elsewhere, while their lands were rezoned for white occupation. Sophiatown (four miles west of Johannesburg centre) was one of the few townships where Africans had owned land. In 1955 the inhabitants of Sophiatown were removed to Meadowlands, a further 8 miles away. It was then rezoned for white occupation and renamed Triomf (Triumph). District Six in the Cape was another notorious forced removal case. It had been home to a vibrant coloured community since the early nineteenth century. Inhabitants of District Six were relocated to the sandy wind-swept Cape flats. The same experience was felt by the Indians in Durban also, as their homes and businesses were lost in areas rezoned for whites.<sup>153</sup>

The government grouped the ‘reserves’ set apart for Africans to live, into ten territories. Each territory became known as a ‘homeland’ for a potential African ‘nation’ administered under white tutelage by a set of Bantu authorities.<sup>154</sup> The reserves were thus turned into homelands, with the promise of a granting of independence by government based on the Bantu Homelands Constitution Act of 1971. The homelands created were Transkei (Umtata), Venda (Thohoyandou), Ciskei (Bhisho), Gazankulu (Giyani), KaNgwane (Louieville), KwaNdebele

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<sup>149</sup> Beinart (2001) 144.

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

<sup>151</sup> Act No 41 of 1950.

<sup>152</sup> Davenport (2000) 378

<sup>153</sup> Thompson (2000) 194; Lodge T (1983) *Black Politics in South Africa since 1945* 91.

<sup>154</sup> Lodge (1983) 91.

(Siyabuswa), KwaZulu (Ulundi), Lebowa (Lebowakgomo), Qwaqwa (Phuthaditjhaba) and Bophuthatswana.<sup>155</sup>

With this, the plan of the government under apartheid to herd the African populations into the homelands (with the exception of those needed as labourers by white employers) began to materialise. This included rigid and sophisticated controls over all black South Africans, through which they were prohibited from visiting an urban area for more than seventy-two hours without a special permit. Officials arrested those who did not have such documentation.<sup>156</sup>

This myth of separate territories was used to deny the African citizenship rights throughout the country.<sup>157</sup> By claiming to have established ‘self-governing homelands’ in which Africans could vote and participate in their own political process, the government was hoping to deflect the black opposition at home and international criticism abroad.<sup>158</sup> The homeland policy, however, did not accomplish this goal, as black South Africans saw this policy as a further erosion of their rights, and the international community did not recognise the homelands.<sup>159</sup>

Beck argues that in order to enforce its draconian measures, the apartheid regime created the ‘best equipped and best trained’ police force in Africa. It expanded and equipped the South African Defence Force (SADF) and created a bureau of State Security (later known as the National Intelligence Service). The bureau operated secretly; interrogating political suspects, carrying out clandestine military operations against anti-apartheid opponents and organisations.<sup>160</sup> It went as far as destabilising neighbouring independent countries because those countries were sympathetic and giving support to the anti-apartheid movements.<sup>161</sup>

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<sup>155</sup> Martin & O’Meara (1995) 398.

<sup>156</sup> On the average, more than a hundred thousand Africans were arrested each year.

<sup>157</sup> Martin & O’Meara (1995) 397.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* Transkei was the first of four homelands to be granted complete independence. It did not, however, receive diplomatic recognition from any country other than South Africa. The same happened with the homelands of Bophuthatswana (1977), Venda (1979) and the Ciskei (1981).

<sup>160</sup> Such operations included acts of torture, brutality and assassinations in a bid to quash the anti-apartheid movements.

<sup>161</sup> Beck (2000) 130. Those countries did in fact host ANC camps and training grounds after the ANC was banned and many of its members had fled the country.

### 5.3.1 Opposition to apartheid: peaceful resistance

Opposition to the apartheid policy of government came from different sectors and directions. Various groups emerged in the fifties who opposed the apartheid laws and policies. As would be expected, Africans were in the forefront of the struggle, led by the middle class Africans who had managed to get an education and to make a living in the midst of the repressive laws of the government. As early as 1912, a formation of African leaders had begun. It later became known as the African National Congress (ANC). The party together with other organisations demanded justice and equality through peaceful and non-violent protests and petitions to the government, following the style adopted by Gandhi in his fight against the oppression of Indians by the British. These included marches, peaceful boycotts of buses (in protest of hike in bus fares for blacks), of schools (in protest of ‘bantu education’), even of ‘potatoes’ (in protest of the mistreatment of farm workers).<sup>162</sup> These measures did not achieve their desired outcomes, and instead, the government at every turn responded with the imposition of more stringent and restrictive laws, arrests and banning of those involved in the struggle.<sup>163</sup>

Other groups involved in the struggle include the South African Indian Congress, the South African Coloured People’s Organisation, student groups and women’s groups (like the Black Sash) were all involved in the struggle against the racist and discriminatory laws that were being implemented by the government in the name of separate development of the cultures. There was also white opposition to apartheid from church leaders,<sup>164</sup> white academics, staff and students in English-medium universities (particularly the universities of Cape Town and Witwatersrand),<sup>165</sup> artists, authors,<sup>166</sup> and various groups. Groups like the predominantly white Congress of Democrats, the South African Communist Party, the multiracial South African Congress of Trade Unions, and the National Union

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<sup>162</sup> Beck (2000) 141.

<sup>163</sup> Martin & O’Meara (1995) 400.

<sup>164</sup> Notable amongst which were the Anglican priest, Trevor Huddleston, and the Dutch Reformed church leader, Beyers Naude, both of whom were later banned by the South African government from leaving their houses or engaging in any public speaking.

<sup>165</sup> These held large rallies in the late 1950’s against the Extension of University Education Act which forbade Black students from attending White universities.

<sup>166</sup> Authors like Alan Paton of *Cry the Beloved Country* (1947) and *The People Wept* (1958); others like Andre Brink, Nadine Gordimer, and Athol Fugard were able to depict in their novels and plays, the suffering and pain caused by officially sanctioned racism and brutal government oppression.

of South African Students (NUSAS) were all party to the opposition to apartheid.<sup>167</sup>

In 1952, the ANC launched Defiance against Unjust Laws Campaign, in which apartheid laws were deliberately broken by the people in a carefully-prepared programme of non-violent passive resistance.<sup>168</sup> This was again met with the usual high-handedness of the government, as over eight thousand arrests were made and a good number of deaths occurred.<sup>169</sup> In a bid to succinctly articulate its demands and desires, the members of these groups formed an alliance and met together in a Congress of the People on 26 June, 1955 at Kliptown, where they adopted the Freedom Charter.<sup>170</sup> This was a defining moment in the struggle against apartheid, and even though there were some criticisms of the Freedom charter,<sup>171</sup> it became the platform on which the decades-long struggle of the ANC and other groups stood, even after it came into power in 1994. Another result of the campaign was that it inspired international sympathy.<sup>172</sup>

The government's unsurprising reaction to the adoption of the Freedom Charter was that it imposed more repressive laws, and arrested and tried the alliance leaders for treason. Citing the charter as a communist manifest, the government charged them for attempting to overthrow of government.<sup>173</sup> They were later acquitted in 1961 by the Supreme Court on the grounds that the government had failed to prove its case. During this time, the main opposition party, the ANC, experienced a number of splits, with the more important one being the formation of the Pan Africanist Congress of Azania (PAC) by members of the ANC who

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<sup>167</sup> Initially formed in 1924 by both English and Afrikaner students, the Afrikaner students left the organisation when it became increasingly liberal in its condemnation of apartheid. The organisation invited US senator Robert Kennedy in 1966, and he gave a series of lectures denouncing apartheid. Even after it was banned, NUSAS continued to educate generations of white students about the evils of apartheid.

<sup>168</sup> Martin & O'Meara (1995) 400.

<sup>169</sup> Welsh (1999) 432.

<sup>170</sup> Thompson (2000) 208. The Freedom Charter emphasised and boldly stated that 'South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people'. It enumerated the demands of the resistance to equality, protection of human rights, political, economic and social rights and many others.

<sup>171</sup> Some of the critics felt that the Freedom Charter was communist inspired because it called for the redistribution of land and nationalisation of the economy; workers felt that it did not make reference to the protection of their rights to strike; and Africanists felt that the charter was faulty in recognizing all 'national groups' rather than Black supremacy.

<sup>172</sup> Welsh (1999) 432.

<sup>173</sup> Beck (2000) 140.

believed that the cooperation with other nationals was weakening the African position, and they were weary of white radicals and socialist ideology.<sup>174</sup> Anti-apartheid demonstrations went on despite the treason trial, and the government continued its crackdown on the demonstrations. The Sharpeville massacre of 1960<sup>175</sup> and other events round the country marked the turning point for the anti-apartheid organisation in their adoption of non-violent means of protest.

In 1961, the Republic of South Africa Constitution Act<sup>176</sup> was passed which declared the former Union of South Africa a republic. It was largely based on the 1909 Constitution, with substitution of the terms and terminologies under the 1909 act that indicated allegiance to the United Kingdom with the word ‘state’.<sup>177</sup>

It must be noted that due to the disenfranchisement of the African members of the population, they could not at this time contribute anything to the making of both the 1909 and 1961 constitutions. These documents were purely the act of the white members of the population; firstly done under colonial authority in 1909, and then even under minority rule in 1961. These documents were therefore only reflective of the wishes of a small fraction of the people.

As has been discussed in the previous chapters, for a constitution to claim legitimacy, it should be the product of the people. There should be a process whereby the people (represented by the majority, as there will always be dissenting voices) will be able to come up with provisions of the constitution, and agree on the resultant document to bind them. It is in this that we are able to see to the legitimacy of the process. The 1909 and 1961 Constitutions of South Africa did not meet this criterion of legitimacy. They were impositions on the majority of the population.

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<sup>174</sup> Beck (2000) 141.

<sup>175</sup> Demonstrations had been organised by the PAC all over the country against the pass laws. The idea was for people to gather at police stations without their passes and to invite arrest, hoping to fill the jails and clog the justice system. In the African township of Sharpeville south of Johannesburg, the white dominated police force opened fire on the demonstrators, killing about sixty-nine of them and wounding many more. This led to a spiral of demonstrations and arrests all over the country. The government declared a state of emergency, mobilised its army reserves, and outlawed the ANC and PAC.

<sup>176</sup> Act 32 of 1961.

<sup>177</sup> ‘1961 Republic of South Africa Constitution Act No 32’, available at <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01904.htm> (accessed on 5 May 2010).



### 5.3.2 Opposition to apartheid: violent resistance

After the events in 1960, the ANC and the other opposition parties were quick to realise that nonviolent methods had not achieved what they desired (which was freedom for the Africans). In 1961, the ANC and the SACP formed *Umkhonto we Sizwe* (Spear of the Nation), the militant wing of the ANC, an underground guerrilla army, to conduct an armed struggle against the regime.<sup>178</sup> It engaged in acts of sabotage against symbolic targets like the post offices, other government buildings, railroads and electrical installations and various others, while disavowing terrorism and attacks on whites.<sup>179</sup>

The PAC also formed its own military wing, Poqo. The apartheid government launched a crack-down on these organisations, succeeded in infiltrating them, and by July 1963, the government had succeeded in arresting all the leaders, including Nelson Mandela. This pushed the resistance further underground and many of the members of the resistance who had not been arrested, fled into exile in other countries to further the work of sensitising the international community of the injustices in South Africa.<sup>180</sup>

The arrested leaders were tried and found guilty of sabotage and sentenced to life imprisonment.<sup>181</sup> By 1964, the leaders of the Poqo and other groups had also been arrested and imprisoned, and the government succeeded in effectively crushing the anti-apartheid movement at that time.<sup>182</sup> Another decade of more repressive laws and brutality by the apartheid government would pass before the masses could again confront the regime. During this period, the arts was used as a medium of rising the awareness of Africans to their rights; the rapid growth of the economy also meant that more and more black semi-skilled and unskilled workers were present (since they were needed in the economy). This raised the level of consciousness of the blacks as to their situation.

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<sup>178</sup> Martin & O'Meara (1995) 401.

<sup>179</sup> Thompson (2000) 211; Martin & O'Meara (1995) 401.

<sup>180</sup> The ANC, under its president Albert Luthuli, sent Oliver Tambo and others abroad to establish offices in London, Dar es Salaam, and an ANC headquarters in exile in Lusaka, Zambia.

<sup>181</sup> These men included Nelson Mandela, Walter Sisulu, Govan Mbeki, Raymond Mhlaba, Elias Motsoaledi, Andrew Mlangeni, Ahmed Kathrada and Dennis Goldberg.

<sup>182</sup> Beck (2000) 146.

The banning of the opposition parties and the imprisonment of their leaders and others even remotely associated with them had left Africans relatively voiceless, leaderless and also vulnerable to the social engineering evidenced in the Homeland policy of the apartheid government. In the late sixties, a new approach to the problem of apartheid emerged. This was less optimistically liberal than the ANC had been before Sharpeville, more realistic in its appraisal of political forces than the PAC, and less vulnerable to the charge of collaborationism with the ‘white apologists’ in general. This approach was epitomised in the philosophy of Black Consciousness movement.<sup>183</sup>

Drawing on earlier South African traditions, the Black Consciousness movement emphasised a strong sense and pride in being African, black self-esteem, self-assertion and psychological emancipation for the black man from generations of conditioning to see himself as the underdog and an inferiority complex instilled over the years. The philosophy focused on race rather than class as the central issue in the liberation struggle. This philosophy was devised by black intellectuals, led by Steve Biko, a student at Natal University’s ‘non-white’ medical school.<sup>184</sup> Biko was able to look beyond his fellow Africans to include in his black spectrum all the oppressed groups of South Africa. He led a breakaway of black students from the National Union of South African Students (NUSAS) and formed the South African Students Organisation (SASO) in 1968 to provide black students with a vehicle entirely on their own.<sup>185</sup>

The philosophy gained grounds in black universities, among educated African elites and in schools. Its effects could be seen by the early 1970s in the growth in the number of literate blacks who could emotionally connect and appreciate the ideas of the movement. In 1972, it organised a Black People’s Convention, which acted as an umbrella organisation for groups advocating Black Consciousness principles. Initially, the apartheid government accommodated it because it seemed to be at par with their agenda of promoting separateness amongst blacks, however, following the 1973 Durban strikes, Biko and other leaders were banned for

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<sup>183</sup> This philosophy drew inspiration from the notions of ‘Black Theology’ or ‘Black Power’, which had their origin in the civil rights movement in America, and also from the writings of Frantz Fanon in Algeria.

<sup>184</sup> By segregating black students in black universities, Verwoerd had unintentionally created a hotbed for black resistance, from which emerged this new movement.

<sup>185</sup> Davenport (2000) 437.

organising rallies in support of the new Frelimo government in Mozambique. The leaders were tried and convicted under the Terrorism Act and imprisoned on Robben Island.

The ideology of Black Consciousness, however, penetrated the urban schools, and in 1976 erupted in another uprising, this time starting from the schools in Soweto township. It started with a peaceful march organised by the scholars demanding the abrogation of the compulsory use of Afrikaans as a medium of instruction in black Transvaal schools.<sup>186</sup> About 15,000 secondary school children took part in the march. The government reacted in its usual use of force and opened fire on the students, killing at least two and injuring many others. What followed was a clampdown on the students and organisers of the march, as they were arrested, detained and tortured by the security services.

The violence which met the march sparked off a spate of violent rioting that spread across the country, from Soweto to the Cape. Indian and coloured teens also partook of the protests and government buildings came under attack. Arrests followed in which the government forces did not offer any of the protection meant for ‘under-aged’ suspects, and the casualty figures were high.<sup>187</sup> These were the largest and most widespread outbreaks of racial violence in South Africa, and it marked the beginning of the end for the apartheid regime. The government in its reaction placed the blame for the uprising on the Black Consciousness movement, and arrested Steve Biko in August 1977. He died in police custody in September that year, of so-called ‘natural causes’ according to the usual government explanation.<sup>188</sup>

### **5.3.3 The end of apartheid**

Around Africa, changes were taking place. African nationalism had swept through the continent and had started a course of events in which political power started to flow in the opposite direction. Africans were agitating for independence. As a

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<sup>186</sup> Davenport (2000) 449.

<sup>187</sup> Many of the victims were children that were arrested, denied access to their parents or lawyers. Many died, according to official explanations, while allegedly trying to ‘escape’ or ‘committed suicide’, or simply of ‘unknown causes’.

<sup>188</sup> Beck (2000) 162.

result, colonialism was coming to an end as more and more African countries were gaining independence. In 1957, Britain transferred power to African nationalists in the Gold Coast (Ghana) as the first African country to gain independence in those times.<sup>189</sup> From 1960 Britain started to transfer its colonial powers to nationalist parties in many of the African countries where that it had been a colonial power. In West Africa, countries like Nigeria, Sierra Leone and the Gambia gained independence, followed by other countries, such as Tanganyika (Tanzania), Uganda, Kenya, Malawi, Northern Rhodesia (Zambia), Basutoland (Lesotho), Bechuanaland (Botswana) and Swaziland over the next four years. An attempt by the white settler community in Rhodesia to prevent such an outcome by unilaterally declaring independence in 1965 led to a bloody civil war between the white minority and the black majority, and eventually ended in 1980 with the election of its first African leader in the person of Robert Mugabe. All of these events put pressure on the apartheid government of South Africa.<sup>190</sup> In 1975, Angola and Mozambique also gained independence.

#### 5.3.3.1 International pressure (apartheid contributing to the development of international law)

The international reaction to apartheid was slow to build up. Many of the developed countries in Europe and the United States were principal trading partners with South Africa, for its minerals. The huge resource of diamonds, gold and other minerals in South Africa made the country almost indispensable to the international community. South Africa at the time had very substantial foreign trade, and foreign investment in the country was substantial also.<sup>191</sup> This situation created vested interests, which despite the apartheid policy of the government, and despite the segregation that had begun as far back as the early century, ensured that there was initially no reaction by the international community.<sup>192</sup> When eventually the international community began to react to apartheid, it was initially inconsistent as those countries which were trade partners were anxious to protect

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<sup>189</sup> Thompson (2000) 214.

<sup>190</sup> Thompson (2000) 214

<sup>191</sup> Reddy ES 'Apartheid and the International Community' (1974) 4(3) *Issue: A Journal of Opinion* 20.

<sup>192</sup> *Ibid.*

South Africa.<sup>193</sup> At the first session of the UN in 1946, India raised the issue of the treatment of its nationals in the Union of South Africa, and the refusal of the South Africa government to grant them citizenship rights.<sup>194</sup>

The Sharpeville massacre of 1960 further turned the attention of the international community on South Africa. The UN Security Council, Britain, and other European governments all condemned the actions of the state police. In 1952, the United Nations General Assembly (UNGA) started passing annual resolutions condemning apartheid.<sup>195</sup> This was usually passed by a majority vote, with some of the developing countries voting against the resolution or abstaining.<sup>196</sup> As more and more African and Asian countries (former colonies) gained independence and joined the UN, the UNGA became increasingly outspoken in condemning apartheid and taking measures to eradicate apartheid.<sup>197</sup> After the Sharpeville massacre, however, the tide changed with the almost unanimous adoption of Resolution 1598 (XV).<sup>198</sup> Between 1962 and 1963, it passed resolutions calling for the breaking of all ties with South Africa, and for instituting an arms embargo;<sup>199</sup> it also formed a Special Committee on Apartheid, a Unit on Apartheid to denounce the regime. South Africa was removed from the membership of various UN agencies like UNESCO in 1956, the ILO in 1961 and the WHO in 1965. The UNGA kept up its campaign against the apartheid regime as more and more events and unrest unfolded in South Africa. In 1974 it rejected the South African delegation's credentials at the UNGA, so that the delegation could no longer speak at the gathering, even though they retained their membership.<sup>200</sup>

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<sup>193</sup> Welsh (1999) 433 at 454, where he refers to how even after the Sharpeville killings, President Eisenhower of the United States was quoted to have said he felt that the US should not sit in judgement on a *difficult social and political problem* six thousand miles away.

<sup>194</sup> Klotz A (1995) *Norms in International Relations: The Struggle against Apartheid* 41. These were those who had migrated to South Africa as indentured labourers, meant to be sent back home after their term of service. The South Africa government, however, claiming not to be able to afford the return ticket cost settled them with land, but refused to grant them citizenship rights.

<sup>195</sup> Klotz (1995). This was based on a motion put forward by India. It was the first motion before the UN that specially dealt with the practice of apartheid.

<sup>196</sup> For example, Resolution 1248 (XIII) of 1958 was adopted 70-5-4, with Australia, Belgium, France, Portugal and Britain voting against it. The Dominican Republic, Luxembourg, the Netherlands, and Spain abstained.

<sup>197</sup> Welsh (1999) 433. The Gold Coast (Ghana) was the first to gain independence in 1957, as Britain demonstrated its commitment to advancing all her African possessions to independence.

<sup>198</sup> Adopted 93-1-0, with Portugal as the only country voting against it.

<sup>199</sup> Beck (2000) 149.

<sup>200</sup> *Ibid.*

At the regional level, calls were made by the Organisation of African Unity (OAU) on all African countries to isolate and destroy the apartheid state. Many African countries denied South African Airways landing rights and air space, and most refused to give the country diplomatic recognition. The OAU set up a Liberation Committee with headquarters in Dar es Salaam, Tanzania. This committee provided camps, education and military training for South African refugees, but they lacked the means to eradicate apartheid. The African countries were themselves weak regimes, struggling for survival.<sup>201</sup> South Africa's neighbours, in particular, were in varying degrees economically dependent on South Africa. Their work force mostly worked in South African mines and factories and farms; and on the military front, they were no match for South Africa's military power.<sup>202</sup>

In the year in which the Soweto riots happened, the reaction of the world to the Soweto riots was unprecedented in the history of the international community's engagement with the apartheid issue. The UN passed a mandatory arms embargo on South Africa in 1977.<sup>203</sup> The US and its European counterparts insisted on majority rule and universal suffrage in South Africa. The economy went into recession as international investors in South Africa began to disinvest in the economy of the country in large numbers. This led to considerable capital out flow from the country.<sup>204</sup> All of this affected the whites greatly as their businesses failed and they started emigrating in huge numbers.<sup>205</sup> Consequently, the impact and pressure on the apartheid government led it to start considering change, with the caveat that white rule be maintained.

#### 5.3.3.2 Moderation of apartheid policies

The government, headed by P.W Botha in 1978, began its reforms to the apartheid system by scrapping some of the apartheid laws and practice that were *not*

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<sup>201</sup> Thompson (2000) 215.

<sup>202</sup> *Ibid.*

<sup>203</sup> Refer to annexure 1 for a tabulation of the sanctions against SA 1960-1989.

<sup>204</sup> Companies and banks like Barclays Bank, Chase Manhattan, Ford, Polaroid, and GM Motors began to pull out of the country. The banks had made loans available to South Africa to bolster its economy. These investments, loans and credit facilities were the life line of the South African economy.

<sup>205</sup> Beck (2000) 163-164. Beck reports that in 1977 alone, South Africa experienced a net loss of more than 3,000 highly skilled and educated white professionals.

*essential* to the maintenance of white supremacy (emphasis mine).<sup>206</sup> By the early 80's, black trade unions that had existed illegally were legalised and free to prescribe membership rules. The Congress of South African Trade Unions (an umbrella body for trade unions) was formed as a result; it was a large and increasingly powerful trade union.<sup>207</sup> Mines and industries were allowed to hire Africans to long-term contracts (as opposed to temporary employment); they were also allowed to bring their families into the urban areas as permanent residents; public places like hotels, restaurants and many others became open to all races; sports became integrated; the amount of spending on African, coloured and Indian schools increased as the demand for more skilled workers increased; by mid-1980s up to about 30 percent of enrolments in former white only universities were students from previously disadvantaged groups.<sup>208</sup>

In 1983, a new constitution was promulgated by the government. The Republic of South Africa Constitutional Act 1983 (Act 110 of 1983) provided for the position of a 'President' as opposed to a Governor-General.<sup>209</sup> The executive authority of the government was made up of the President and the members of cabinet (ministers appointed by the State President to perform such functions). The legislative powers of the Republic were vested in the State President and Parliament of the Republic, which was the sovereign legislative body and could make laws for any purpose in the republic.<sup>210</sup> The 1983 Constitution provided for three uni-racial chambers; a House of Assembly (comprising of whites elected by whites); a House of Representatives (comprising of coloureds elected by coloureds) and a House of Delegates (comprising of Indians elected by Indians).<sup>211</sup>

The separate houses were allowed to deal only with problems and legislation pertaining to their own population groups. Africans, who formed 75 percent of the country's population, were totally excluded from the process, and the House of Assembly on its own formed the majority, accordingly when joint sessions were

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<sup>206</sup> This meant that the intent for real reform was lacking, and the action(s) of government were geared towards giving the impression, especially to the international community, that reform was taking place.

<sup>207</sup> Beck (2000) 167.

<sup>208</sup> Beck (2000) 169.

<sup>209</sup> Section 6 of Act 110 of 1983.

<sup>210</sup> Part VI of Act 110 of 1983.

<sup>211</sup> Section 37; sections 41-43 of Act 110 of 1983.

held, the whites still held the majority.<sup>212</sup> This new constitutional system was unsatisfactory for the blacks, coloureds and Indians, especially as the coloureds and Indians realised that they did not really have power under this system, only a semblance of power, and the Africans were out rightly excluded from the system. These groups were greatly dissatisfied with the developments and considered it a slap in the face.

This general feeling of dissatisfaction led to black resistance mounting and erupting once again in the country, only this time around, it was on an unprecedented scale and was more formidable than ever as the culture of protest had grown in the country.<sup>213</sup> Out of this feeling of dissatisfaction, the United Democratic Front (UDF) in 1983 was born. It was to coordinate internal opposition to apartheid, since the ANC and other political parties were still banned. Delegates of all races, trade union, sports bodies, community groups, women's and youth's organisations gathered under this umbrella body, and in their own way, in their various dynamics, organised resistance to the apartheid government.<sup>214</sup> The UDF also functioned as a national anti-apartheid political voice at a time when government had silenced all the official groups by banning them.<sup>215</sup> The nature of the UDF and its structure (the fact that it was an affiliation of over 500 organisations), made it difficult for the government to deal with. As an ephemeral organisation, it lacked formal leaders or property, or any real base.<sup>216</sup> This culture of protest coupled with international criticism,<sup>217</sup> led to divestment by foreign companies in the South African economy.<sup>218</sup> Economic sanctions imposed by the

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<sup>212</sup> Thompson (2000) 225- 226.

<sup>213</sup> Thompson (2000) 228; Beck (2000) 170. It erupted as a culture of protest pervading the black population of South Africa. Any and every opportunity that presented itself was used as a form of protest, especially funerals. Blacks became openly defiant, wearing and waving the banned ANC colours and flags, singing ANC songs, and toyi-toying. *Amandla ngawetu* ('the power is ours!') became a popular refrain amongst the people.

<sup>214</sup> Thompson (2000) 228-229.

<sup>215</sup> Beck (2000) 171.

<sup>216</sup> *Ibid.*

<sup>217</sup> The commonwealth was very vocal in condemning apartheid, and in 1986 sent an Eminent Persons Group (EPG) composed of senior British Commonwealth politicians on a policy recommendations mission. This mission proposed the withdrawal of the military from townships, freedom of assembly and discussion and the release of Mandela as recommendations. It was abruptly cut short when South Africa carried out air raids on its neighbouring countries. Its report was scathing and resulted in the Commonwealth intensifying its sanctions.

<sup>218</sup> South Africa's economy was heavily reliant on foreign investment. Thus, when many state governments, universities and businesses withdrew from South Africa, or sold their investments in companies that did business in South Africa between 1984 and 1986, the South African economy



international community<sup>219</sup> added pressure on the apartheid government, resulting in the government's attempt at reform.

In 1986, in continuing with the 'reforms' of the government, over thirty-four legislative enactments relating to pass laws were repealed, and a policy of 'orderly urbanization' was implemented to allow mixed-race areas. Segregation laws were repealed to allow multiracial political parties, interracial sex and marriage and many others. However, the apartheid government was not ready for the power to slip from the control of the whites, thus government's response to the protests by the blacks continued to be one of a total clampdown. The economic meltdown and the resulting pressure from white businesses, the loss of confidence in the government by the white electorate, the continuous unrest within the country, and the pressure from the international community, all ultimately contributed to the collapse of the apartheid system of governance in 1989.<sup>220</sup>

In January 1989, President Botha suffered a stroke and resigned temporarily as president. However in August, he resigned completely after a Cabinet revolt, when it became clear to him that he no longer had the support of his cabinet. This led the way for FW de Klerk, a younger member of parliament to assume office as state president following the House of Assembly elections. The following year, in February, de Klerk announced in his speech in parliament the lifting of the ban on the ANC, and other political parties, the freeing of political prisoners, and the suspension of capital punishment.<sup>221</sup> It marked a watershed moment in the history of South Africa. The speech was an encapsulation of the preconditions for

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plummeted. Chase Manhattan bank in the US created a financial crisis in South Africa when it refused to roll over its short-term loans and other banks followed suit.

<sup>219</sup> The commonwealth had imposed sanctions, and in October 1986, the US Congress passed the Comprehensive Anti-Apartheid Act over President Reagan's veto, banning new investments and bank loans, ending South African air links with the US, prohibiting South African imports, threatening to cut off military aid to allies suspected of breaching the international arms embargo against South Africa.

<sup>220</sup> Thompson (2000) 240; Beck (2000) 180. See Tafel HL 'Regime Change and the Federal Gamble: Negotiating Federal Institutions in Brazil, Russia, South Africa, and Spain' (2010) *Publius* 1-29 at 14-17, in which he discusses *inter alia* the events that led to the collapse of the apartheid system, and how the negotiations to bring about a new democratic system evolved. See also Jung C & Shapiro I 'South Africa's Negotiated Transition: Democracy, Opposition and the New Constitutional Order' (1995) 23(3) *PAS* 269-308; and Corder H 'Towards a South African Constitution' (1994) 57(4) *Mod. L. Rev.* 491-533.

<sup>221</sup> See De Klerk Foundation website for the full speech, titled 'Opening of 2<sup>nd</sup> Session of 9<sup>th</sup> Parliament of the Republic of South Africa', available at [https://www.givengain.com/cgi-bin/giga.cgi?cmd=cause\\_dir\\_news\\_item&cause\\_id=2137&news\\_id=73749&cat\\_id=1595](https://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=73749&cat_id=1595) (accessed on 5 May 2010).

negotiations that had been set out in both Mandela's letter to the President<sup>222</sup> and the Harare Declaration<sup>223</sup> of August 1989.<sup>224</sup> Nine days later, on the 11<sup>th</sup> February 1990, Nelson Mandela was released unconditionally from prison after twenty-seven years in jail.<sup>225</sup>

After this, negotiations were entered into by the leaders of the white establishment and by those of the black resistance under the umbrella of the Convention for the Democratic South Africa (CODESA). This was a difficult and thorny period in the history of South Africa which saw many more acts of violence being committed by the state and state sanctioned agencies, by the whites and also by the Africans on one another.<sup>226</sup> At different times, negotiations were called off between the parties due to lack of trust and the politically explosive situation in the country then.<sup>227</sup> Unrest continued in various areas of the country, and deadly physical struggles for power continued even though negotiations for a peaceful settlement were on at that time.<sup>228</sup>

Between 1990 and 1994 (when the democratic elections took place) the number of deaths due to political violence in the country multiplied.<sup>229</sup> Amidst all these acts of violence and the situation in the country, negotiations resolved that April 27, 1994, be chosen as the date for South Africa's first democratic election, that an interim constitution be put in place for the elections, and that a final one was to be drawn up by an elected Constitutional Assembly after the elections.<sup>230</sup> The elections itself witnessed a massive turn out of the African population, who were enfranchised for the first time in their lives. The ANC won with the largest margin

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<sup>222</sup> Nelson Mandela had written a ten page memorandum to the president in early 1989, which set out his pre-conditions for the suspending of the armed struggle and the opening of formal negotiations with the government.

<sup>223</sup> This document was the result of a meeting of the ANC executive in exile, in Zimbabwe in August 1989. It was a cautious document setting out five conditions to be satisfied for them to enter into negotiations with the apartheid government to end apartheid.

<sup>224</sup> Thompson (2000) 246.

<sup>225</sup> Thompson (2000) 247.

<sup>226</sup> For an analysis of the increase in the rate of violence during this period, see article of Sisk T, 'The Violence-Negotiation Nexus: South Africa in Transition and the Politics of Uncertainty' (1993) 9(1) *Negotiation Journal* 77 – 94; Jung (1995) 23(3) *PAS* 269; and Corder (1994) 57(4) *Mod. L. Rev.* 491.

<sup>227</sup> Beck (2000) 181; covert operations had continued against the ANC and other members of the resistance for another two years after this time.

<sup>228</sup> Thompson (2000) 248; Corder (1994) 57(4) *Mod. L.Rev.* 491; Tafel (2010) *Publius* 1.

<sup>229</sup> South African Institute of Race Relations Survey Report 1996 – 1997, 600; Sisk (2009) 9(1) *Negotiation Journal* 77.

<sup>230</sup> Sisk (2009) 9(1) *Negotiation Journal* 77.

of 62.65 percent, and the National Party (NP) won 20.4 percent. This meant that the NP held the position of deputy president in the five-year transitional government. On the 10 May 1994, four years after leaving jail, Nelson Mandela was sworn in as the president of South Africa, with Thabo Mbeki (of the ANC) and FW de Klerk (of the NP) as deputy presidents, signalling the dawn of the new democratic South Africa.

## **5.4 Post Apartheid South Africa: An analysis of its Constitutions**

This period after the swearing in of the country's first democratically elected president is one that has introduced big changes in the South African legal system. The changes have been so far reaching that it could be described as an entire 'overhaul' of the legal system. The change and the contingent adjustments are still ongoing, and this particularly in the way people perceive the law, also the legitimacy it holds during apartheid, immediately after apartheid; and even now some 16 years after apartheid. These developments and changes will be explored in the following sub-sections.

### **5.4.1 Interim Constitution**

The 1993 Constitution of South Africa (Act 200 of 1993) famously referred to as the 'Interim Constitution', was passed into law on the 25<sup>th</sup> January 1994. It was a transitional document, used as the vehicle to move South Africa from a racial autocracy to a non-racial democracy.<sup>231</sup> The need for such a document which acted as a 'stop-gap' was apparent because the negotiating parties at that time were not democratically elected, and did not have any democratically proven

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<sup>231</sup> Sachs A (Justice of the Constitutional Court of South Africa) 'Constitutional Developments in South Africa' (1996) *N.Y.U.J.Int'l L. & Pol.* 695-709 at 695; see also Jung & Shapiro (1995) 23(3) *PAS* 269-308; Corder (1994) 57(4) *Mod. L. Rev.* 491-533 gives an expansive explanation of the contents of the 1993 Constitution in terms of the provisions for fundamental rights, executive, legislative and judicial powers and other provisions also.

constituencies.<sup>232</sup> It was also conceived in order to mitigate the different demands from different parties that came through during the negotiations of 1990 to 1993.<sup>233</sup>

Principal to these demands was the push by the whites to seek to protect their interests under the new process (government), in light of the fact that they constituted the minority in the society.<sup>234</sup> They wanted the ‘self-appointed’ negotiators to be the ones to write the new constitution for the country, and then for it to be put to a referendum in order for it to gain legitimacy. The ANC and other liberation parties, however, were of the view that such a document would lack legitimacy, and that a constitution had to be drafted by a democratically elected Constitutional Assembly, which would be representative of the people.<sup>235</sup> They insisted that the only purpose of the negotiations was to arrange conditions for general elections to establish a constituent assembly, with the purpose of drafting a new constitution.

These differences in demand gave rise to a compromise position: the interim constitution provided a framework of the basic principles, agreed to by the parties, governing the country within the transitional period, and upon which the 1996 Constitution was to be built.<sup>236</sup> These principles were to be justiciable by a future Constitutional Court, which would verify that the 1996 Constitution had been formulated in accordance with the constitutional principles laid out in the interim constitution.<sup>237</sup> According to the interim constitution itself, it was a ‘historic bridge between the past of a deeply, divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of

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<sup>232</sup> Lemmer E & Olivier M ‘The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom’ (2000) 33(1) *De Jure* 138 at 141; Sarkin J ‘The Drafting of South Africa’s Final Constitution from a Human Rights Perspective’ (1999) 47(1) *The American Journal of Comparative Law* 67-87 at 68.

<sup>233</sup> Sachs (1996) *N.Y.U.J. Int’L & Pol* 695. The parties to the negotiations included the then South African government (together with other white parties), and some of the appointed heads of some of the homelands on the one hand, and on the other hand, the ANC and other liberation parties.

<sup>234</sup> *Ibid*; Sarkin (1999) 47(1) *The American Journal of Comparative Law* 67 at 68; see generally Basson DA (1994) *South Africa’s Interim Constitution: Texts and Notes*.

<sup>235</sup> Gross A, ‘The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel (2004) *Stan. J. of Int’l L.* 46-104 at 59.

<sup>236</sup> *Ibid*; Sachs (1996) *N.Y.U.J. Int’L & Pol* 695; principles such as a commitment to a multiparty democracy based on universal adult franchise, individual rights without discrimination, and separation of the powers of government amongst others.

<sup>237</sup> Sachs (1996) *N.Y.U.J. Int’L & Pol* 695.

human rights, democracy and peaceful co-existence .... for all South Africans,  
...<sup>238</sup>

Sachs sees the interim constitution as a vehicle to ‘establish new institutions of democracy that would take over responsibility for government and for drafting the new constitution with the mandate of the whole nation, and also to function in terms of a bill of fundamental rights within which government and executive action could take place and legislation could be adopted’.<sup>239</sup>

The preamble of the interim constitution reflected its history and the forces that brought it to being.<sup>240</sup> It indicated that the document was being adopted in the interim while a more representative constitution was being drawn up, for the promotion of national unity and restructuring and governance of South Africa.<sup>241</sup> Amongst other things, the Constitution provided for a Government of National Unity<sup>242</sup>, a five year transition<sup>243</sup> and a bicameral parliament made up of the Senate and National Assembly. Both houses of parliament also formed the Constituent Assembly in order to draft a new constitution. An important inclusion in the interim constitution was the chapter on fundamental rights (the Bill of Rights). This was particularly necessary in view of the past history of the country. Chapter three (sections seven to thirty-five) guaranteed internationally accepted basic human rights.<sup>244</sup>

Historic provisions were also included in the 1993 Constitution, amongst which were the creation of public institutions as a mechanism to safeguard the new democratic system. Institutions such as the Office of the Public Protector, the Human Rights Commission, the Commission on Gender Equality, the Public Service Commission were created in chapter 8 of the interim constitution, to serve

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<sup>238</sup> Chapter 16 (Provision on National Unity and Reconciliation) of the Constitution of South Africa Act 200 of 1993.

<sup>239</sup> Sachs (1996) *N.Y.U.J. Int’L & Pol* 695 at 696; see also Dugard J ‘International Law and South African Constitution’ (1997) 8(1) *EJIL*. 77-92.

<sup>240</sup> ‘We, the people of South Africa declare that-

WHEREAS there is a need to create a new order ... so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;...’

<sup>241</sup> Preamble to the 1993 Constitution.

<sup>242</sup> Chap 6, S. 84-95 of the interim constitution.

<sup>243</sup> Section 38 of interim constitution.

<sup>244</sup> Corder (1994) 57(4) *Mod. L. Rev.* 491-533 at 511-514 explains these rights in the 1993 Constitution, and how they came to be.

as ‘watch dogs’ in protecting the new democratic system.<sup>245</sup> Also the nine provinces of the country were provided for.<sup>246</sup>

## 5.4.2 The Constitution of the Republic of South Africa, 1996

### 5.4.2.1 Constitution-making process

As indicated above, the agreement of the negotiating parties was that once the interim constitution was in place, a Constituent Assembly would be elected to adopt a more representative constitution. Despite having a legitimate mandate from the people to draft such constitution (as a result of being an elected body), the Constituent Assembly knew this was insufficient. The Assembly felt that the process of constitution-making had to be transparent, open and credible. The resultant constitution had to have an enduring quality and had to enjoy the support of all South Africans.<sup>247</sup> They felt that the credibility of the resultant constitution depended on a process through which people could claim ownership of the constitution.<sup>248</sup> The people not only had to feel a part of the process, but the content of such constitution had to be representative of the views of the people.<sup>249</sup> This constitution came to be known as the 1996 Constitution.

The Constituent Assembly thus adopted a process whereby public meetings (especially in rural areas, where the people did not have access to the web or print media), workshops, community based awareness campaigns, and extensive radio and television campaigns were rolled out. A free monthly newsletter was also published by the Constitutional Assembly, called *Constitutional Talk*. This

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<sup>245</sup> Section 110-123 of the 1993 Constitution of South Africa; see also Corder (1994) 57(4) *Mod. L. Rev.* 491-533.

<sup>246</sup> Schedule 1 to the 1993 Constitution.

<sup>247</sup> This was also necessary in order to placate the fears and concerns of minority groups, and yet satisfy the majority also.

<sup>248</sup> Chapter 13 (Public Participation Process) of Ebrahim H (1998) *The Soul of a Nation: Constitution-Making in South Africa*. Also available at <http://www.sahistory.org.za/pages/library-resources/online%20books/soul-of-nation-constitution/soul-of-nation-index.htm> (accessed on 7 May 2010);

<sup>249</sup> For a full explanation of the participatory system adopted by the Constituent Assembly, see Chapter 13 of Ebrahim; see also Sarkin (1999) 47(1) *AJCL* at 69-87 where he divides the process of making the 1996 Constitution into three distinct time periods: a) negotiations from May 1994 leading to the adoption ceremony in May 1996, b) the first Constitutional Court certification process ending in September 1996, and c) the second round of negotiations leading to certification by the Constitutional Court in December 1996.

reviewed in detail the submissions, committee activities and debates in the Assembly.<sup>250</sup> This ensured that the people were informed of the proposals for the 1996 Constitution, and they were invited to share their views on the document. It was a very rigorous process, at the end of it, about 1.7 million submissions were received, of which just about 11 000 were substantive to the issue of the 1996 Constitution.<sup>251</sup>

In the second phase, the Constituent Assembly produced a Refined Working Draft, based on the comments and submissions that had been made to it. This document was then circulated, and comments received. After the incorporation of the comments made, the constitution was then agreed upon by the assembly.<sup>252</sup> On the 8<sup>th</sup> of May 1996, the Constituent Assembly completed two years of work on a draft of the 1996 Constitution that replaced the interim constitution. It was then sent to the Constitutional Court to fulfil part of the requirement of the negotiations that before a new constitution was passed into law, the document would have to be certified by the Constitutional Court to be in accordance with the principles elaborated in the interim constitution.<sup>253</sup> The court insisted on certain amendments and subsequently granted certification,<sup>254</sup> after which the final document was signed into law.

This has resulted in the 1996 Constitution being the product of a highly consultative process, which has ensured its entrenchment as the basic law of the nation. The making of the current constitution in particular involved participation and agreement, which allowed many parties in South Africa to sense that they had a share in shaping of the country's new structure.<sup>255</sup> The ability of parties and political factions with differing views, perceptions and concerns to coexist in the

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<sup>250</sup> Hovell D and Williams G 'The Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melb. U. L. Rev.* 101.

<sup>251</sup> Chapter 13 of Ebrahim; though Hovell & Williams (2005) 29 *Melb. U. L. Rev.*, quoting from *Constitutional Talk*, the Official Newsletter of the Constitutional Assembly, contend that the figure amounts to some over 2.5 million submissions received from the public.

<sup>252</sup> Ebrahim, chapter 13.

<sup>253</sup> See Gross (2004) *Stan. J. of Int'l L.* 46–104 at 61. Gross notes that the requirement that the Constitutional Court certifies the 1996 Constitution to be in accordance with the principle agreed on in the interim constitution, was aimed at guaranteeing to all involved parties that the 1996 Constitution was based on the agreed principles as opposed to only reflecting a majority decision by those who happened to control the Constitutional Assembly.

<sup>254</sup> CCT 37/96 Ex parte Chairperson of the Constitutional Assembly: In re: *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996, 1997 (2) SALR 97 (CC).

<sup>255</sup> Gross (2004) *Stan. J. of Int'l L.* 46–104 at 62.

consultative processes carried out, strengthened feelings of belonging and participation. Also the hearings before the Constitutional Court and the rulings of the court showed that there were alternative ways of engagement that did not require violent confrontations that had characterised the society in the past.<sup>256</sup>

The 1996 Constitution has been described as masterpiece of post-conflict constitutional engineering in the post cold war era.<sup>257</sup> Its design in the context of South Africa's transition to democratic rule which started with the release of Mandela in February 1990 has enabled it to completely reconfigure South Africa's political institutions. It effectively ended decades of oppressive white minority rule.<sup>258</sup>

#### 5.4.2.2 Content of the 1996 Constitution

The 1996 Constitution itself was not very different from the interim constitution, especially as far as the constitutional protection of human rights is concerned.<sup>259</sup> The contents of the documents remained basically the same, except for a few changes.<sup>260</sup> Amongst the changes evident in it was the replacement of the Government of National Unity by a majoritarian government.<sup>261</sup> The party with the greater number of votes at election and with a majority in parliament would be the one in government. Such party (acting through the president) would appoint the cabinet members and other officials without necessarily consulting the minority parties that would be represented in the National Assembly.<sup>262</sup>

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<sup>256</sup> *Ibid.*

<sup>257</sup> 'South Africa: Constitutional Development in the 1990s', available at <http://www.constitutionnet.org/en/countrysouth-Africa> (accessed on 6 May 2010).

<sup>258</sup> *Ibid.*

<sup>259</sup> See Sarkin (1999) 47(1) *AJCL* at 69-87 for an analysis of the provisions of the 1996 Constitution in relation to the Bill of Rights.

<sup>260</sup> Amongst the changes is the provision for socio-economic rights in sections 24, 26, 27 and 29. Another change under the new constitutional dispensation is the abolition of the death penalty by the Constitutional Court in *S v Makwanyane* 1995 BCLR 665, despite the outcry in certain quarters for its retention. See Milton *et al* 'Demise of the Death Penalty: The Constitutional Court Pronounces' (1995) 8 *S. Afr. J. Crim. Just.* 188-204; Sarkin J 'Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment' (1996) 113 *S. African L. J.* 71.

<sup>261</sup> This was been rebutted by Lijphart A 'South African Democracy: Majoritarian or Consociational?' (1998) 5(4) *Democratisation* 144, where he argues that though the permanent constitution of 1996 moved away from 'strict power sharing' as a formula, it is, however, still much closer to consociational than to majoritarian democracy.

<sup>262</sup> Sections 86 and 91 of the 1996 Constitution.



The Constitution also introduced changes to the legislative structure of the country. According to section 42 of the Constitution, parliament consists of both the National Assembly and the National Council of Provinces (not the Senate as seen under the interim constitution). The National Council of Provinces represents the provinces<sup>263</sup> to ensure that provincial interests are taken into account in the national sphere of government.<sup>264</sup>

### **5.4.3 South African Constitution in light of the social contract theory and the positivist school of thought**

The basis of state formation in western liberal democracies is the theory of the social contract. This is the point that runs through the body of this thesis. The social contract theory explains why and how governments are formed, and what makes them legitimate or illegitimate, and thus sets the standard against which to measure the legitimacy of a constitution. Regarding the 1996 Constitution, Heyns observes as follows:

‘... [T]he new constitution must be truly legitimate; it must reflect the soul of our nation; it must be an expression of our history and of our deepest values, because only then will it have the spontaneous support of all our people. And to do this, it must surely be rooted in African soil’.<sup>265</sup>

This emphasises the fact that the legitimacy of the constitution means that it must be owned by the people and should reflect the wishes and values of the people. In this will the constitution have the support of the people.

As indicated above, the 1996 Constitution was the outcome of a broadly participatory process, in which South Africans were given the opportunity to make their input in the constitution. The provisions contained in the Constitution were negotiated by the Constituent Assembly, and these provisions were further

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<sup>263</sup> Provided for in Schedule 1 of the 1993 (Interim) Constitution.

<sup>264</sup> Section 42(4) of 1996 Constitution.

<sup>265</sup> Heyns C ‘Where is the Voice of Africa in our Constitution?’ *Occasional Paper 8*, (1996) Centre for Human Rights, University of Pretoria, available at [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ8.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ8.html) (accessed on 13 May 2010).

validated (or in some cases removed) by the input of the people of South Africa. This is reflected in the preamble to the Constitution which reads as follows:

‘We the people of South Africa, recognise the injustices of our past; ...  
We therefore, *through our freely elected representatives*, adopt this  
Constitution as the supreme law of the Republic so as to ... .’<sup>266</sup>

This participation and ownership by the people is echoed by Professor Dugard when he says:

‘Great care was taken in the drafting of the South African Constitution of 1996 to ensure that it was, and was seen to be, *a constitution of the people, for the people, by the people*. The Constitutional Assembly that drafted the Constitution *had legitimacy* as it comprised of the elected leaders of South Africa. But they did not draft the Constitution alone. On the contrary, they consulted widely with society. Members of the public were invited to make suggestions and they did, in the form of written representations. Moreover, members of the Constitutional Assembly travelled throughout the country to public meeting at which positions were expounded, clarified and defended ... at least the South African Constitution has the appearance of being a popularly accepted instrument. In this sense it differs from the constitutions which colonial rulers, notably Britain, imposed upon or granted to their erstwhile colonies on independence.’<sup>267</sup>

Lemmer and Olivier also observe of the 1993 Constitution (which laid the foundation for the 1996 Constitution) that

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<sup>266</sup> Own emphasis.

<sup>267</sup> Dugard J ‘Twenty Years of Human Rights Scholarship and Ten Years of Democracy’ (2004) 20 *S. Afr. J. on Hum. Rts* 352-353. It is important to note that the allusion to the British colonies by Prof Dugard reflects what has been analysed in the preceding chapter as the imposition by the colonists of replicas of their constitutions on their colonies at independence, as was the case in Nigeria (author’s emphasis).

‘...these constitutions, which resulted from a negotiated peaceful settlement, should be regarded as ...a blueprint of and impetus for further transformation of ... The aforesaid negotiated peaceful settlement entailed that the break with the past would be achieved in an evolutionary and progressive fashion. The starting point was the granting of indemnity enabling political adversaries to unite in a negotiating process which would ultimately produce the 1993 Constitution. ... During a collective drafting process, *special care was taken to include all South Africans: historically marginalised groups such as women and traditional leaders were encouraged to voice their opinions and actively participate in the process*’.<sup>268</sup>

In applying the social contract theory to the South African scenario, it is seen that the constitution-making process that preceded the 1996 Constitution gives an indication of the extent of involvement of the citizens (‘We the people’) in the process. The preamble of the 1996 Constitution is therefore a valid representation of the participatory and consent-seeking process that was engaged in to get to the final document. The processes of consultation, whereby the desires, demands and needs of the people were considered and eventually factored into (or not) the final product, is essential for legitimacy. The preamble is an indication of the social contract, and it has been said to govern the rest of the Constitution in such a way that its contents become truly fundamental.<sup>269</sup> By making it fundamental, it reflects the protection that the different groups that make up South Africa are guaranteed under the Constitution.

It has been noted that constitutions based on the consent and legitimate participation of the people translates into a sense of ownership by the people. Levy alludes to this when he says that such constitutions would ‘...emphasize a kind of democratic positivism, relying on the constitution that a people did in fact agree to ordain and establish.’<sup>270</sup> The people see it as their own document, binding on

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<sup>268</sup> Lemmer & Olivier (2000) 33(1) *De Jure* 138 at 141 (own emphasis).

<sup>269</sup> Marasinghe L ‘Constitutional Reform in South Africa’ (1993) 42(4) *Int’l & Comp. L. Q.* 827-854 at 849.

<sup>270</sup> Levy JT *Montesquieu’s Constitutional Legacies*, available on the Social Science Research Network website at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1117087](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117087) (accessed on 12 May 2010).

them all and with which they all should comply. This is reflected in the saying ‘...for the people, by the people’. Such a situation of ownership means that the people are ready to defend the constitution, and do not approach it with the nonchalance that is seen in other jurisdictions where the binding documents lack legitimacy.

As mentioned in preceding chapters, participation by the people in the process brings about ownership of the constitution by the people. If this is the case, they do not see it as a strange or foreign document but rather as a document which sets out what they expect from their society, and what is expected from them in return. Whoever or whatever government is in power as a result of the constitutional process is viewed by the people as their own elected official(s). As a result, they accord such people or government their support and allegiance. This fosters a situation of compliance, in which the law is respected and obeyed, and in which government policies are geared towards the improvement of the wherewithal of the people.

This confidence in the constitution, and the sense of ownership that people have towards it and the system, is conveyed in the way and manner that the populace is ready and willing to defend the constitutional provisions and the underlying philosophy of the South African state. Deviant and unlawful behaviour is instantaneously frowned upon and questioned. The activism of the media and civic organisations as they expose ‘deviant’ behaviour (cases of breach of law, corruption, fraud and others, by those in positions of authority, as well as breaches of law by ordinary citizens), and advocate for the different purposes of their different organisations, is very vibrant. This provides a good check for the state as it acts as a constraint on leaders endowed with the authority to provide protection and to produce public goods, from using their authority for predatory purposes.<sup>271</sup> The recent issues that have arisen concerning media freedom will be discussed later in this chapter.

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<sup>271</sup> Leeson PT ‘The Calculus of Piratical Consent: the myth of the myth of social contract theory’ (2009) 139(3/4) *Public Choice* 443-459 at 447.

#### 5.4.4 Connection with Kelsen's theory

Another angle from which to examine the extent of the rule of law in South Africa is to juxtapose the issue against Kelsen's theory relating to the efficacy and efficiency of a legal system. According to Kelsen, as explained in the preceding chapter, one of the different ways in which a system (be it constitutional or not) is conferred with the status of legitimacy, is if the people that it seeks to bind, act or behave by and large, in such a way as to show that they believe that they are bound by it.<sup>272</sup> This belief is played out in the actions of the people, in the way and manner in which the citizenry and people living within a system are able to rise in defence of the legal system that they have fashioned and which emanates from them.

The fact that South Africans have been part of the fashioning of the post-apartheid constitution and that the legal system that South Africa operates is in line with the demands of the people makes it very easy for the citizenry to take ownership of the running of their country, its democracy, constitution and legal systems. This has recently been re-emphasised by President Zuma in his speech at the presentation of the 2010 budget before parliament on Wednesday, the 12<sup>th</sup> May 2010.<sup>273</sup> Starting his speech, the president quoted the preamble of the Constitution of the Republic to signify the fact that government rested on the mandate of the people of South Africa as a collective. He traced the history back through the CODESA negotiations and the defeat of apartheid in order to buttress the fact that 'the people' were the decision makers and that the constitution was not imposed on them in any way.<sup>274</sup>

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<sup>272</sup> Oqwurike (1979 112-113, see section 4.3.3 in the previous chapter.

<sup>273</sup> 'Address by President Jacob Zuma on the Occasion of the Presidency Budget Vote for 2010/2011', from the Parliamentary Monitoring Group website at <http://www.pmg.org.za/briefing/20100512-presidency-ministers-budget-speech> (accessed on 15 May 2010)

<sup>274</sup> *Ibid.*

## 5.5 Mechanism for the rule of law: The South African Legal System

This section will look more closely at the legal system of South Africa, in order to give a brief overview of the nature thereof. Due to the various external influences that the country has been exposed to in the last few centuries, South Africa has developed a multicultural society in which a multiplicity of legal systems exists and are observed. This is legal pluralism and it exists as a corollary of the prevailing cultural pluralism. Legal pluralism has been defined variously as ‘a state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs’,<sup>275</sup> ‘a situation in which two or more legal systems coexist in the same social field’,<sup>276</sup> or ‘a state whereby the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system’.<sup>277</sup>

Van Niekerk argues that legal pluralism can be defined widely or narrowly. Narrowly, it may be seen as the co-existence of various officially recognised state laws.<sup>278</sup> State laws are said to refer to the Roman-Dutch common law as influenced by English law, adapted and developed through judicial decisions and legislation, as well as indigenous law incorporated into legislation or pronounced in judicial decisions.<sup>279</sup> In the wider sense, ‘legal pluralism’ could be construed to include the living laws of religious communities, such as Hindu, Muslim and Jewish communities, as well as unofficial indigenous law and people’s law.<sup>280</sup> All of these have been meshed together to form a unique system of law in the South African legal system, and it is only when one gets to different areas and units of the legal system that the different influences become more apparent.

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<sup>275</sup> Griffiths J ‘What is Legal Pluralism?’ (1986) 24 *J. Legal Pluralism & Unofficial L.* 1.

<sup>276</sup> Merry SE ‘Legal Pluralism’ (1988) 22 *Law & Soc’y Rev* 870.

<sup>277</sup> Merry (1988) 22 *Law & Soc’y Rev* 870 at 871.

<sup>278</sup> Van Niekerk GJ ‘Legal Pluralism’ in Bekker JC (ed) et al (2002) *Introduction to Legal Pluralism in South Africa* 3.

<sup>279</sup> Bekker (2002) 3.

<sup>280</sup> *Ibid.* These are the laws that are being applied by unofficial indigenous institutions in the rural areas (like the court of the ward heads), and also being applied unofficially by state recognised institutions such as the chiefs’ courts.

### 5.5.1 Customary (indigenous) law in South Africa

As we have stated in the previous chapter, customary law has been defined as the practices of a particular group of people (which in many cases has been handed down over the years), which they believe in and submit to; or as the norms and values which operate amongst a people, in which they invest binding authority; and as deriving from social practices that the community concerned accepts as obligatory.<sup>281</sup> It has also been defined as ‘a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority’.<sup>282</sup> It is embodied in the culture of a people.

These unwritten laws are brought about and discovered in different ways; by questioning informants, by on-the spot observation, and by the spoken word. Due to the fact that it originates from the practices of the people, in its original form, customary law is oral, unwritten and passed down from generation to generation.<sup>283</sup> It is thus evolving, allowing forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place.<sup>284</sup> For the purposes of clarity, it is important to note that the reference to customary law in this context means Indigenous African law, which refers to the norms and practices of the indigenous inhabitants of South Africa that have developed and guided the way of life of the people even prior to the advent of the Europeans.

Over time, due to the effects of civilization and colonialisation, customary law has been reduced to writing in many instances. This has resulted in an ethnocentric summation of customary law in Africa, as the initial authors who penned down customary law were people of European origin. They tended to write what was told to them and what they observed from a European mindset, which included a predisposition to give a privileged status to the written as opposed to the spoken word.<sup>285</sup>

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<sup>281</sup> Bennett TW (2004) *Customary Law in South Africa* 1.

<sup>282</sup> Hamnett I (1975) *Chieftainship and Legitimacy, an Anthropological Study of Executive Law in Lesotho* 14.

<sup>283</sup> In which process a lot of it is lost, and replaced by the practises of generations coming after. Thus, customary law is ever changing and not static.

<sup>284</sup> Bennett (2004) 3.

<sup>285</sup> Bennett (2004) 2.

Ethnocentrism created a situation in which in colonial times, the West's attitude to indigenous people was marked by a deepening prejudice. It has been said that Western writers perceived the local institutions they were dealing with, at best as *exotica* and thus beneath concern.<sup>286</sup> In cases where it was of concern, customary law was perceived through the positivist lens, which excluded any social or moral standards for judging the validity of commands or ideas. Instead, positivism claimed that 'law properly so called' emanated from the commands of a sovereign,<sup>287</sup> and it thus concerned itself with the workings and implementation of the legal code by the courts, regardless of how the rules were implemented in society and whether they were morally or politically legitimate.<sup>288</sup>

When the process of colonising southern Africa began, all the customary laws of the region were unwritten,<sup>289</sup> allowing for considerable variety. This did not suit the settler community who considered uniformity a primary goal to be achieved through the codification of customary law. Thus began the business of capturing oral custom in written texts.<sup>290</sup> This capturing of customary law led to the existence of the 'official' version of customary law, which has its origins in the colonial administration's attempt to eliminate the uncertainties of custom by reducing it to writing.<sup>291</sup>

The capturing of customary law in writing was done more to suit the purposes of the state in denigrating customary law. As such, the codification of customary law ended up describing less the customs of the people, and more what the government (and the 'chiefs' it had imposed on the people) thought they ought to be doing.<sup>292</sup> Also the codified version of customary law was cast in the language of western law, which further removed it from the living practices of the people. The more the social practices of the communities developed, the more the rules of customary

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<sup>286</sup> *Ibid.*

<sup>287</sup> Austin (1999) *Province of Jurisprudence Determined in Lectures on Jurisprudence* 101.

<sup>288</sup> Bennett (2004) 9.

<sup>289</sup> Except for Madagascar, where the Merina monarchs had been codifying the law from around 1828.

<sup>290</sup> For example, in 1869 much of the customary law on marriage and divorce amongst the Zulu was reduced to writing, and by 1891, an amended version was made binding law, referred to as the Natal Code of Zulu Law 19 of 1891.

<sup>291</sup> South African Law Reform Commission (SALRC) Project 90 – *The Harmonization of the Common Law and the Indigenous Law: Report on Customary Marriages* (August 1998) 19, available at [http://www.justice.gov.za/salrc/reports/r\\_prj90\\_cstm\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf) (accessed on 22 May 2010).

<sup>292</sup> SALRC Report on customary marriages, *ibid* 20



law applicable to them changed. The codified version, however, remained unchanged until it was formally changed by the law-maker.<sup>293</sup>

#### 5.5.1.1 Customary law during colonial times

In South Africa, customary law was adversely affected by the advent of the settlers and the colonialists. At various times, the Dutch government in certain areas of the country refused to recognise the existence of customary law amongst the indigenes,<sup>294</sup> whilst in certain areas, a system of indirect rule was imposed, through which the traditional leaders were allowed to continue leading the people, but receiving their instructions from the colonial government.<sup>295</sup> In 1913 (after the unification of the country), the Natives Land Act<sup>296</sup> was promulgated. This act prohibited Africans from buying or leasing land outside certain ‘scheduled’ areas, thus laying down a territorial framework for segregation.<sup>297</sup>

In 1927 the Native Administration Act<sup>298</sup> was introduced, in which customary law was recognised and allowed to apply nation-wide, but only in a separate system of courts (created by the Act), constituted by traditional leaders and others constituted by native commissioners. The courts of traditional leaders could only apply customary law, along with the courts of native commissioners, but those of native commissioners had discretion to apply either customary or common law in suits between ‘natives’ involving questions of customs followed by ‘natives’.<sup>299</sup> It has been said that though ostensibly it appeared that the purpose of the Act was to rejuvenate African tradition, this was not true, as its actual intention was to establish a separate system of justice to match segregation in land and society.<sup>300</sup>

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<sup>293</sup> *Ibid.*

<sup>294</sup> South African Law Reform Commission (SALRC) Project 90 – *The Harmonization of the Common Law and the Indigenous Law: Report on the Conflict of Laws* (September 1999), Chapter 1, available at [http://www.justice.gov.za/salrc/reports/r\\_prj90\\_conflict\\_1999sep.pdf](http://www.justice.gov.za/salrc/reports/r_prj90_conflict_1999sep.pdf) (accessed on 17 May 2010).

<sup>295</sup> Beall J & Ngonyama M (2009) ‘Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development: The Case of Greater Durban, South Africa’, Crisis States Research Centre Working Paper No. 55 (series 2) available at <http://www.crisisstates.com/download/wp/wpSeries2/WP55.2.pdf> (accessed on 17 May 2010).

<sup>296</sup> Act 27 of 1913.

<sup>297</sup> Bennett (2004) 41.

<sup>298</sup> Act 38 of 1927.

<sup>299</sup> Bennett (2004) 42; this was stipulated by section 11(1) of the Native Administration Act.

<sup>300</sup> SALRC Report on Conflict of Laws, *supra* 10.

Over these courts, the Native Appeal Court was established for appeals from either the courts of traditional leaders or from the commissioners' courts. In applying its discretion as to when to apply customary law, the Native Appeal Court was guided by the decision of the Appellate Division in the case of *Ex parte Minister of Native Affairs: In re Yako v Beyi*,<sup>301</sup> in which the court held that in the exercise of its discretion, the court had to consider all the circumstances of a case, and without any prejudice, select the appropriate law to deal with the facts of the case.<sup>302</sup>

This system of dealing with customary law lasted from 1927 until the 1980's, when the Law of Evidence Amendment Act was promulgated<sup>303</sup> in an attempt to 'de-racify' the terms for the recognition of customary law. Section 1(1) of the Act enabled any court to take judicial notice of the law of indigenous law... provided that it was not opposed to the principles of public policy or natural justice.<sup>304</sup> This provision extended the sphere of the application of customary law to all courts in the country.<sup>305</sup> However, in spite of this, customary law was still associated with race and treated as a subordinate element of the legal system.

#### 5.5.1.2 Proof and ascertainment of customary law

Customary law derives from the practices of particular communities, which differ considerably from place to place, and change constantly over time. This makes it more challenging for a court to prove or ascertain customary law applicable in a particular case, in order to apply it. Another issue is the fact that customary law can be ambiguous (in the sense that it is uneasily poised on the boundary between law and fact),<sup>306</sup> and thus the modes of ascertaining them are different. With law, such rules can be ascertained through authoritative texts, whilst with fact, such issues must be proved by leading evidence. Prior to 1988, the courts relied on existing precedents and texts, and where litigants alleged that there were other, more genuine rules, they were allowed to call witnesses to prove the evidence of such other rules.<sup>307</sup>

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<sup>301</sup> 1948 (1) SA 388 (A).

<sup>302</sup> 1948 (1) SA 388 (A) at 397; SALRC, 12.

<sup>303</sup> Act 45 of 1988.

<sup>304</sup> Section 1(1) of law of Evidence Amendment Act of 1988.

<sup>305</sup> SALRC, 13.

<sup>306</sup> Bennett (2004) 44.

<sup>307</sup> Bennett (2004) 48.

The 1988 Law of Evidence Amendment Act provides that all courts in the country should take judicial notice of customary law, subject to the qualification that ‘such law can be ascertained readily and with sufficient certainty’. Thus, the courts continue to rely on existing precedents and texts (so-called ‘official version’), and then also on evidence called by parties who disprove the position of the texts on the particular rule in question.

As indicated above, the Law of Evidence Amendment Act also provides for the condition of the repugnancy clause in the application of customary law by the courts. The repugnancy clause, as we have seen in chapter four, stipulates that any rule of customary law that is found to be ‘repugnant to natural law, equity and good conscience’ would be declared null and void and be struck down, and therefore not be applied. The repugnancy clause is one of the legacies of the colonial system in Africa, and is still applied in certain African countries.<sup>308</sup>

In South Africa (with its peculiar history of apartheid),<sup>309</sup> the courts have over time exercised considerable restraint and moved away from the use of the repugnancy clause in relation to the application of customary law.<sup>310</sup> They applied the repugnancy clause only with regard to ‘such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence’.<sup>311</sup> Though not yet repealed, courts have expressed views and sentiments to the effect that in the light of the provision of section 9 of the Constitution on the right to equality, it would be unconstitutional to strike down a particular rule of customary law on the basis of it being ‘repugnant to the principles of natural justice, equity and good conscience’.<sup>312</sup> This would be tantamount to elevating the common law legal

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<sup>308</sup> Nigeria, South Africa, Ghana, Zambia and Zimbabwe are some of the African countries still using the repugnancy clause. Taiwo EA ‘Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions – Some lessons for Nigeria’ (2009) 34(1) *J.J.S.* 89-115 at 91 notes that, in the case of South Africa, the courts now apply customary law subject to the Constitution and any legislation that specifically deals with customary law.

<sup>309</sup> During apartheid, the repugnancy clause was used as a weapon to nullify anything indigenous in the country at that time. There was a deliberate effort (as was in every other area of life) to elevate the common law (comprising of English common law and the Roman-Dutch law) above the African customary law/ Indigenous law. It was all part of the attempt to mentally and physically subjugate the African population.

<sup>310</sup> *Chiduku v Chidano* 1922 SR 55; *Matiyenga & Another v Chinamura & Others* 1958 SRN 829 at 831.

<sup>311</sup> *Chiduku v Chidano*, 1992 SR 55 at 58.

<sup>312</sup> Two cases of *Mahaye v Mabuso* 1951 NAC 280 (NE); *Bhe v Magistrate of Khayelitsha* 2005 (1) BCLR 1 (CC).

system above the customary law legal system and would be a breach of the Constitution.<sup>313</sup>

### 5.5.1.3 Impact of international law on customary law

The development of international law in the area of human rights brought to the fore issues dealing with customary law in communities all over the world, especially African countries. The Universal Declaration on Human Rights (UNDR)<sup>314</sup> emphasised a situation whereby human rights norms are universal and would have universal application all over the world.<sup>315</sup> This is also replicated in various international human rights instruments that South Africa has ratified over the years.<sup>316</sup> By ratifying these instruments, the application of international human rights norms in South Africa is mandated. This, however, poses difficulty in a culturally diverse society like South Africa.<sup>317</sup>

The UDHR provides for every member of a society to be entitled to the realisation of his or her cultural rights<sup>318</sup> and to freely participate in the cultural life of the community to which he or she belongs.<sup>319</sup> These are also replicated in other international human rights instruments.<sup>320</sup> It is the general belief that the South African Bill of Rights has been modelled after these international instruments.<sup>321</sup>

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<sup>313</sup> Commentators have diverse views on the clash between culture and equality. See the discussion on the different views in Grant E 'Human Rights, Cultural Diversity and Customary Law in South Africa' (2006) 1 *J.A.L.* 2-23 at 9; see also Kaganas F & Murray C 'The Contest between Culture and Gender Equality under South Africa's Interim Constitution 1994 (21) *J.L. & Soc'y* 409 at 427-428; Bennett (2004) 56-57, and Bronstein V 'Reconceptualising the Customary Law Debate in South Africa' (1998) *S.Afr.J. on Hum.Rts* 388 at 410.

<sup>314</sup> UN General Assembly (UNGA) Resolution 217A (III) of 1948.

<sup>315</sup> See also para 5 of the Vienna Declaration and Program of Action, UNGA, UN Doc.A/CONF.157/23, 12<sup>th</sup> July 1993.

<sup>316</sup> These include International Covenant on Civil and Political Rights, 1966 (ICCPR), ratified 10 March 1999; Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), ratified on 14 January 1996; International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD), ratified on 9 January 1999, and others.

<sup>317</sup> Grant (2006) 1 *J.A.L.* 2-23 at 3.

<sup>318</sup> Article 22 of UDHR.

<sup>319</sup> Article 27 of UDHR.

<sup>320</sup> For example Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); Article 27 of ICCPR.

<sup>321</sup> Bennett (2004) 84, whilst noticing that article 27 of the ICCPR applies only to minorities, he notes also that the right to self-determination and doctrine of aboriginal right provide the international law background to the right to culture in South Africa.

The 1996 Constitution makes the consideration of international law mandatory for the courts when interpreting the Bill of Rights,<sup>322</sup> and makes application of customary international law automatic in South Africa, with certain exceptions.<sup>323</sup> By these provisions, the Constitution enables international law to exert a strong influence on the status and development of customary law in South Africa.

#### 5.5.1.4 Customary law, the Constitution and the Constitutional Court

Under the 1996 Constitution, the right to culture is restated. Sections 30 and 31 make special provision for this right, which in itself gives rise to the recognition and application of customary law. Culture has been defined to mean ‘a people’s store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society.’<sup>324</sup> Section 30 guarantees everyone the right to use the language and to participate in the cultural life of their choice. It provides:

‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights’.<sup>325</sup>

The section gives individuals the right to their culture, whilst section 31 (which is similar to section 30 of the 1993 interim Constitution) grants group rights to communities or associations to practise their culture. Section 31 of the Constitution reflects the formulation of article 27 of the ICCPR and grants every person the right to participate in the cultural life of his or her choice. It provides not only for the right to participate in a cultural life, but also goes further to reinforce the right to culture, religion or language being enjoyed together with other members of the same community. It provides:

- (1) ‘Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
  - (a) to enjoy their culture, practise their religion and use their language; and

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<sup>322</sup> Section 39(1) of the 1996 Constitution.

<sup>323</sup> Section 232 of the 1996 Constitution.

<sup>324</sup> Bennett (2004) 79.

<sup>325</sup> Section 30 of 1996 Constitution.

- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.<sup>326</sup>

As far as recognition is concerned, section 211(3) of the 1996 Constitution, in addition, instructs that,

‘the courts *must* apply customary law when that law is applicable, subject to the provisions of the Constitution and any legislation that deals specifically with customary law’.

These sections indicate that the Constitution has made customary law a core element of the South African legal system, both in its recognition and application.<sup>327</sup>

In the exercise of its constitutional mandate under the interim constitution, the Constitutional Court, in a number of cases, has referred to the place of customary law in the current dispensation in South Africa. In *S v Makwanyane & Others*,<sup>328</sup> the court in abolishing the death penalty had recourse to the customary law principle of *ubuntu*. The Court held, *inter alia*, that ‘to be consistent with the value of *ubuntu* ours should be a society that wishes to prevent crime ... [not] to kill criminals simply to get even with them.’<sup>329</sup> The court further held, in explaining the concept of *ubuntu*, that ‘it placed value on life and human dignity, that the life of another person is at least as valuable as one’s own’. Respect for the dignity of every person is integral to this concept.<sup>330</sup>

The provisions also have (apart from the two normal restrictions implicit in fundamental rights) an ‘internal limitation clause’ in section 31(2) which states that

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<sup>326</sup> Sections 31(1) and 31(2) of the 1996 Constitution.

<sup>327</sup> Bennett (2004) 43.

<sup>328</sup> 1995 (3) SA 391 (CC).

<sup>329</sup> Per Chaskalson J at para 131.

<sup>330</sup> *Ibid*, para 225.

‘the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.’<sup>331</sup>

The introduction of the constitutional system in South Africa necessitated a measure of reform of customary law. One of the most important reasons why this was necessary was because the official version of customary law (as found in written form) was lagging behind social practice.<sup>332</sup> In many cases, many aspects of customary law violated the internal control measure of section 31, and also violated certain provisions of the bill of rights in many aspects. It was quickly realised that if the courts were to strike down the aspects that were in violation, they would not be able to replace them with another form of customary law, thus leaving a gap.<sup>333</sup> Legislative reform thus became necessary and came in the form of the work of the South African Law Reform Commission,<sup>334</sup> discussed below.

Legislative reform has reduced the friction between customary law principles and the Constitution to an extent, but not absolutely. Recently, the Constitutional Court had to deal with the question of the compatibility of customary law and the right to equality. One of such cases was the joint cases of *Bhe v Magistrate Khayelitsha*, *Shibi v Sithole* and *South African Human Rights Commission v President of the Republic of South Africa* (commonly referred to as the *Bhe* case).<sup>335</sup> These cases dealt with the similar issue of the rights of females to inherit under customary law. The principle of male primogeniture was central to the customary law of succession. This determined that as a general rule that only a male relative of a deceased could inherit in an intestate situation. Female members of the family did not qualify to inherit.<sup>336</sup> This was in sharp contrast to the constitutionally guaranteed right to equality. The Constitutional Court in these cases had to determine the compatibility of the two opposing systems.

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<sup>331</sup> Bennett (2004) 89. This has been upheld in the case of *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE) at 1100-1101; the High Court in upholding section 31 and refusing to allow corporal punishment in schools, felt that section 31 could not be read to permit practices that are specifically excluded by the legislation on corporal punishment.

<sup>332</sup> Bennett (2004) 96.

<sup>333</sup> This was discussed by the constitutional court in the case of *Bhe* case as one of the options open to the court.

<sup>334</sup> SALRC, *supra*; established in 1973 by Act 19.

<sup>335</sup> 2005 (1) BCLR 1 (CC).

<sup>336</sup> 2005 (1) BCLR 1 (CC), para 88 of the judgement.

In the *Bhe* case, a woman, upon her partner's death, launched an application in court challenging the appointment of the deceased's father as heir to the intestate estate of the deceased (based on the principle of male primogeniture). The widow showed evidence that she had jointly contributed to the estate, which included an uncompleted building. She and her children had lived with the deceased on their property for twelve years prior to his death. She thus sought an order of court that the exclusion of women from inheritance on the grounds of gender was in breach of the constitutional provisions guaranteeing equality.<sup>337</sup>

In the third related case of the *South African Human Rights Commission*, the appellants had sought, in addition to the reliefs in the first two cases, for the entire section 23 of the Black Administration Act (which determined the applicability of a legal system governing intestate succession simply on the basis of race) to be declared unconstitutional and inconsistent with the right to equality, human dignity and rights of children protected under sections 9, 10 and 28 of the Constitution respectively.<sup>338</sup>

The Constitutional Court unanimously found for the appellants on the two issues and declared that section 23 of the Black Administration Act was discriminatory and a breach of section 9(3) of the Constitution.<sup>339</sup> This thus created a gap in the law, as the existing law had been struck down. On the issue of the male primogeniture rule, the court found that the exclusion of women from inheritance on grounds of gender was also in breach of sections 9(3) and 10 of the Constitution.<sup>340</sup>

Further to this decision, the court had to then decide on the appropriate remedy in this case. It could either allow the gap to be dealt with by legislature passing into law the appropriate law to fill the gap; or it could apply the Intestate Succession Act<sup>341</sup> (which was a law applicable to non-African people); or it could develop customary law in accordance with the provisions in section 39(2) of the

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<sup>337</sup> 2005 (1) BCLR 1 (CC), para 11-15 of the judgement.

<sup>338</sup> 2005 (1) BCLR 1 (CC), para 31 of the judgement.

<sup>339</sup> 2005 (1) BCLR 1 (CC), para 66 of the judgement.

<sup>340</sup> 2005 (1) BCLR 1 (CC), para 91-92 per Langa, A.C.J and para 210 per Ngcobo J.

<sup>341</sup> Act 81 of 1987.



Constitution.<sup>342</sup> The majority of the learned justices of the court decided to opt for the second option of applying the Intestate Succession Act as a temporary measure to provide for cases that would fall into the category otherwise provided for under the ‘discriminatory’ section 23 of the Black Administration Act. This was meant to be a temporary measure until legislature was able to come up with the appropriate law to fill the gap.

In doing this, the court rejected the third option open to it of developing customary law.<sup>343</sup> The reasons adduced for this were that whilst acknowledging that there was a difference between the ‘living’ customary law that communities experienced daily, and the ‘official’ customary law that was before the court, the court felt that there was a lack of evidence as to the content of the ‘living’ customary law.<sup>344</sup> The court also felt that due to the non-uniformity of customary law, such development had to be done on a case by case basis.<sup>345</sup>

A more recent case that has dealt with this issue of compatibility of customary law and the right to equality is the case of *Shilubana & Others v Nwamitwa*<sup>346</sup> that was decided by the Constitutional Court in 2008. It related to the customary law rule of male primogeniture, which stipulated that a female could not become ‘chief’ of a traditional community in Limpopo. In upholding the right of the female applicant to the chieftaincy, the Constitutional Court developed customary law, by upholding the constitutional provisions to equality.

It is worthy to note from all of this that the attempt by the colonial and apartheid governments to restrain the growth and applicability of indigenous law has now been rectified by the 1996 Constitution, which recognises and protects indigenous law, and urges the courts in sections 30, 31 and 211 to uphold the rights of people to practise their customs.<sup>347</sup>

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<sup>342</sup> This mandated courts, whenever they were interpreting any legislation and/or developing common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

<sup>343</sup> 2005 (1) BCLR 1 (CC), para 109-110 of the judgement.

<sup>344</sup> 2005 (1) BCLR 1 (CC), para 109 of judgement.

<sup>345</sup> 2005 (1) BCLR 1 (CC), para 111-113 of the judgement.

<sup>346</sup> 2008 (9) BCLR 914 (CC).

<sup>347</sup> This constitutional protection of customary law, and other legal sources in South Africa, has had a positive effect on the decisions that have come out of the judiciary, in relation to customary law. This ensures that the rights of people in the Bill of Rights are upheld and enforced.

#### 5.5.1.5 Legislative reform of customary law and the South African Law Reform Commission

As indicated above, apart from the efforts of the Constitutional Court at reconciling customary law and the common law, legislative reform has also been explored through the work of the South African Law Reform Commission (SALRC). The SALRC was established by Act 19 of 1973. The commission was set up with the objective of doing research in all branches of law in order to make recommendations to government for the development, improvement, modernisation or reform of the law.<sup>348</sup> The commission worked on different areas of law, especially where there was a conflict with the constitutional provisions.<sup>349</sup>

The commission made proposals over the years to government on changes that were necessary to be made to certain laws and new laws that needed to be promulgated.<sup>350</sup> The proposals often led to the promulgation of new laws, such as the Recognition of Customary Marriages Act (RCMA),<sup>351</sup> based on the report of SALRC on customary marriages.<sup>352</sup> The promulgation of the act was in fulfilment of South Africa's international obligations and commitments under the relevant human rights treaties it had ratified.<sup>353</sup> It was also meant to address the issue of the compatibility of customary law with the equality clause in the Bill of Rights.

#### 5.5.2 Common law and statutory law in South Africa

The common law in South Africa is generally accepted to be Roman-Dutch law, as influenced by English law and adapted and developed through judicial decisions

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<sup>348</sup> South African Law Reform Commission website, available at <http://www.justice.gov.za/salrc/index.htm> (accessed on 21 May 2010).

<sup>349</sup> The Committee worked on different aspects of customary law, such as the customary law of succession; the administration of estates under customary law; and the application and ascertainment of customary law, amongst others.

<sup>350</sup> See the website of SALRC on the many reports and proposals that have been made to government over the years; see particularly in this respect, SALRC Project 90 report on Customary Marriages, *supra* 19.

<sup>351</sup> Act 120 of 1998 which came into force in November 2000.

<sup>352</sup> In the report, the SALRC suggested in bill form the Recognition of Customary Marriages Bill (in annexure A and B of its report on customary marriages).

<sup>353</sup> See SALRC Project 90 report, *supra*. See especially the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) which specifically targeted discriminatory practices against women.

and legislation.<sup>354</sup> Common law principles form part of the general legal principles that operate within a particular system. In South Africa, principles such as the fact that murder, robbery and rape are common law crimes; and that compensation must be paid for damages caused unlawfully, are examples of common law principles. South African courts do not only interpret legislation, but also common law.<sup>355</sup> A more succinct definition of common law has been given by Kleyn and Viljoen to the effect that the South African common law is ‘*mainly Roman law of the Corpus Iuris Civilis as it was explained by the glossators and commentators and received in the local customary law of the Netherlands; and Roman-Dutch law*’.<sup>356</sup>

The common law in South Africa provides the basic framework of principles of most areas of law. It is to be noted that some of the most important fields of law are governed by what are, in effect, mini-codifications.<sup>357</sup> For example, company law is to be found in the Companies Act 61 of 1973 and other associated legislation; the law dealing with insolvency is to be found in the Insolvency Act 24 of 1936.<sup>358</sup> Thus, whilst legislation has altered and supplemented the common law in most areas, it is still a cardinal feature of South African law that the fundamental rules and principles of large parts of the law, especially the law of obligations and property law, are not contained in legislation, but rather in common law principles and concepts.<sup>359</sup>

It has been submitted that the common law should be seen as the central framework or core around which the other sources of South African law (namely statute, case law and custom) revolve.<sup>360</sup> Even though the rules of common law may be abolished by statute, common law is still very much a foundational source to the legal system. It is used to comprehend and apply statutes and it forms the substratum of law in the land, which is the Constitution.<sup>361</sup> Where there is a gap in a statute, where a statute inadvertently fails to provide an answer for a particular

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<sup>354</sup> Bekker (2002) 12.

<sup>355</sup> Kleyn D & Viljoen F (2002) *Beginners Guide for Law Students* 82-83.

<sup>356</sup> Kleyn (2002) 87 (own emphasis).

<sup>357</sup> Van der Merwe & Du Plessis(ed) (2004) *Introduction to the Law of South Africa* 40.

<sup>358</sup> *Ibid.*

<sup>359</sup> Van der Merwe *et al* (2004) 40.

<sup>360</sup> Hosten *et al* (1995) *Introduction to South African Law and Legal Theory* 384.

<sup>361</sup> Hosten (1995) 385.

point that is raised, the courts conveniently fall back on the common law in order to determine the issue. The common law is flexible and changes to suit prevailing conditions.<sup>362</sup>

Prior to the 1993 Constitution, there was a defined division between private law and public law. The common law generally governed South African private law, whilst statutory law governed public law. However in light of the provisions of the 1996 Constitution, the division between private law and public law has been blurred as certain parts of the constitution, especially the Bill of Rights, are now applicable to both aspects of law, and the Constitution is now the supreme law of the land. It enjoins the courts to apply common law to matters before them, but this must be subject to constitutional principles. An example of this is the Bill of Rights.

The Constitution mandates the courts to interpret common law through its principles and through the elaboration of the framework of rights and duties contained in it. The courts carry out this mandate through their judicial decisions (precedent). Section 173 of the Constitution vests in the courts the mandate of developing the common law. It provides as follows:

‘The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.’

Section 39(2) of the Constitution also requires that courts, *when developing common law, to promote the spirit, purpose and objects of the Bill of Rights*. By this, the Bill of Rights is made applicable to bind private and juristic persons.<sup>363</sup> This is embodied in section 8(2) of the Constitution which states that

‘a provision of the Bill of Rights binds a natural and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

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<sup>362</sup> *Ibid.*

<sup>363</sup> Sarkin J ‘The Common Law in South Africa: Pro-Apartheid or Pro Democracy?’ (1999) 23 *Hastings Int’l & Comp. L. Rev.* 18.

Thus, in giving effect to this mandate of the Constitution, we see a new common law methodology emerging, in which common law rules are being interpreted, abolished, extended and truncated to the extent that they have taken on a uniquely new South African flavour. This, especially in the case of the SCA, differs from the ever ready and historical recourse to Roman-Dutch legal principles, and results in a marked difference between the Roman-Dutch legal principles, and the common law that is being developed by the courts.<sup>364</sup> Roman-Dutch law nevertheless constitutes the original core of the common law in the country.<sup>365</sup>

Part of the ways in which the courts give effect to the constitutional mandate is by following the system of legal precedent or *stare decisis*. By this is meant that a lower court is bound by the decisions of a higher court on similar causes of action. Put in another way, a higher court develops the law in such a way that it becomes a precedent for lower courts to follow.

For this system of judicial or legal precedent to be effective, the courts are structured in hierarchy according to the Constitution. Chapter 8 of the Constitution makes provision for the judicial authority of South Africa. Section 165 of the Constitution vests this judicial authority in the courts. The courts are independent organs, subject only to the Constitution and the law.<sup>366</sup> The Constitution mandates other organs of state to assist and protect the courts to ensure this independence and the dignity, accessibility and effectiveness of the courts. Section 166 lists the courts in hierarchical order, starting with;

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal
- (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
- (d) the Magistrates' Courts; and

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<sup>364</sup> Van der Merwe *et al* (2004) 41.

<sup>365</sup> Sarkin (1999) 23 *Hastings Int'l & Comp. L. Rev.* 18.

<sup>366</sup> Section 165(2) of the 1996 Constitution.

- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.<sup>367</sup>

The Constitutional Court, Supreme Court of Appeal and High Courts are courts of superior record, whilst the Magistrate court and any other court established pursuant to section 166(e) are courts of inferior record. The other courts that have been created by Act of Parliament include the Labour Courts and Labour Appeal courts; Divorce Courts; Land Claims Court; Water Tribunal; Small Claims Court; Community Courts (and courts for Chiefs and Headmen).<sup>368</sup>

### 5.5.3 Statutory law

Statutory law refers to the law that is codified. These are contained in Acts, by-laws, and other pieces of legislation. Statutes are a very important part of the South African legal system. They form a majority of the sources of law and cover every conceivable field of social intercourse. Statutes stand as a source of first recourse whenever the content of the law on any particular topic is being sought. Section 44 of the Constitution confers on Parliament the power to make laws and to amend the Constitution. This power is further broken down in subsections (a) and (b), between the National Assembly and the National Council of Provinces.<sup>369</sup> The Constitution provides rules for the enactment of statutes.<sup>370</sup> These rules are to be followed by both the National Assembly and the National Council of Provinces in enacting statutes. All legislation made is however subject to the provisions of the Constitution and must be consistent with the Constitution.<sup>371</sup>

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<sup>367</sup> Sections 166 (a)-(e) of the 1996 Constitution.

<sup>368</sup> 'Courts in South Africa', available at

[http://www.capegateway.gov.za/eng/pubs/public\\_info/C/32303/](http://www.capegateway.gov.za/eng/pubs/public_info/C/32303/) (accessed on 24 May 2010).

<sup>369</sup> Section 44 of the 1996 Constitution of the Republic of South Africa.

<sup>370</sup> Sections 73 to 82 of the Constitution.

<sup>371</sup> Section 2 of the 1996 Constitution.

## 5.6 Impact of the Legal System on the rule of law in South Africa

The rule of law is fundamental to South African law. It is enshrined in the first section of the Constitution in section 1(c), which provides, *inter alia*, that ‘the Republic of South Africa is founded on ... supremacy of the constitution and on the rule of law’. This pivotal position of the rule of law in the Constitution signifies how important the concept is to post-apartheid South Africa.

However, despite the vantage position granted to the rule of law in the Constitution, it can only be effective if it is adhered to by the people and if the structures and institutions meant to foster the rule of law are properly operational and independent. There must be a collective effort by all persons in South Africa to foster and entrench the rule of law. Chapter 9 of the Constitution establishes and empowers certain institutions for the purpose of strengthening constitutional democracy (by inference the rule of law).<sup>372</sup> These institutions must be effective, vigilant and driven in the work that they have been assigned by the Constitution.

When the collective effort needed for the upholding of the rule of law is lacking; when actions of government, political, judicial and other leaders are contrary to the law and thus seen as undermining the rule of law, it signals the existence of a problem. Even though the legitimacy that guided the process of the 1996 constitution making was alluded to above, it is necessary to remember that the ‘ownership’ and allegiance of the people does not mean that there is an all around or a hundred percent allegiance, as there will always be the ‘deviant’ group within any society. These show their deviance by preferring not to conform to the law and looking for ways by which to flout the law to their own advantage. Deviant behaviour, if it is condoned can unfortunately become entrenched and widespread, and eventually become the norm.

### 5.6.1 Entrenchment of the rule of law

Activism by members of the society, institutions of democracy, and organs of state will work to counter the actions of the deviants. As the famous quote states,

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<sup>372</sup> Sections 181-194 of the 1996 Constitution.

‘eternal vigilance is the price of freedom’,<sup>373</sup> it is in the ‘watchfulness and attentiveness’ of the people to the ‘constitutional democracy’ building project that freedom is guaranteed.

As indicated above, after the formal transition from apartheid to democracy, much progress was experienced in building and enthroneing constitutional democracy and the rule of law in South Africa. This was evidenced by the enactment of the Constitution, establishment of the Constitutional Court, and the creation of the various institutions meant to strengthen the new constitutional democracy.<sup>374</sup> Judgements of the Constitutional Court have to a large extent set the stage for the legal protection of the rule of law. The Court has been proficient in its judgements based on the provisions of the Constitution.<sup>375</sup> It has established the fact that no-one is above the law, and that the law applies to everyone equally. For example, in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,<sup>376</sup> the court held that whilst the President of the Republic was not granted immunity from giving evidence in court cases, ‘... the President should be required to give evidence orally in open court in civil matters relating to the performance of his official duties only in exceptional circumstances’.<sup>377</sup>

2) Another pointer to the entrenchment of the rule of law in South Africa is the freedom of the press (which comprises South African journalists of all races) which is very vibrant, critical and often times outspoken.<sup>378</sup> The press here includes the print, audio and visual media. Freedom of the press is constitutionally

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<sup>373</sup> This quote is often attributed to Thomas Jefferson (1743 – 1826), the third president of the United States, though no evidence of this can be found in his writings. It is contended that the earliest reflection of the quote can be attributed to a John Philpot Curran in his speech on the Right of Election in 1790, contained in a 1808 publication, titled *Speeches*.

<sup>374</sup> Institutions provided for in chapter 9 of the 1996 Constitution. They are listed in section 181 of the Constitution.

<sup>375</sup> The court has over time declared a number of Acts of the president null and void on grounds that it is inconsistent with the Constitution. For instance, in the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC), in which the Court declared section 16A of the Local Government Transition Act 209 of 1993 (LGTA) an unconstitutional delegation of legislative power to the executive.

<sup>376</sup> (1999) ZACC 11.

<sup>377</sup> (1999) ZACC 11, paras 243-245.

<sup>378</sup> Jowell Jeffrey ‘How Secure is the Rule of Law in South Africa?’ TimesOnline of March 5, 2009, available at <http://business.timesonline.co.uk/tol/business/law/article5840634.ece> (accessed on 24 May 2010).



guaranteed under section 16 of the Constitution.<sup>379</sup> The press is thus designed to be independent, and not controlled or curtailed by the government or members of the public from expressing and reporting on news. This sector of society has consistently been at the forefront of exposing and bringing to light deviant behaviour amongst members of the public sector, private sector and particularly government.

The press has a duty to be responsible in all the news it reports. This is a tough balance that the press has battled to maintain since the beginning of the post-1994 period, but it is a balance that is necessary for the success of the constitutional democracy in the country and for the entrenchment of the rule of law. In recent times, there have been attempts by certain members of the society to curtail and censor the actions of the press. Principal amongst these are the Protection of Information Bill presently being discussed in Parliament and the proposed Medial Appeals Tribunal. These will be discussed further below.

The work of investigative journalists has produced results through publications such as *The Sunday Times*, *Mail & Guardian* and many others. Investigative journalism also comes through in TV programs like *Carte Blanche*, *Special Assignment* and *3<sup>rd</sup> Degree*. These have been prolific in exposing and drawing the attention of the public to the injustices and wrongs in the society, and to the actions of individuals in government, business, or politics.

Early in 2010, *The Sunday Times* published the story of how Julius Malema, the ANC Youth League president, was alleged to have been involved in lucrative government contracts totalling several millions of rands. These were allegedly awarded to his companies by the government, especially his home province, Limpopo.<sup>380</sup> The newspaper report stated that proper tender awarding procedures were not followed and that in many cases, Malema's companies did not have the required expertise to do the jobs effectively, and did not even bother with the quality of the work they did.<sup>381</sup> The response of the ANC Youth League, apart

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<sup>379</sup> Section 16 states

‘everyone has the right to freedom of expression, which includes –  
(a) freedom of the press and other media;  
(b) freedom to receive or impart information or ideas...’

<sup>380</sup> ‘How Malema made his millions’, Front page, *Sunday Times*, 21 February 2010.

<sup>381</sup> *Ibid.*

from denouncing the story, was on the wider level, to order an investigation of the private lives of some members of the press. This was targeted at putting undue influence on journalists, probably with the purpose of getting them to ‘back down’ and leave the story. The allegations against Malema led to various media investigations and audit into his lifestyle and means.

After the story broke, the Office of the Public Protector and Auditor General were petitioned by various interested bodies to investigate the allegations.<sup>382</sup> This was done and in August 2010, the Public Protector issued a statement in which it found that it ‘could not determine’ whether tenders awarded to companies affiliated to Malema had complied with the relevant processes.<sup>383</sup> The Public Protector determined that this was due to poor procurement record keeping by the authorities.<sup>384</sup>

Thus the progress of constitutional democracy in the country has lately been affected by a number of challenges that have surfaced. This had led those in certain quarters to proffer that constitutional democracy is in crisis in South Africa.<sup>385</sup> While the populace continue to clamour for service delivery in terms of houses, health care, education, social infrastructure, there continues to be more cases of people (even the high-powered people) exhibiting ‘deviant’ behaviour (contrary to the Constitution and the laws of the land), becoming involved in corrupt practices and in many instances, being condoned.

The Julius Malema story above is just one of many such stories.<sup>386</sup> The publication of the story was one of the things that resulted in a call for ‘lifestyle audit’ for public officers (starting with the members of the executive and ruling party).<sup>387</sup> This call has been mostly ignored and rejected by ANC ruling

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<sup>382</sup> ‘Auditor, Public Protector probes Limpopo tenders’, *The Times*, 29 March 2010.

<sup>383</sup> ‘No Irregularities in Malema Tenders Contracts’, available at <http://www.iol.co.za/news/politics/no-irregularities-in-malema-tender-contracts-1.673142> (accessed on 9 October 2010).

<sup>384</sup> *Ibid.*

<sup>385</sup> Dodeck AM ‘State v Zuma: The Future of Constitutional Democracy in South Africa’ (2009) 3 *J.P.P.L* 121 at 121-122.

<sup>386</sup> There abound different stories and cases of people amassing wealth ‘illegally’.

<sup>387</sup> This call was made by COSATU General-Secretary, Zwelinzima Vavi, early in 2010.

government, and rather what we see is the vilification of those calling for lifestyle audits.<sup>388</sup>

The Sunday Times in April 2010 carried the story of the National Stadium Company of South Africa Company.<sup>389</sup> The company had allegedly fraudulently indicated in a tender bid for the management of the stadia for the World Cup, that it met the requirements of the Broad Based Black Economic Empowerment (BBBEE) Act.<sup>390</sup> It was discovered that the company's averment was false as the supposed 'BEE' board member was a mere stooge. It turned out that the directors of the company had included the details of one of its 'black' employees as a director in the company and a 25 percent shareholder of the company. This employee was in reality in no way connected to the running or management of the company.<sup>391</sup>

It has become the practice now that whatever exposé the Sunday Times runs on Sunday, sets the pace for the discourse in the media for the coming week. The exposé by media achieves a two-fold purpose: firstly, it raises the level of awareness of the public to the different happenings in the country, and actions of government, public officials and even private citizens, when such actions are in contravention of or aimed towards sabotaging the laws of the land. This has the effect of putting pressure on the officials to be effective and efficient in whatever they are doing. The second effect is that it compels the relevant authorities (in many instances) to take action on the cases that are reported.

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<sup>388</sup> President Zuma rejected the calls on the basis that government had pre-existing mechanisms in place to detect any instance of unjust enrichment. See 'Zuma rejects Vavi's call for lifestyle audits', Business Day of 24 of February 2010, available at <http://www.businessday.co.za/articles/Content.aspx?id=94571> (accessed on 4 June 2010)

<sup>389</sup> 'Soccer City Scam', Sunday Times of 25 April 2010.

<sup>390</sup> Act 53 of 2003. It is described as an Act 'to establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith.' The Preamble further explains the Act as designed to

'promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services'.

<sup>391</sup> This was followed up in the Sunday Times of 23 May 2010 with a report that stated that the gentleman in question had now sued the holding company of the National Stadium of South Africa, for breach and failure to pay him his dues as a 20 percent stakeholder in the company.

However, there have been certain worrying events and signs in the recent past which have indicated certain cracks that may be leading to an encroachment of the rule of law in the country. For example, even though there is press freedom, the exercise of such (like other guaranteed rights) is importantly curtailed by the limitation clause contained in section 36 of the Constitution. Such limitation must be ‘reasonable and justifiable ... based on human dignity, equality and freedom, taking into account all relevant factors ...’ Some of the factors to be taken into account in the application of section 36 are listed in this section.<sup>392</sup>

The ANC, in its 2007 52<sup>nd</sup> National Conference, adopted the recommendation of its Policy conference that there should be an investigation of the establishment of a Media Appeals Tribunal (MAT).<sup>393</sup> This was stated to be with a view of curbing instances of questionable, irresponsible and sensationalist journalism. The conference opined ‘that the creation of the MAT would strengthen, complement and support the current self-regulatory institutions (like the Press Ombudsman/Press Council) in the public interest’.<sup>394</sup> The call for discussions on this was recently revived by the ANC in an advance discussion document prepared for its National General Council (NGC) in September 2010.<sup>395</sup> This discussion document comprehensively dealt with the issue of media freedom, media diversity and ownership, and reiterated the call for such an appeals tribunal for the media.<sup>396</sup>

While the reasons for the tribunal might be necessary to curb irresponsible journalism as stated by the ANC, it is important to note that it could also have the counterproductive effect of muzzling the media, intimidating journalists and thus

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<sup>392</sup> Sub-section (1) of Section 36 of 1996 Constitution lists the factors as including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose;
- (e) and less restrictive means to achieve the purpose.

<sup>393</sup> ‘ANC 52<sup>nd</sup> National Conference: Resolutions’ available on the ANC website, available at <http://www.anc.org.za/show.php?include=docs/res/2007/resolutions.html&ID=2536> (accessed on 8 October 2010).

<sup>394</sup> *Ibid.*

<sup>395</sup> NGC 2010 Discussion Document - Media Diversity and Ownership, available on the ANC website at [http://www.anc.org.za/events.php?t=National General Council - 2010](http://www.anc.org.za/events.php?t=National%20General%20Council%20-%202010) (accessed on 8 October 2010).

<sup>396</sup> *Ibid.*, see particularly points 69-109. The document also extended to a call for a Media Charter (115-122) to ensure transformation in employment and ownership, particularly in the print media.

preventing reportage and monitoring of the actions of the authority.<sup>397</sup> Also, the Protection of Information Bill recently presented by the Department of Justice to Parliament for adoption, seeks to broaden the classification of protected information. The bill provides that any Head of an Organ of State would be empowered to classify any document or information as protected in the national interest. This bill, together with the ruling party's MAT, raises the suspicion in the minds of people that the government is on a deliberate drive to silence the investigative capabilities of the media. These steps have had the media, opposition parties and civil society up in arms.<sup>398</sup>

In as much as there is press freedom, there is also the responsibility that comes with exercising such freedom. This can be evidenced in section 36 of the Constitution, referred to above. The press has a duty to uphold responsible journalism and not to engage in sensationalism or incitement of any kind. This was recently brought to the fore again in a Sunday Times publication.<sup>399</sup> In an article that was a response to a previous column by Fred Khumalo of the Sunday Times, Professor Z Motala, a long standing professor of the University of Western Cape, raised issue with the tone of Mr Khumalo's previous publication. Professor Motala alleged that the tone of the article amounted to offensive and racist references about Indians, and offensive generalisations about Chinese in the country. He noted the need for responsible journalism and for media houses and the press ombudsman to be proactive in dealing with incidents that contravene the Constitution or the code of conduct of journalism. He said that '[w]hen a journalist does not exercise his/her craft in a way that respects core constitutional values of anti-racism and violates the dignity of other groups in the society, it is expected that media houses and the press ombudsman would deal with such incidents with alacrity'.<sup>400</sup>

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<sup>397</sup> See, generally, 'Power without Responsibility – the Media Appeals Tribunal', by Thabani Khumalo posted on AllAfrica.com, available at <http://allafrica.com/stories/201008030432.html> (accessed on 5 August 2010). This write-up enumerates the pros and cons of a media appeals tribunal, especially in the light of press freedom and press responsibility.

<sup>398</sup> See various articles in the Mail and Guardian on the issue, available at <http://www.mg.co.za/tag/protection-of-information-bill> (accessed on 5 of August 2010).

<sup>399</sup> 'Dignity should be protected', by Professor Motala, *Sunday Times Review* 1 of 7 of November 2010.

<sup>400</sup> *Ibid.*

### 5.6.2 Further challenges to the rule of law

There are also other events that have constituted challenges to the rule of law in the country, and that have put the entronement of rule of law under great strain. These affect the rule of law and its perception as law in the country. These events (sometimes bordering on scandals) are important in order to determine the state of the rule of law in the country, and efforts being made to either build on it or to destroy it. A brief exploration of some of these will be carried out below. Firstly, the different issues that have arisen in the recent past concerning Mr Jacob Zuma, the President of the Republic, will be examined.

1) There have been a number of issues and allegations involving Mr Zuma prior to his election as the President of the Republic. Part of these are his role in the ‘1999 arms deal’ and his ‘friendship’ with Shabir Shaik, and the allegation of rape that was levelled against him by an acquaintance. His role in the 1999 arms deal<sup>401</sup> was investigated, and as a result in 2003, the former special unit on organised crime, the ‘Scorpions’ (an elite anti-crime unit, reporting to the National Prosecuting Authority) recommended that Mr Zuma and Shabir Shaik (a close associate, and personal financial advisor of Mr Zuma) be charged for fraud and corruption for their role in the arms deal.<sup>402</sup> This was whilst Mr Zuma was the Deputy President of the republic. Eventually, the National Director of Public Prosecutions decided not to proceed against Mr Zuma, but to prosecute Shabir Shaik.<sup>403</sup> He was convicted of fraud in 2005 after he was found to have defrauded the state and to be guilty of various financial crimes. This was upheld on appeal.

The Supreme Court of Appeal (SCA),<sup>404</sup> in dismissing the appeal, upheld the ‘finding’ of the lower court (High Court),<sup>405</sup> *inter alia* held that there was a ‘generally corrupt’ relationship between Mr Shaik and Mr Zuma.<sup>406</sup> This led to the

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<sup>401</sup> The ‘arms deal’ involved the procurement by the South African government of arms and military weapons from a French arms company, to bolster its defence capability. The deal was valued at approximately R30 billion at the time of the transaction.

<sup>402</sup> Dodek (2009) 3 *J.P.P.L* 121 at 128.

<sup>403</sup> At a press conference in 2003, the head of the NPA, Bulelani Ngcuka announced that Mr Zuma was not to be charged despite the existence of a *prima facie* case against him.

<sup>404</sup> *Shaik & Others v S* 2007 (2) All SA 9 (SCA).

<sup>405</sup> *S v Shaik & Others* 2005 (3) All SA 211 (D).

<sup>406</sup> The learned judge who heard the case in the high court, Judge Hillary Squires, has refuted the claim that he used the words ‘generally corrupt’ in his judgement. In a letter to ‘The Weekender’, a Business Day publication over the weekend of the 11<sup>th</sup> of November 2006, the honourable judge

corruption investigation against Jacob Zuma, which ultimately led to his being charged in December 2007 on different counts of fraud, racketeering and money laundering by the National Prosecuting Authority (NPA).<sup>407</sup>

Based on the unfolding events, the then president Mbeki on the 14<sup>th</sup> of June 2005 relieved Mr Zuma of his position as Deputy President on the basis of the decision of the High Court in the Shabir Shaik case.<sup>408</sup> The decision of the High Court had been to the effect that there was a mutually beneficial symbiosis between Mr Zuma and Mr Shaik.<sup>409</sup> This followed the undisputed evidence before the court that a series of payments were made to Mr Zuma by Shaik, with the only possible return being the influence of Mr. Zuma's political office. As stated above, the then president Mbeki, on the grounds of upholding the rule of law, and respecting a decision of the court, relieved Zuma of his post as Deputy President of the republic.<sup>410</sup>

The NPA in June 2005, after the court judgement in the Shaik case, reinstated the charges against Mr Zuma. The process of such reinstatement was challenged by the Mr Zuma, and after a number of interlocutory applications and processes,<sup>411</sup> the SCA in February 2009 decided that Mr Zuma should be tried on the charges laid

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indicated that he never used the phrase attributed to him and that it was used by the prosecution in the case. See 'Squires never used *generally corrupt* phrase', available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=qw1163318760847B263](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1163318760847B263) (accessed on 27 May 2010). This finding of the court was based on the fact that Shaik admitted in the course of the trial to have made several payments to Mr Zuma, totalling over R1m, and had negotiated a bribe of over R1.5m from the French company, in exchange for Mr Zuma providing future protection to the French Company from investigation.

<sup>407</sup> 'Zuma Charged with Corruption, Fraud', available at Mail & Guardian Online at <http://www.mg.co.za/article/2007-12-28-zuma-charged-with-corruption-fraud> (accessed on 27 May 2010). The NPA is created by section 179 of the Constitution, and the NPA Act 32 of 1998. These laws provide for it to be headed by a National Director of Public Prosecution (NDPP).

<sup>408</sup> 'Statement of President Thabo Mbeki at the Joint Sitting of Parliament on the Release of Hon Jacob Zuma from his responsibilities as Deputy President', 14 June 2005, available as Institute for Security Studies (ISS) Resource Centre publication on [http://www.ipocafrika.org/index.php?option=com\\_content&view=article&id=70&Itemid=67](http://www.ipocafrika.org/index.php?option=com_content&view=article&id=70&Itemid=67) (accessed on 27 May 2010).

<sup>409</sup> 'Shaik, Zuma relationship 'corrupt'', 1 June 2005, Mail & GuardianOnline, available at <http://www.mg.co.za/article/2005-06-01-shaik-zuma-relationship-corrupt> (accessed on 27 May 2010).

<sup>410</sup> He remained deputy president of the ANC, however, and later became the president of the ANC when Thabo Mbeki lost out to him in the ANC elections in Polokwane in 2007.

<sup>411</sup> Part of the interlocutory processes was a judgment by Judge Chris Nicholson of the Natal High Court on the 12<sup>th</sup> of September 2008, reported in (2009) 1 All SA 54 (N). The judgment was to the effect that the prosecution of Mr Zuma had been politically motivated. The ANC capitalised on this judgment and recalled the then President Thabo Mbeki as President of the Republic. Thus, Mbeki also became a casualty of the events relating to Mr Zuma.

by the NPA against him.<sup>412</sup> By this time, Mr Zuma was running on the ANC ticket for the presidency of South Africa. The NPA thereafter faced the dilemma of deciding whether to proceed with the corruption case against him whilst it was becoming clearer by the day that he would be the next president of the Republic. Apart from this, there was pressure from various sectors of the population on the organisation to drop the charges.<sup>413</sup>

On the 6<sup>th</sup> of April 2009 (just a few days before the presidential elections), the NPA decided to ‘drop’ the charges against Mr Zuma. According to the then acting head of the NPA, Mokededi Mpshe, new revelations to the NPA showed that the timing of the prosecution of Mr Zuma had been planned by the former head of ‘Scorpions’, Mr Leonard McCarthy and former National Director of Public Prosecutions, Mr Bulelani Ngcuka, to prevent Mr Zuma from being elected the president of the ANC.<sup>414</sup> To them, this was necessary, as being president of the ANC, more or less meant becoming the president of the Republic whenever the tenure of the incumbent was up.

The dropping of the charges by the NPA paved the way for Mr Zuma to become the third democratically elected president of post apartheid Republic of South Africa.<sup>415</sup> It however raised a lot of issues about the independence of the NPA and other government institutions. The NPA was heavily criticised by the opposition parties, civil society and members of the public as it appeared that it had become a tool in the hands of those with power and influence, with which they served and achieved whatever purposes they had.

Not long after the commencement of the corruption trial, in 2006 Mr Zuma faced another trial in which he was charged with the rape of a 31-year old woman.<sup>416</sup>

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<sup>412</sup> *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277.

<sup>413</sup> The ANC had called for the prosecution to be dropped in the public interest, insinuating that if Mr Zuma was tried (let alone found guilty), there would be unrest in the country. The ANC Youth League on its own filled the air waves with a lot of fiery rhetoric that the organisation was prepared to ‘take up arms and kill for Zuma.’ All of these put pressure on the NPA and heated up the public sphere just before the 2009 presidential elections.

<sup>414</sup> Statement delivered by Mpshe, ‘Statement of the National Director of Public Prosecutions on the matter *S v Zuma and Others*’, available at <http://www.mg.co.za/uploads/2009/04/06/statement.pdf> (accessed on 29 May 2010).

<sup>415</sup> Although the existence of the criminal charges against him would not have necessarily barred him from the presidency as the Constitution only bars, *inter alia*, someone who has been convicted of an offence and sentenced to more than a year imprisonment.

<sup>416</sup> *S v Zuma* 2006 SA (WLD) 2.



The High Court in this case held that the State had not proved its case beyond reasonable doubt, and as a result found Mr Zuma not guilty and discharged him.<sup>417</sup>

This case further put a strain on Mr Zuma's reputation. It created factions within the ANC and other parties (as many of those who had supported him ardently had been disappointed by the further allegation of rape).

The effect of the Zuma trials on the rule of law and the political system of the country was profound. It created rifts and different levels of distrust amongst the arms of the political party, law enforcement agencies and even within the judiciary.<sup>418</sup> It formed part of the bitter succession battle that was then ongoing between Mr Mbeki and Mr Zuma. This scenario was aptly captured by the Mail & Guardian analysis of April 2006, which stated, amongst other things, that

‘the political damage is incalculable, with the ruling ANC now an openly divided and faltering movement. This has had a domino effect on the South African Communist Party and the Congress of South African Trade Unions, which have floundered and fractured in the face of damaging charges against a man they ardently backed as the country's next president’.<sup>419</sup>

Apart from the political damage, there was also damage suffered by the judiciary. The whole Zuma matter put a strain on the judiciary, as it faced the prospect that regardless of the legal validity of any action or decision of the courts, any decision against Mr. Zuma would be considered by the majority of his supporters to be part of the ‘conspiracy’ against him. This played out in calls by the ANC alliance partners and their allies that the judiciary was partisan in the matter.<sup>420</sup>

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<sup>417</sup> *S v Zuma* 2006 SA (WLD) 2 at 140-174, per Van der Merwe J.

<sup>418</sup> A fallout of the Zuma trials was the case of Judge Hlophe, president of the Cape High Court Division. He was accused of trying to influence the Constitutional Court. This would be discussed later in this research.

<sup>419</sup> ‘23 Days that shook our World’, Mail & Guardian of the 28<sup>th</sup> April 2006, available at [www.mg.co.za](http://www.mg.co.za) (accessed on 29 May 2010).

<sup>420</sup> See the views expressed by Cosatu, the ANC Youth League and other allies in Matshiqi A (2007) *Undamaged Reputations: Implications for the South African Criminal Justice System of the Allegations against and prosecution of Jacob Zuma*, (a research report written for the Centre for the Study of Violence and Reconciliation) available at [http://www.csvr.org.za/index.php?option=com\\_content&task=view&id=362](http://www.csvr.org.za/index.php?option=com_content&task=view&id=362) (accessed on 2 June 2010) at 7, 11-12, 14.

2) A second example of events that have played out and resulted in undermining the rule of law in the country, in terms of the perception of legitimacy of the judiciary, the legal profession and other law making institutions, is the case concerning the Judge President of the Cape Provincial Division, John Hlophe in 2008. The facts of this case are very much in the public domain and as such a detailed account would not be necessary here, except for a brief summary.

The Hlophe matter involved an allegation by the judges of the Constitutional Court that Judge Hlophe had approached certain of its members in 2008 and attempted to improperly influence them in proceedings pending before the Constitutional Court, in one of the cases involving Mr Zuma (then he was the president of the ANC).<sup>421</sup> These allegations are very serious, and if found to be true, would have been in violation of sections 165(3) and (4) of the Constitution concerning the independence of the judiciary and non-interference by any person or organ.<sup>422</sup> A complaint was subsequently laid by the Constitutional Court judges against Judge Hlophe at the Judicial Services Commission (JSC), which had the mandate to investigate complaints of misconduct against and amongst judges.<sup>423</sup>

In response to the complaint against him, and before the JSC could proceed on the matter, Judge Hlophe brought a court case against the Constitutional Court and each of its members in the High Court and the JSC. He alleged that his constitutional rights to dignity, equality and privacy had been violated.<sup>424</sup> The High court found in his favour in *Hlophe v Constitutional Court of South Africa and Others*,<sup>425</sup> but this was overturned on appeal by the SCA.<sup>426</sup> The decision of the SCA paved the way for the JSC to commence its hearing into the alleged

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<sup>421</sup> This was released into the public domain through a public statement issued by the Constitutional Court which contained these allegations on 30 May 2008. The case in question was *Zuma & Another v NDPP & Others* 2008 ZACC 13. It related to the constitutionality of various searches that the NPA had conducted on the offices Zuma's defence team, and on the admissibility of the materials seized.

<sup>422</sup> Sections 165(3) and (4) provide:

(3) 'No person or organ of state may interfere with the functioning of the courts.

(4) 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'.

<sup>423</sup> Provided for in section 178 of the 1996 Constitution; also provided for in Part IV of the Judicial Services Commission Act 9 of 1994.

<sup>424</sup> This was based on the fact that the Constitutional Court held a press conference making the allegations against Judge Hlophe, even before it had lodged its complaint with the JSC.

<sup>425</sup> 2008 ZAGPHC 289.

<sup>426</sup> *Langa v Hlophe* 2009 ZASCA 36.

conduct. The JSC eventually decided not to hold a formal inquiry, with cross-examination into the complaints concerning Judge Hlophe. It thereafter dismissed the complaint laid by the Constitutional Court against Judge Hlophe, saying that it was not convinced that Judge Hlophe had tried to improperly influence the Constitutional Court.<sup>427</sup> This decision was challenged in the Western Cape High Court by the Premier of the Western Cape, Helen Zille, and in April 2010, the judges of the Cape High Court ruled, overturned the JSC decision, declaring it ‘unconstitutional and invalid’.<sup>428</sup>

The ruling of the high court leaves the JSC with two options, either to re-try the matter, or to appeal the ruling of the high court. The JSC, on the 30<sup>th</sup> April 2010, decided to appeal the ruling of the high court.<sup>429</sup>

### 5.6.3 Assessing the resultant fall-out

The actions of the NPA in the various cases concerning Mr Zuma have come under a lot of criticism from the opposition parties, the public, civil society, members of the academic profession and even private sector.<sup>430</sup> It brings to question the independence and impartiality of the NPA, and its officers, especially in relation to the authorities’ stance regarding the decision to charge or not charge Mr Zuma,<sup>431</sup> the timing of the eventual decision to charge him, and the final decision to withdraw all charges against him in 2009. It is felt that the decision to withdraw

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<sup>427</sup> ‘Mixed reaction to JSC decision to drop Hlophe charges’, SAC NEWS, 28 August 2009, available at <http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnextoid=4ae210086a163210VgnVCM10000077d4ea9bRCRD&vgnnextfmt=default> (accessed on 6 June 2010).

<sup>428</sup> *Premier Western Cape Province v The JSC & Others* Case No: 25467/2009 (not yet reported). In the case, the judges held that the JSC was improperly constituted when it decided to dismiss the charges against Judge Hlophe, because the Constitution provided that in such cases before the JSC, the premier of the city was entitled to be part of the JSC hearing the matter, and also that the votes for the decision to dismiss the charges were only 6 out of 13, and thus not a majority as provided by the law.

<sup>429</sup> ‘JSC to appeal Hlophe Ruling’, available at <http://www.newstoday.co.za/index.php/news/sanews/4254-jsc-to-appeal-hlophe-ruling.html> (accessed on 6 June 2010).

<sup>430</sup> Helen Zille, Leader of the Democratic Alliance said in April 2009, that the dropping of the charges was irrational and unlawful. See ‘Zille: Dropping the charges against Zuma is Irrational and Unlawful’ at <http://www.da.org.za/newsroom.htm?action=view-news-item&id=6584> (accessed on 31 May 2010).

<sup>431</sup> Matshiqi (2007) 18.

charges against Mr. Zuma impacts on the rule of law in South Africa negatively. The perception created by this is that certain members of the society are beyond and above the rule of law and the judicial system, and thus they are exempt from going through the due process of law if they are found wanting.

The criticisms are further to the effect that even if there was a conspiracy or a manipulation of the ‘timing’ of the prosecution of Mr Zuma, this did not negate the fact that there was a *prima facie* case against him which was declared by the Supreme Court of Appeal to be a sufficient basis for prosecution.<sup>432</sup> The court held that ‘a prosecution is not wrongful merely because it is brought for an improper purpose, it will however be wrongful if, in addition, reasonable and probably grounds for prosecuting are absent.’<sup>433</sup> This has been echoed by the chair of the Centre for Constitutional Rights in its April 2009 press statement.<sup>434</sup>

Matshiqi, however, in another view of the NPA decision, held that the NPA yielded to public and political pressure when it charged Mr Zuma in 2005. This was because it already knew that there was not enough evidence to convict him. Thus, according to Matshiqi:

‘The unenviable position of the NPA is reflected in the fact that, ever since the Shaik judgment, it has had little choice but to pursue Zuma in order to retain broad public credibility. If the NPA had acted in a manner consistent with Ngcuka’s original statement, and withdraw from its efforts to prosecute Zuma on the basis that it had insufficient evidence, this would be taken as proof that it had succumbed to political pressure, or that a political deal had been made...’<sup>435</sup>

This view has now seemingly been ratified by the criticism of impartiality, lies, and other allegations that followed advocate Mpshe’s decision to withdraw the

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<sup>432</sup> Decision made in the *NDPP v Zuma* 2009 (2) SA 277.

<sup>433</sup> *NDPP v Zuma* 2009 (2) SA 277, par 37 of SCA decision.

<sup>434</sup> De Havilland N ‘The Rule of Law and the Independence of the National Prosecuting Authority’, available at <http://www.nmmu.ac.za/documents/law/zumaopinion2.pdf> (accessed on 31 of May 2010). The author, considering the powers of the NPA granted to it by the Constitution and the enabling act; the circumstances of the scenario painted by Advocate Mpshe (acting Director of the NPA); and the decision of the SCA in its verdict of 2008; inferred that Advocate Mpshe had erred in his decision to drop the charges and that the independence of the NPA was under great threat from the influences of the executive.

<sup>435</sup> Matshiqi (2007) 18.

charges against Mr Zuma in 2009. It is submitted that even if the NPA did not have sufficient evidence to prosecute Mr Zuma in the first place, and even if it had yielded to ‘pressure’ to prosecute in 2005, the only way the uncertainties and negative perception could have been avoided would have been for the case to be decided by a competent court of law, which was denied by the withdrawing of the charges.

When one compares South Africa to her peers on the continent, the feeling is, however, that the investigation and prosecution of a senior leader of the ruling ANC, and a deputy president of the country (even if the charges were eventually withdrawn) is indicative of the health and strength of the democratic institutions in the country. The same scenario would be very far-fetched in Nigeria or other African countries, if it happens at all. This solid nature and good foundation of the democratic institutions in the country was reaffirmed in the final report of the APRM process that took place in South Africa in 2005 (discussed later in this thesis).

The Hlophe matter is another test of the strength of the judiciary and the legal profession as it involved judges of the highest court of the land laying a complaint against a fellow judge. It has called into question the integrity of a single judge, one of South Africa’s highest ranking judicial officers, a judge president, as well as the propriety of the actions of the Constitutional Court judges in publicising the complaint.<sup>436</sup> It is felt that these proceedings risk damaging the legitimacy of the judiciary as an institution, damage the judiciary can ill afford at a time when it has gone through a spate of external attack that it suffered during the Zuma corruption cases.<sup>437</sup> The case of Judge Hlophe and the Constitutional Court judges have been described as internal ‘self-inflicted’ wounds that could, together with the external attacks on the judiciary, undermine the progress made in building a post-apartheid judiciary that is both independent and impartial.<sup>438</sup>

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<sup>436</sup> Dodek (2009) 3 *J.P.P.L* 121 at 130.

<sup>437</sup> *Ibid.* The judiciary was under a lot of attack from pro-Zuma loyalists who felt that it was being used as a tool by those who were conspiring against Zuma. Particularly, the ANC Youth League and the Young Communist League, COSATU, all attacked the integrity of the judiciary after the Shaik judgement which implicated Mr Zuma.

<sup>438</sup> Dodek (2009) 3 *J.P.P.L* 121 at 131.

Whilst these concerns are probably true and germane, it is also very important that if there exists any evidence of misconduct, misbehaviour and failure of integrity within the judiciary (or any other institution in society), such must not be shielded and buried in the name of ‘not wanting to damage the integrity and legitimacy of the institution’. The way and manner in which the JSC will go about the compliant a second time around will be indicative of the seriousness of the country, especially those in positions of authority, to foster and work to enthrone the rule of law and the independence of the judiciary, which are constitutional principles. The fact that the JSC consists of a number of political appointees and that the President has the final say on the ratification of nominations to the commission may not bode well for the commission. It may also further the impression and allegations of interference with the independence of the judiciary being created by the actions of the ANC-led government.

Whilst the ANC has indicated that the ‘transformation of the judiciary’ forms part of its post-apartheid mission goals for a while now, more proactive steps need to be taken to see this being actualised. Following its Polokwane conference at the end of 2007, part of the resolutions of the ANC National Executive Conference was that though progress had been made in this regard, more still needed to be done in transforming the judiciary.<sup>439</sup> Even though it is necessary and in accordance with the Constitution for the judiciary to be transformed from the racial and pro-government posture it took during apartheid to an independent judiciary, the way and manner the transformation agenda is effected would impact on the independence and legitimacy of this very important branch of government. If the implementation of the transformation agenda creates the perception that government is interfering in the independence of the judiciary, public confidence in the judiciary would be adversely affected, and this would impact on the enthronement of the rule of law in the country.<sup>440</sup>

Another contributor to the enthronement of the rule of law in the country is international law. The respect and observance of international law principles

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<sup>439</sup> ANC 52<sup>ND</sup> National Conference 2007 – Resolutions, available at <http://www.anc.org.za/ancdocs/history/conf/conference52/index.html> (accessed on 14 June 2010).

<sup>440</sup> See possible instances of interference in the actions of the Minister of Justice, Jeff Radebe, as relates to the composition of the JSC in 2009, just before the Hlophe matter was deliberated on by the JSC; the appointment of Advocate Mpshe as a judge, which seems to be a reward for the former’s decision as NDPP to withdraw charges against Jacob Zuma, and others.

(which are basically formed by states and individuals on the global level) plays a great role in the country. The South African Constitution makes international law a very important role player, not only in the legal system, but even in the country as a whole. The role of international law in enthroneing the rule of law in South Africa will be examined in the next section.

## 5.7 International law in South Africa and its impact on the rule of law

Against the backdrop of the experiences of South Africans during the apartheid era, the impunity of the National Party, the extensive violations of human rights and human dignity, it was imperative that the drafters of the 1996 Constitution focused greatly on entrenching the protection of fundamental human rights in line with international standards.<sup>441</sup> Compliance with international law under the 1996 Constitution takes on a heightened significance for the country. The 1996 Constitution of South Africa makes international law of both direct and indirect application in the country. It specifically provides for the basis for the application of treaties and customary international law in the country. This depicts a greater reliance on international law in the country, as opposed to previous South African constitutions which made very little mention of international law, and its position in the South African legal order, if at all.<sup>442</sup> The reason for this greater reliance on international law has been said to be the need to fundamentally reconstruct the South African legal system.<sup>443</sup>

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<sup>441</sup> Schaffer RP 'The Inter-relationship between Public International Law and the Law of South Africa: an Overview (1983) 32 *ICLQ* 277. This article provides a useful summary of the main developments leading up to 1983. On the conclusion and incorporation of treaties before this present dispensation under the 1996 Constitution, see Dugard J 'The Treaty-making Process (1968) 85 *SALJ* 1; Dugard J 'International Law and the South African Constitution' (1997) *EJIL* 77-92; Devine DJ 'Some Problems relating to Treaties in the Interim South African Constitution and Some Suggestions for the Definitive Constitution' (1995) 20 *SAYIL* 1; Olivier ME 'The Status of International Law in South African Municipal Law: Section 231 of the 1993 Constitution' (1993/94) 19 *SAYIL* 1; Botha NJ 'Incorporation of Treaties under the Interim Constitution: A Pattern Emerges' (1995) 20 *SAYIL* 196.

<sup>442</sup> Dugard (2005) *International Law: A South African Perspective* 55. As indicated in the footnote above, the 1993 Constitution made the first elaborate provision for the place of international law in the South African legal system.

<sup>443</sup> Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 127.

Section 231 of the 1996 Constitution provides for the basis for the application of treaties (international agreements) within the South African legal system.<sup>444</sup> It provides, *inter alia*, that an international agreement would generally only bind the Republic after it has been approved by resolution of parliament, and enacted into law by national legislation.<sup>445</sup> The only exception to this constitutional provision is in the case of the international agreement being of a ‘technical, administrative or executive nature, or an agreement which does not require either ratification or accession’.<sup>446</sup> In such cases, the Constitution provides that such agreements would bind the Republic without needing the approval of parliament.<sup>447</sup> It is, however, required that such be tabled before parliament within a reasonable time.<sup>448</sup> These types of agreements have been understood to be agreements ‘of a routine nature, flowing from the activities of government departments’.<sup>449</sup>

Section 231(4) further provides that an international agreement would only become law in the country when it is enacted into law by national legislation.<sup>450</sup> This

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<sup>444</sup> See Dugard (2005) 58-62, Dugard 1997 *EJIL* 77 *et seq*; Michie A ‘The Provisional Application of Treaties in South African Law and Practice’ (2005) 30 *SAYIL* 1; Keightley R, ‘Public International Law and the Final Constitution’ (1996) 12 *SAJHR* 405; Scholtz W ‘A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996’ (2004) 29 *SAYIL* 202 at 208 *et seq*.

<sup>445</sup> Section 231(1) provides:

‘The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.’

<sup>446</sup> Section 231(3) 1996 Constitution.

<sup>447</sup> Dugard (2005) 60; see also Botha N ‘Treaty Making in South Africa: A Reassessment’ (2000) 25 *SAYIL* 69, in which the author discusses the ways in which these types of agreements come about and how they are applicable. He also notes the potential for manipulation of the system.

<sup>448</sup> Dugard 1997 *EJIL* 77.

<sup>449</sup> Olivier M ‘Informal International Agreements under the 1996 Constitution’ (1997) 22 *SAYIL* 63 at 64, in which she notes that this is the view taken by the state international law advisers.

<sup>450</sup> Section 231(4) of the 1996 Constitution; the Constitution in section 239 defines the term ‘national legislation’ as including not only an act of parliament, but also ‘subordinate legislation made in terms of an Act of Parliament; and legislation that was in force when the Constitution took effect and that is administered by the national government’.



means that for any international agreement, treaty, convention to be law in South Africa, it must first have been passed into law by an act of parliament, or other such legislation (like a schedule to a statute, or means of proclamation or notice in the Government Gazette).<sup>451</sup> The only exception to this rule is contained in the proviso to the section, which deals with the issue of ‘self-executing parts of treaties’, which do not need enactment into law before becoming law in the Republic.

By these provisions, it becomes clear that South Africa adopts the dualist approach to the incorporation of treaties in South African law. Section 231(4) is the only exception to this by making self-executing treaties directly applicable in South African law without the need for parliamentary legislation.<sup>452</sup> This tends towards a monist approach. This proviso has been criticised by Dugard, who feels that it would cause problems for the South African courts, as there is no clear-cut definition of the meaning of ‘self-executing’ parts of treaties, and thus, it would be left to the courts to decide on it.<sup>453</sup> This decision, he feels, would need to be based ‘on its own merits by the courts with due regard to the nature of the treaty, the precision of its language and the existing South African law on the subject in question’.<sup>454</sup>

The one thing to note about the proviso of section 231(4) is that it grants direct application to parts of international treaties which are capable of direction

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<sup>451</sup> Dugard (2005) 61; see Keightley (1996) 12 *SAJHR* 405 at 410-412, in which the author raises the concern that has been echoed by many about the impact of waiting for parliamentary action before a treaty can become law in South Africa, even after the country has ratified it.

<sup>452</sup> Olivier ME ‘Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations’ (2002) 27 *SAYIL* 99; Ngolele EM ‘The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law’ (2006) 31 *SAYIL* 141-172, in which the author explores the origin of the term ‘self-executing’, its definition and its application in South African law, see also Keightley (1996) 12 *SAJHR* 405 at 411, where he suggests that the treaties or agreements referred to in section 231(3) and (4) can be viewed as being the same or similar, since they both would not need parliamentary ratification or to be passed into law by an act of parliament for them to be binding.

<sup>453</sup> Dugard (2005) 62; Botha (2000) 25 *SAYIL* 69 at 91; Olivier (2002) 27 *SAYIL* 99.

<sup>454</sup> Dugard (2005) 62, where he states his definition of *self-executing provision of an agreement* as involving a decision whether the existing law of the Republic is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty or in the converse, whether further legislation is required. Ngolele (2006) 31 *SAYIL*, goes to great length to define what self-executing treaties are in line with their definition in the United States from which the term originates.

application. These parts will be directly applicable in South African law, without the need for incorporating legislation,<sup>455</sup>

Section 232 of the 1996 Constitution makes provision for the direct application of customary international law in the Republic, the only exception being if it is inconsistent with the Constitution or an Act of Parliament.<sup>456</sup> This entrenches the common law position that makes international law automatically a part of municipal law, making it compulsory for the courts to consider it.<sup>457</sup> This provision also raises the importance the Constitution gives to customary international law, making it subject only to an Act of Parliament and the Constitution, thus all other sources of law in the South African legal system will come second to customary international law. As Dugard observed, ‘even the doctrine of *stare decisis* would not be evocable as an obstacle to the application of a new rule of *customary* international law’.<sup>458</sup>

Section 233 of the 1996 Constitution reinforces the importance of international law in the South African legal system. It provides that a court, in interpreting any legislation, must prefer an interpretation that conforms with international law, as opposed to one that does not conform to international law. This suggests that international law should play a part not only in the application of treaties and customary international law, but also be used as an interpretative tool. The Constitution therefore establishes a framework for using international law in constitutional interpretation, such that any interpretation to be adopted by the courts must be consistent with international law.

Section 39(1) of the Constitution, in referring to interpretation of any of the rights contained in the Bill of Rights, mandates courts or any other type of forum to consider international law.<sup>459</sup> Whilst this is a peremptory obligation, it requires the

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<sup>455</sup> Oliver ME ‘South Africa and International Human Rights Agreements: Procedure and Policy (Part 1)’ (2003) 2 *TSAR* 292 at 303.

<sup>456</sup> It states that ‘[c]ustomary international law *is law* in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’ (own emphasis).

<sup>457</sup> Dugard (2005) 55; Keightley (1996) 12 *SAJHR* 405 at 406.

<sup>458</sup> Dugard (2005) 56 (author’s emphasis).

<sup>459</sup> Section 39 provides:

- ‘(1) When interpreting the Bill of Rights, a court tribunal or forum –
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and

courts to merely ‘consider’ international law. The Constitutional Court has stated in this regard that ‘public international law’ in this context would include non-binding as well as binding law. They may both be used under the section as tools of interpretation’.<sup>460</sup>

The impact of these provisions on the development of the rule of law in South Africa (especially the development of human rights jurisprudence) is apparent. Law-making is influenced by international law, as law making bodies are now compelled to ensure that their rules, statues and regulations are in accordance to international law (whether that binding on the country, or customary international law). The constitutional provisions go a long way in establishing that international law principles and rules are guiding principles for the development of law within the country. Thus, by this the rule of international law is further entrenched.

In instances where laws (whether statutes or other rules) are not in compliance with international law, such statutes or provisions of statutes, if challenged in a court of law, can be struck down.<sup>461</sup> In the cases that have emanated from the courts, especially the Constitutional Court, the court has made use of international law as an interpretative aid in a number of cases, as prescribed by the Constitution. The next section will examine this impact in more detail.

### **5.7.1 International law in the legal system with specific reference to International Human Rights Law**

As indicated in chapter 3, international law is developed by international organisations, international tribunals, bodies and states. After South Africa was accepted back into the international community in the early nineties, the country has ratified a number of international agreements, conventions or treaties,<sup>462</sup> and is

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(c) may consider foreign law.’

<sup>460</sup> *S v Makwanyane*, *supra* 391 at 413. This statement was made in reference to section 35 of the 1993 interim constitution, which was reproduced as section 39 of the 1996 Constitution.

<sup>461</sup> See n 375 above, where reference is made to the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, *supra*, in which the Court declared section 16A of the Local Government Transition Act 209 of 1993 (LGTA) an unconstitutional delegation of legislative power to the executive.

<sup>462</sup> For a list of these agreements as at 2007, see annexure to article by Olivier ME & Abioye FT ‘International Environmental Law: Assessing Compliance and Enforcement under South African and International Law’ (2008) 33 *SAYIL* 184-216 at 208-216.

particularly party to major universal human rights instruments.<sup>463</sup> The influence of these international agreements on the rule of law in the country is determined by the way and manner the provisions of the Constitution (examined above) are implemented. Since the establishment of the new constitutional order in 1994, courts in South Africa have demonstrated a great willingness to be guided by the decisions of international organisations, and tribunals in matters relating to international law.<sup>464</sup>

Chapter two of the 1996 Constitution (containing the Bill of Rights) makes provision for the guarantee of human rights in the country. The Bill of Rights is modelled on international human rights conventions, as almost all of the provisions have been adopted from these conventions.<sup>465</sup> As a result of this, it has become commonplace for the Constitutional Court and other courts to invoke human rights norms and decisions by international human rights tribunals and supervisory bodies to interpret the Constitution.<sup>466</sup>

In *Kaunda & Others v President of the RSA & Others*,<sup>467</sup> the applicants were a group of South Africans who had been arrested in Zimbabwe on charges inclusive of being mercenaries and plotting a coup against the President of Equatorial Guinea. Upon their arrest, they sought for an order of court to compel the government of South Africa to make representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, to avoid their being extradited to Equatorial Guinea (which was alleged to have a poor record of human rights observance). The Constitutional Court, in reaching a decision, carried out a thorough discussion and analysis of the nature and scope of diplomatic protection at international law and the limitations on extraterritorial action.<sup>468</sup>

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<sup>463</sup> The International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child, and others.

<sup>464</sup> Dugard (2005) 66.

<sup>465</sup> Particularly the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); and International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>466</sup> Dugard (2005) 338.

<sup>467</sup> (2004) 10 BCLR 1009 (CC); also reported in (2005) 4 SA 235.

<sup>468</sup> *Ibid.*

In *S v Makwanyane* the Constitutional Court had to decide on the constitutionality of the death penalty.<sup>469</sup> In doing so, the court made extensive use of several international human rights instruments, including the different instruments on human rights, especially the rights to life and human dignity.<sup>470</sup> In declaring the death penalty unconstitutional, the court held that it was ‘a cruel, inhuman and degrading punishment’.<sup>471</sup>

In *S v Williams*<sup>472</sup> the Constitutional Court found that corporal punishment was unconstitutional in that it violated the prohibition of ‘cruel, inhuman or degrading treatment’ in the Constitution, which also conformed to most international human rights instruments.<sup>473</sup>

The above cases are just a very small fraction of the cases dealt with by the Constitutional Court over the years. There are many more cases relating to the rights contained in provisions of the Bill of Rights.<sup>474</sup>

In the post-apartheid South Africa, the use and impact of the rule of international law has been evident and is definitely still evident within the legal system. It is playing a part in the evolution and moulding of the legal system, whether as a binding or a non-binding authority. A different view has, however, been expressed by some authors and commentators. In a survey on the use of international law in the decisions of the Constitutional Court, carried out in 2005, it was indicated that the court has made limited use of international law in constitutional interpretation, especially in regard to the Bill of Rights.<sup>475</sup> Hovell and Williams, who

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<sup>469</sup> *S v Makwanyane* (1995) 3 SA 391 (CC) at 402, per Chaskalson J. This case was decided under the 1993 interim constitution; the international law provisions of which have been regurgitated in the 1996 Constitution to a great extent.

<sup>470</sup> *S v Makwanyane* (1995) 3 SA 391, paras 66-86. The court’s reaction to the use of these instruments was that they were of value and mandated by the Constitution.

<sup>471</sup> *S v Makwanyane* (1995) 3 SA 391, paras 95, 146.

<sup>472</sup> (1995) 2 SA 632 (CC); (1995) 7 BCLR 861.

<sup>473</sup> (1995) 2 SA 632 at 639; the court referred to article 5 of the UDHR, article 7 of the ICCPR, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and article 5 of the African Charter on Human and Peoples’ Rights.

<sup>474</sup> *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148; *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) dealt with the constitutionality of extraditing an accused person to a country that imposes the death penalty, whilst it is abolished here in South Africa; *Hoffman v South African Airways* 2001 (1) SA 1, dealing with employment discrimination against an HIV-positive person; *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) which dealt with the right to equality, in which the court declared the tradition based on male primogeniture unconstitutional; *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721, dealing with the right to health care and access to HIV/Aids treatment. These are just some of the cases.

<sup>475</sup> Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 114.

commissioned the survey, found that out of 228 cases that the court had decided in the period from 1995 to the end of 2004, the court had made detailed consideration of international law in only 32 (14 percent) cases.<sup>476</sup> The figures pertaining to the Bill of Rights cases present a brighter picture. Out of the 137 of such cases that had come before the court in the same period of time, the court had made detailed consideration in only 30 (22 percent) of the cases. The authors referred to this as a ‘relatively limited use of international law in constitutional interpretation’.<sup>477</sup>

This limited use has been attributed to the fact that on any particular issue (or right), most of the references to international law would occur in the early decisions on the issue (*when the principles are being established*), but as the field of law *and the principles of law* on the issue develop and achieves consistency, the use and resort to international law will become less useful.<sup>478</sup> Another reason cited by the authors is the *ad hoc* basis on which international law is considered. The consideration is at times cursory and does not extend beyond a depiction of the relevant international law treaty provisions. It is also on a case by case basis and subject to the judge(s) hearing the case.<sup>479</sup>

As stated above, South Africa is a signatory to the Convention on the Rights of the Child, adopted by the UN General Assembly, which came into force in 1990. South Africa ratified the convention in 1995.<sup>480</sup> Its African equivalent, the African Charter on the Rights and Welfare of the Child, was signed in 1997 and ratified in 2000.<sup>481</sup> The provisions of these international instruments have been domesticated by the Children’s Act.<sup>482</sup> This act makes reference in its preamble to the constitutional protection provided by section 28 of the Constitution on the rights of the child, and also to other international instruments dealing with the rights of a child. In *Christian Education South Africa v Minister of Education*,<sup>483</sup> South Africa’s obligations under the Convention on the Rights of the Child, and other

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<sup>476</sup> Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 115.

<sup>477</sup> Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 117.

<sup>478</sup> Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 118.

<sup>479</sup> *Ibid.*

<sup>480</sup> Dugard (2005) 325.

<sup>481</sup> See, in this regard, [http://www.african-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf](http://www.african-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf) (accessed on 6 June 2010).

<sup>482</sup> No 38 of 2005.

<sup>483</sup> 2000 (4) SA 757 (CC).

international human rights instruments were invoked to uphold the prohibition on corporal punishment in independent schools.<sup>484</sup>

Another international law treaty which South Africa is a party to is the International Covenant on Civil and Political Rights (ICCPR).<sup>485</sup> The covenant and its optional protocol entered into force for South Africa in March 1999 and November 2000 respectively. In the case of *Prince v South Africa*,<sup>486</sup> which came on appeal before the UN Human Rights Committee (UNHRC), the applicant challenged the failure of the country's laws to exempt Rastafarians from the ban of using cannabis, as a violation of his right to freedom of religion, and freedom from discrimination on the basis of religion, under articles 18(1), 26 and 27 of the ICCPR.

The case had come before the South African High Court,<sup>487</sup> the Supreme Court of Appeal,<sup>488</sup> and two decisions of the Constitutional Court of South Africa,<sup>489</sup> where it was held that even though the prohibition of the use of cannabis in the Drugs and Drugs Trafficking Act<sup>490</sup> and the Medicines and Related Substances Control Act<sup>491</sup> affected and limited the applicants' constitutional right to use cannabis for the purposes of his Rastafarian religion, such limitation were reasonable, justifiable and necessary under section 36 of the Constitution,<sup>492</sup> and was thus upheld. On appeal to the African Commission on Human and Peoples' Rights in *Prince v South Africa*,<sup>493</sup> it was found that there had been no violation of the applicants' rights. The matter before the UNHRC was considered and the committee decided upon the facts that the prohibition under the South African legislation was based on objective and reasonable grounds and thus the failure of the state to provide an exemption for Rastafarians did not constitute differential treatment contrary to the ICCPR. The committee thus found no breach of the articles of the covenant.

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<sup>484</sup> 2000 (4) SA 757 (CC), paras 19-20; 23 and 40.

<sup>485</sup> Available on the website of the Office of the United Nations High Commissioner for Human Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed on 14 April 2010).

<sup>486</sup> (2007) AHRLR 40 (HRC 2007).

<sup>487</sup> *Prince v President of the Law Society, Cape of Good Hope and Others* (1998) 8 BCLR 976.

<sup>488</sup> *Prince v President, Cape Law Society and Others* (2000) 3 SA 845 (SCA).

<sup>489</sup> *Prince v President, Cape Law Society and Others* (2001) 2 SA 388 (CC); (2002) 2 SA 794 (CC).

<sup>490</sup> Act 140 of 1992.

<sup>491</sup> Act 108 of 1996.

<sup>492</sup> (2007) AHRLR, para 2.5, although the minority decision found the prohibition on the use and possession of cannabis in religious practices (which did not pose an acceptable risk to society and the individual) unconstitutional, and considered that government should allow such an exemption.

<sup>493</sup> (2004) AHRLR 105 (ACHPR 2004).

On the regional level, South Africa is party to a host of treaties and agreements, central of which is the African Charter on Human and Peoples Rights (the Charter), which was ratified on the 9<sup>th</sup> July 1996. The African Commission on Human and Peoples Rights (the Commission), whilst acknowledging limitations faced by member states, has imposed further obligations on them to ensure that they, at the very least, satisfy minimum levels of the rights contained in the Charter.<sup>494</sup>

Part of the limitations mentioned above is where the government lacks the capacity to enforce the rights, whether in terms of the resources needed or in terms of the human capital needed.<sup>495</sup> The case of *Government of South Africa & Others v Grootboom & Others*<sup>496</sup> is case in point here. The Constitutional Court held in this case that government had a positive obligation to take reasonable steps within its available resources to implement the respondents' socio-economic right to adequate housing, which was guaranteed by section 26 of the 1996 Constitution of South Africa.

A product of the influence of international law and the international community in terms of rule of law in African countries are the effects of globalisation, and the APRM review process, which South Africa is a party to. As already indicated in chapter 3, globalisation is a phenomenon that has swept through the world, at an alarming rate, and has made brought about interconnectedness between and amongst nations. The effects of this on the rule of law in South Africa, together with the effects of the APRM review process, will be examined below.

As explained in chapter 2, the APRM is a peer-review mechanism through which member states in Africa commit to adhere to general principles on democratic and political governance, amongst others.<sup>497</sup> Through these guidelines and principles, the state of the entronement of law in South Africa has been surveyed in the South African review, which was completed in 2007. The review was carried out in line with the procedures of the APRM, and a report issued. This yielded great dividends for the country both within and outside the continent, partly because the

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<sup>494</sup> ACHPR Res 73 (XXXVI) 04.

<sup>495</sup> Egede, *ibid.*

<sup>496</sup> 2001 (1) SA 46; which will be discussed in the next chapter.

<sup>497</sup> These are set out in the Base Document of September 2003. These principles are more or less an African domestication of newly developed international guidelines.



submission to the review of peers and the publication of the report indicates the willingness of the country to strive for greater heights. The steps required and taken by the government of South Africa in order to comply with the APRM process further strengthens democracy and rule of law in the country, as discussed below.

### **5.7.3 Impact of the APRM initiative on the rule of law in South Africa**

As part of the review process, the South Africa government appointed an APRM Focal Point with the responsibility of sensitising the country and outlining modalities for participation in the APRM process.<sup>498</sup> In 2005, the APRM National Governing Council (NGC) was inaugurated by the then president, Thabo Mbeki. This council was in charge of the whole process of the self-assessment from the part of the country. Whilst the council had a widely representative membership, these were initially overly dominated by members of the government, and this issue was raised by civil society within the country. Consequently, the NGC was expanded in order to make it more inclusive.

In its assessment by the APRM, South Africa went through a rigorous process. Measures were put in place to get widespread consultation from members of the public on the four thematic areas of the APRM. All stakeholders were encouraged to also carry out their own self-assessment for submission to the APRM. Thus labour, parliament, private and public sector organisations were encouraged to do an internal self-assessment in the process of participating in the APRM process.<sup>499</sup> Sensitisation and consultation processes were effective and put the participation of the society at just over 5 million people.<sup>500</sup> The NGC consolidated the CSAR and submitted to the APRM, though the approach used by the governing council was criticised by some of the stakeholders as reflecting that

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<sup>498</sup> APRM Country Review Report on South Africa, 2007, available on the APRM website at <http://www.aprm.org.za/docs/SACountryReviewReport5.pdf> (accessed on 14 June 2010) 39. Honourable Geraldine Fraser-Moleketse was appointed as the APRM Focal point (also known as the APRM country representative) for South Africa.

<sup>499</sup> APRM Country Review Report, chapter 1.

<sup>500</sup> See the entire APRM report on the stage by stage processes that had to be followed in order to get a thorough report; see also page 45, where the National Governing Council is reported to have recorded awareness raising tapes in all the eleven languages, recorded CDs and songs to popularise the APRM.

the council wanted to manipulate the process and its outcome,<sup>501</sup> presumably to conceal the depth of the challenges the country was facing.

At the end of the self-assessment, the Country Review Report (CRR) on South Africa was issued by the APRM. It was a product of the consideration of both the Country Self-Assessment Report (CSAR) and the Country Review Mission (CRM). The CRR highlighted areas where the country was making progress and areas that were lacking and that needed more attention and political will to be paid to them. Of the thematic areas of the APRM, the one that relates the most to the issue of the rule of law is the Democracy and Political Governance theme. As stated in the SA APRM country report,

‘the key objective of democracy and political governance is to consolidate a constitutional political order in which democracy, respect for human rights, the rule of law, the separation of powers and an effective, responsive public service are entrenched to ensure sustainable development and a peaceful and stable society.’<sup>502</sup>

This stresses the role that the Constitution plays in determining the rule of law within a country. This is just one part of it, the other part of it is the way that the Constitution is respected and upheld by the members of the society. The report goes on to buttress the fact that the South African Constitution is not only the most important document in the construction of the state, but also the most crucial instrument in forging a nation.<sup>503</sup> Whilst the CRR identified issues under the thematic areas on which the country needed to make improvements, it also commented the progress made by South Africa in its 13 years of democracy in enthroneing the rule of law.<sup>504</sup>

Amongst the issues identified were the increasing phenomena of corruption, the poverty levels, the lasting impact of apartheid on the people and xenophobia. The NPoA was submitted along with the CRR to the CHSG. It signifies the steps that have been identified that will be taken to address the issues that were identified in

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<sup>501</sup> APRM Country Review Report 43.

<sup>502</sup> APRM Country Review Report 69.

<sup>503</sup> *Ibid.*

<sup>504</sup> See, generally, APRM Country Review Report on South Africa, especially the Executive Summary.

the CRR. It is a program of action as the name depicts. An annual progress report is expected to be issued by the country to indicate how much progress is being made in relation to the issues raised, and how the country is coping with implementing the recommendations of the CRR.

South Africa has submitted the first progress report on the NPoA, and was due to submit the second in this year 2010. The progress report has been criticised by civil society as not fulfilling and reflecting the purpose for which it is designed.<sup>505</sup> The progress report is meant to give an indication of the progress made by government in correcting the concerns raised in the CRR. It would appear that even though South Africa is one of the pioneer countries of the mechanism, the country has not been able (and or willing) to give effect to the purpose of the APRM.

Unfortunately, the first progress report was unable to show any substantial effort that has been put into addressing the problems identified in the CRR a year after. In particular, the problem of xenophobia that was identified in the CRR spiralled out of control in 2008.<sup>506</sup> Currently, there have been threats and insinuations made by communities that they will again chase foreigners out of their communities after the world cup.<sup>507</sup> The issue of the proper implementation of the BBE initiative (now under the BBBEE) was another issue identified. The effectiveness of this initiative in correcting the ills of the society is still questionable, as it has merely succeeded in creating a tiny black middle class. As indicated earlier in this chapter, corruption is still a problem, along with issues of poverty and others.

Whilst it is not expected that by the time the first progress report is issued, the identified problems would have been conclusively dealt with, it is at least expected that there will be signs of efforts being made to meet the challenges identified in

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<sup>505</sup> Turianskyi Y 'Off Track? Findings from South Africa's First APRM Implementation Report' *SAIIA Occasional Paper* No 53.

<sup>506</sup> This resulted in the loss of lives, property and source of livelihood for immigrants. It created a temporary refugee community as foreigners had to be living in makeshift tents after being chased out of their communities.

<sup>507</sup> This issue has been brought into the public domain by the media. Talk Radio 702 in particular has alerted the public and authorities to these threats. This has been corroborated by members of the public who have called in to confirm such threats. On the 2<sup>nd</sup> of July 2010, the Police Minister, Nathi Mthethwa, was reported to have issued a strong statement against any xenophobic attacks. See also 'Anti-xenophobia Committee Finalising Post Cup Plans', available at [http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=8728:zz&catid=3:Civil%20Security&Itemid=113](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=8728:zz&catid=3:Civil%20Security&Itemid=113) (accessed 2 July 2010).

order to ensure growth and development. This is when the APRM process is said to be effective and successful. The effectiveness of the APRM will translate to better and greater respect for the rule of law in the country.

## **5.8 Conclusion**

In examining the existence of the rule of law in South Africa, this chapter provided a brief historical background, especially in relation to the evolution and formation of the country, the role of the Dutch, British, Afrikaners and Africans and other nationalities, in what has now evolved into South Africa. This historical perspective paid particular attention to the role that law played in the evolution process of South Africa (whether good or bad, legitimate or illegitimate).

South Africa as a country has gone through tumultuous times and challenges on its path to liberation for all its citizens. In the seventeenth and eighteenth centuries, the legal practices of the Dutch, notably the institution of slavery, led to the development of a racial order. This racial order manifested as the system of apartheid, which resulted in a lot of damage to the social fabric of the country. It has resulted in the country having one of the most extreme cases of inequalities ever seen in a country. In examining the legitimacy of the laws promulgated under apartheid, it is seen that these lacked, and have not fostered, the growth of the rule of law in the country.

This chapter has sought to lay the foundation for the place of the rule of law in the legal system in post-apartheid South Africa. The rule of law, as used here, implies the rule of 'legitimate' law; law that the people perceive and obey as binding on them; and law that they are participatory in its making and moulding. The pre-1993 constitutions of South Africa were not products of public participation; rather, they were products of the desires of a white minority. These constitutions lacked legitimacy due to the prohibition from participation of the greater majority of the population, thus giving rise to a situation in which the system of governance that emanated from these constitutions was such that allowed and perpetuated discrimination and racism against the majority of the people. The laws that emanated from this system also followed suit in perpetuating apartheid.

The post apartheid period has seen a marked improvement in the state of the rule of law in the country. The 1993 and the current 1996 Constitutions are products of extensive consultations and public participation, which confer a great deal of legitimacy on these documents. They express the hopes, values and aspirations of the majority of the people of the country. There exists a sense of ownership, acceptance of the process and the document by the people. This is translated into the public sphere, where the law continues to order and direct people's lives, and continues to be upheld.

The rule of law in South Africa has shown a level of resilience in withstanding the challenges and pressures which can actually be turned into 'building blocks'. This can be partly attributable to the people of South Africa and the way in which they engage with the law, and also the perception that exists and that is transferred into behavioural patterns, that they (the people) are bound by the tenets of the law. This can also be adduced to the reflection by government (state) that it itself is bound by the law. Thus, on both sides of the divide, the people and the state exhibit a reasonable level of compliance with the law.

However, even though this is the case, there are still challenges that have to be surmounted in order to properly enthrone the rule of law in the country. These challenges can be seen manifesting in the various instances referred to above, that have had the effect of raising anxiety and doubt in the public domain. What these events have shown is that the public needs to keep its vigilance in protecting the entrenchment and entronement of the rule of law. The vigilance of the public puts those in positions of power on their guard, to realise that their very actions are being monitored, gauged and accessed by the people. Vigilance of the public remains a much needed virtue; so also transparency and accountability on the part of public office holders, and the society in general.

Compared to her African peers, the rule of law in post-apartheid South Africa is better established. The law is generally upheld and respected, the Constitution and its institutions are respected also. This can be attributed to the fact that at the dawn of the new South Africa, the memories and scars of apartheid were still so fresh in people's minds that there were definite lines and boundaries that were not to be

crossed by the government or the people under any circumstance.<sup>508</sup> This is manifested also in the way that international law is incorporated into and adhered to by the South African legal system. As we saw earlier on, international law has had a huge influence on the development of the legal system, and continues to play an important role as such. Compliance with international law further enhances the profile of the country on the international plane and the different institutions that exist to ensure compliance with the law in various areas and aspects of life

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<sup>508</sup> Both the interim and 1996 Constitutions (especially with the Bill of Rights) were very clear as to what was expected by the people and what was expected of the people. Any type of unfair discrimination on whatever ground was contrary to the Constitution, and not allowed. Institutions were set up in Chapter 9 of the 1996 Constitution for the purpose of strengthening constitutional democracy. They were mandated to be subject only to the Constitution and to be impartial, and without prejudice.

## Chapter 6

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### 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 enthroneing the rule of law in these countries. The presence and enthroneing 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...’<sup>1</sup>

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.<sup>2</sup>

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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<sup>1</sup> Shklar JN ‘Political Theory and the Rule of Law’ in Hutchinson & Monahan (1987) *The Rule of Law: Ideal or Ideology* 16.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Such leaders were also bound by tradition and customs, and ruled according to the dictates of the tradition of the land.<sup>6</sup> Elias pointed out over two decades ago that the basis of

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<sup>3</sup> 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*;

<sup>4</sup> Kairys D ‘Searching for the Rule of Law’ (2003) 36(2) *Suffolk University Law Review* 307 at 308.

<sup>5</sup> Quashigah (1999) 44.

<sup>6</sup> *Ibid.*

these pre-colonial ideas and practice of governance in Africa can be traced to the social contract theories.<sup>7</sup>

The colonisation 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'<sup>8</sup> 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

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<sup>7</sup> Elias TO (1988) *Africa and Development of International Law* 36.

<sup>8</sup> 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).<sup>9</sup> 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

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<sup>9</sup> 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;<sup>10</sup> a growing lack of accountability in and amongst public office holders (and consequently private office);<sup>11</sup> 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.

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<sup>10</sup> 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.

<sup>11</sup> 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’.<sup>12</sup>

Using the example of the constitutional arrangement under the old Oyo empire<sup>13</sup> (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,<sup>14</sup> 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’.<sup>15</sup> 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.<sup>16</sup> Unfortunately, the post-colonial African state has also done little to attract the allegiance of its population.<sup>17</sup>

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

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<sup>12</sup> 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.

<sup>13</sup> Quashigah & Okafor (1999) at 555.

<sup>14</sup> 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).

<sup>15</sup> Quashigah & Okafor (1999) 555.

<sup>16</sup> Quashigah & Okafor (1999) 556.

<sup>17</sup> *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 enthroneing 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 enthroneing 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).<sup>18</sup>

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,<sup>19</sup> the number of countries undergoing review; and the diagnostic validity of the reports in identifying critical issues affecting governance in the countries reviewed.<sup>20</sup>

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.<sup>21</sup> 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

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<sup>18</sup> 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)

<sup>19</sup> Now standing at 13, with the completed review of Mauritius in July 2010.

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

<sup>21</sup> 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.<sup>22</sup> 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'.<sup>23</sup> Building the rule of law and enthroneing 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'<sup>24</sup>; 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:<sup>25</sup>

'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:<sup>26</sup>

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<sup>22</sup> Peerenboom R 'The Future of Rule of Law: Challenges and Prospects for the Field' (2009) 1 *HJRL* 5-14 at 14.

<sup>23</sup> *Ibid.*

<sup>24</sup> Ezetha in Quashigah & Okafor (1999) 424.

<sup>25</sup> (1856-1924) 28<sup>th</sup> President of the United States of America, in his Mount Vernon speech at Washington's Tomb on the 4<sup>th</sup> of July 1918.

<sup>26</sup> Thomas Jefferson (1743-1826) in the Declaration of Independence for the United States. He was the 3<sup>rd</sup> 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...’

## TABLE OF ABBREVIATIONS

AC	-	Appeal Court
AD	-	Anno Domini (Year of our Lord)
AJCL	-	American Journal of Comparative Law
AJICL	-	African Journal of International and Comparative Law
AJIL	-	American Journal of International Law
All ER	-	All England Reports
ALJ	-	American Law Journal
ALR	-	Arizona Law Review
ASILP	-	American Society of International Law Proceedings
ASR	-	African Studies Review
CILSA	-	Comparative and International Law Journal of Southern Africa
CJPS	-	Canadian Journal of Political Science
CLB	-	Commonwealth Law Bulletin
CPS	-	Comparative Political Studies
EALR	-	East African Law Report
EJIL	-	European Journal of International Law
Fordham Int'l Law Journal	-	Fordham International Law Journal
FSC	-	Federal Supreme Court
Hastings Int'l & Comp L Rev	-	Hastings International and Comparative Law Review Review
HJRL	-	Hague Journal on Rule of Law
ICJ Rep	-	International Court of Justice Reports

ICLJ	-	International and Comparative Law Journal
ICLQ	-	International and Comparative Law Quarterly
JAL	-	Journal of African Law
JCMS	-	Journal of Common Market Studies
JHRLP	-	Journal of Human Rights Law and Practice
JIAI	-	Journal of International African Institute
JJS	-	Journal for Juridical Science
J.L. & Soc'y	-	Journal of Law and Society
J. Legal Pluralism & Unofficial L.	-	Journal of Legal Pluralism and Unofficial Law
J. of Modern African Studies	-	Journal of Modern African Studies
JPPL	-	Journal of Parliamentary and Political Law
J. Soc. Comp. Legis. n.s	-	Journal of Society of Comparative Legislation
J. Soc. Sci.	-	Journal of Social Sciences
Law & Soc'y Rev.	-	Law and Society Review
LJNL	-	Leiden Journal of National Law
McGill L. J.	-	McGill Law Journal
Mel. U. L. Rev.	-	Melbourne University Law Review
MJIL	-	Michigan Journal of International Law
Mod. L. Rev.	-	Modern Law Review
N.C.J Int'l & Com. Reg.	-	North Carolina Journal of International Law and Commercial Regulation
NGO	-	Non Governmental Organisation
NLR	-	Nigerian Law Report
NWLR	-	Nigerian Weekly Law Report
NYIL	-	Netherlands Yearbook of International Law

N.Y.U.J.Int'l & Pol.	-	New York University Journal of International Law and Politics
PAS	-	Politics and Society
Public Admin. Dev.	-	Public Administration and Development
QB	-	Queen's Bench
RRPE	-	Review of Radical Political Economy
S. Afr. J. Crim. Just.	-	South African Journal of Criminal Justice
SAJHR	-	South African Journal on Human Rights
SAJIA	-	South African Journal of International Affairs
SALJ	-	South African Law Journal
SAS	-	Southeast Asian Studies
SAYIL	-	South African Yearbook of International Law
Stan. J. Int'l L.	-	Stanford Journal of International Law
Suffolk U. L. Rev.	-	Suffolk University Law Review
Texas L. Rev.	-	Texas Law Review
TWQ	-	Third World Quarterly
WACA	-	West Africa Court of Appeal
WNLR	-	Western Nigerian Law Report
YJIL	-	Yale Journal of International Law

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## ANNEXURES

**Table 1**

List of cases brought by African countries before the ICJ (or in which African Countries have appeared before the ICJ).

<b>Year</b>	<b>Title of Case</b>	<b>Parties before the Court</b>
1960	South West Africa	Ethiopia v South Africa
1960	South West Africa	Liberia v South Africa
1961	Northern Cameroons	Cameroon v United Kingdom
1978	Continental Shelf	Tunisia v Libyan Arab Jamahiriya
1982	Continental Shelf	Libyan Arab Jamahiriya v Malta
1983	Frontier Dispute	Burkina Faso v Republic of Mali
1984	Application for Revision and Interpretation of the Judgement in the case of Continental Shelf (Tunisia v Libyan Arab Jamahiriya)	Tunisia v Libyan Arab Jamahiriya
1989	Territorial Dispute	Guinea Bissau v Senegal
1990	Territorial Dispute	Libyan Arab Jamahiriya v Chad
1991	Maritime Delimitation between Guinea Bissau and Senegal	Guinea Bissau v Senegal
1992	Questions of Interpretation and Application of 1971 Montreal Convention arising from Aerial Incident at Lockerbie	(Libya Arab Jamahiriya v USA)
1994	Land and Maritime Boundary between Cameroon and Nigeria	Cameroon v Nigeria: Equatorial Guinea Intervening
1996	Kasikili / Sedudu Island	Botswana / Namibia
1998	Request for Interpretation of Judgement of 11 June 1998 in case of Land and Maritime Boundary between Cameroon and Nigeria	Cameroon v Nigeria
1998	Preliminary Objections (Nigeria v Cameroon)	



1998	Ahmadou Sadio Diallo	Republic of Guinea v Democratic Republic of Congo
1999	Armed Activities on the Territory of the Congo	Democratic Republic of Congo v Uganda
1999	Armed Activities on the Territory of the Congo	Democratic Republic of Congo v Rwanda
2000	Arrest Warrant of 11 April 2000	Democratic Republic of Congo v Belgium
2002	Frontier Dispute	Benin v Niger
2002	Armed Activities on the Territory of the Congo (New Application: 2002)	Democratic Republic of Congo v Rwanda
2003	Certain Criminal Proceedings in France	Democratic Republic of Congo v France
2010	Frontier Dispute	Burkina Faso v Niger

**Table 2**

Corruption Perception Index Of 2009

<b>Rank</b>	<b>Country/Territory</b>	<b>CPI 2009 Score</b>	<b>Surveys Used</b>	<b>Confidence Range</b>
1	New Zealand	9.4	6	9.1 - 9.5
2	Denmark	9.3	6	9.1 - 9.5
3	Singapore	9.2	9	9.0 - 9.4
3	Sweden	9.2	6	9.0 - 9.3
5	Switzerland	9.0	6	8.9 - 9.1
6	Finland	8.9	6	8.4 - 9.4
6	Netherlands	8.9	6	8.7 - 9.0
8	Australia	8.7	8	8.3 - 9.0
8	Canada	8.7	6	8.5 - 9.0
8	Iceland	8.7	4	7.5 - 9.4
11	Norway	8.6	6	8.2 - 9.1
12	Hong Kong	8.2	8	7.9 - 8.5
12	Luxembourg	8.2	6	7.6 - 8.8
14	Germany	8.0	6	7.7 - 8.3
14	Ireland	8.0	6	7.8 - 8.4
16	Austria	7.9	6	7.4 - 8.3
17	Japan	7.7	8	7.4 - 8.0
17	United Kingdom	7.7	6	7.3 - 8.2
19	United States	7.5	8	6.9 - 8.0
20	Barbados	7.4	4	6.6 - 8.2
21	Belgium	7.1	6	6.9 - 7.3
22	Qatar	7.0	6	5.8 - 8.1
22	Saint Lucia	7.0	3	6.7 - 7.5
24	France	6.9	6	6.5 - 7.3
25	Chile	6.7	7	6.5 - 6.9
25	Uruguay	6.7	5	6.4 - 7.1
27	Cyprus	6.6	4	6.1 - 7.1
27	Estonia	6.6	8	6.1 - 6.9
27	Slovenia	6.6	8	6.3 - 6.9

Rank	Country/Territory	CPI 2009 Score	Surveys Used	Confidence Range
30	United Arab Emirates	6.5	5	5.5 - 7.5
31	Saint Vincent and the Grenadines	6.4	3	4.9 - 7.5
32	Israel	6.1	6	5.4 - 6.7
32	Spain	6.1	6	5.5 - 6.6
34	Dominica	5.9	3	4.9 - 6.7
35	Portugal	5.8	6	5.5 - 6.2
35	Puerto Rico	5.8	4	5.2 - 6.3
37	Botswana	5.6	6	5.1 - 6.3
37	Taiwan	5.6	9	5.4 - 5.9
39	Brunei Darussalam	5.5	4	4.7 - 6.4
39	Oman	5.5	5	4.4 - 6.5
39	Korea (South)	5.5	9	5.3 - 5.7
42	Mauritius	5.4	6	5.0 - 5.9
43	Costa Rica	5.3	5	4.7 - 5.9
43	Macau	5.3	3	3.3 - 6.9
45	Malta	5.2	4	4.0 - 6.2
46	Bahrain	5.1	5	4.2 - 5.8
46	Cape Verde	5.1	3	3.3 - 7.0
46	Hungary	5.1	8	4.6 - 5.7
49	Bhutan	5.0	4	4.3 - 5.6
49	Jordan	5.0	7	3.9 - 6.1
49	Poland	5.0	8	4.5 - 5.5
52	Czech Republic	4.9	8	4.3 - 5.6
52	Lithuania	4.9	8	4.4 - 5.4
54	Seychelles	4.8	3	3.0 - 6.7
<b>55</b>	<b>South Africa</b>	<b>4.7</b>	<b>8</b>	<b>4.3 - 4.9</b>
56	Latvia	4.5	6	4.1 - 4.9
56	Malaysia	4.5	9	4.0 - 5.1
56	Namibia	4.5	6	3.9 - 5.1
56	Samoa	4.5	3	3.3 - 5.3
56	Slovakia	4.5	8	4.1 - 4.9
61	Cuba	4.4	3	3.5 - 5.1

<b>Rank</b>	<b>Country/Territory</b>	<b>CPI 2009 Score</b>	<b>Surveys Used</b>	<b>Confidence Range</b>
61	Turkey	4.4	7	3.9 - 4.9
63	Italy	4.3	6	3.8 - 4.9
63	Saudi Arabia	4.3	5	3.1 - 5.3
65	Tunisia	4.2	6	3.0 - 5.5
66	Croatia	4.1	8	3.7 - 4.5
66	Georgia	4.1	7	3.4 - 4.7
66	Kuwait	4.1	5	3.2 - 5.1
69	Ghana	3.9	7	3.2 - 4.6
69	Montenegro	3.9	5	3.5 - 4.4
71	Bulgaria	3.8	8	3.2 - 4.5
71	FYR Macedonia	3.8	6	3.4 - 4.2
71	Greece	3.8	6	3.2 - 4.3
71	Romania	3.8	8	3.2 - 4.3
75	Brazil	3.7	7	3.3 - 4.3
75	Colombia	3.7	7	3.1 - 4.3
75	Peru	3.7	7	3.4 - 4.1
75	Suriname	3.7	3	3.0 - 4.7
79	Burkina Faso	3.6	7	2.8 - 4.4
79	China	3.6	9	3.0 - 4.2
79	Swaziland	3.6	3	3.0 - 4.7
79	Trinidad and Tobago	3.6	4	3.0 - 4.3
83	Serbia	3.5	6	3.3 - 3.9
84	El Salvador	3.4	5	3.0 - 3.8
84	Guatemala	3.4	5	3.0 - 3.9
84	India	3.4	10	3.2 - 3.6
84	Panama	3.4	5	3.1 - 3.7
84	Thailand	3.4	9	3.0 - 3.8
89	Lesotho	3.3	6	2.8 - 3.8
89	Malawi	3.3	7	2.7 - 3.9
89	Mexico	3.3	7	3.2 - 3.5
89	Moldova	3.3	6	2.7 - 4.0
89	Morocco	3.3	6	2.8 - 3.9
89	Rwanda	3.3	4	2.9 - 3.7



<b>Rank</b>	<b>Country/Territory</b>	<b>CPI 2009 Score</b>	<b>Surveys Used</b>	<b>Confidence Range</b>
95	Albania	3.2	6	3.0 - 3.3
95	Vanuatu	3.2	3	2.3 - 4.7
97	Liberia	3.1	3	1.9 - 3.8
97	Sri Lanka	3.1	7	2.8 - 3.4
99	Bosnia and Herzegovina	3.0	7	2.6 - 3.4
99	Dominican Republic	3.0	5	2.9 - 3.2
99	Jamaica	3.0	5	2.8 - 3.3
99	Madagascar	3.0	7	2.8 - 3.2
99	Senegal	3.0	7	2.5 - 3.6
99	Tonga	3.0	3	2.6 - 3.3
99	Zambia	3.0	7	2.8 - 3.2
106	Argentina	2.9	7	2.6 - 3.1
106	Benin	2.9	6	2.3 - 3.4
106	Gabon	2.9	3	2.6 - 3.1
106	Gambia	2.9	5	1.6 - 4.0
106	Niger	2.9	5	2.7 - 3.0
111	Algeria	2.8	6	2.5 - 3.1
111	Djibouti	2.8	4	2.3 - 3.2
111	Egypt	2.8	6	2.6 - 3.1
111	Indonesia	2.8	9	2.4 - 3.2
111	Kiribati	2.8	3	2.3 - 3.3
111	Mali	2.8	6	2.4 - 3.2
111	Sao Tome and Principe	2.8	3	2.4 - 3.3
111	Solomon Islands	2.8	3	2.3 - 3.3
111	Togo	2.8	5	1.9 - 3.9
120	Armenia	2.7	7	2.6 - 2.8
120	Bolivia	2.7	6	2.4 - 3.1
120	Ethiopia	2.7	7	2.4 - 2.9
120	Kazakhstan	2.7	7	2.1 - 3.3
120	Mongolia	2.7	7	2.4 - 3.0
120	Vietnam	2.7	9	2.4 - 3.1
126	Eritrea	2.6	4	1.6 - 3.8
126	Guyana	2.6	4	2.5 - 2.7

Rank	Country/Territory	CPI 2009 Score	Surveys Used	Confidence Range
126	Syria	2.6	5	2.2 - 2.9
126	Tanzania	2.6	7	2.4 - 2.9
130	Honduras	2.5	6	2.2 - 2.8
130	Lebanon	2.5	3	1.9 - 3.1
130	Libya	2.5	6	2.2 - 2.8
130	Maldives	2.5	4	1.8 - 3.2
130	Mauritania	2.5	7	2.0 - 3.3
130	Mozambique	2.5	7	2.3 - 2.8
130	Nicaragua	2.5	6	2.3 - 2.7
<b>130</b>	<b><i>Nigeria</i></b>	<b>2.5</b>	<b>7</b>	<b>2.2 - 2.7</b>
130	Uganda	2.5	7	2.1 - 2.8
139	Bangladesh	2.4	7	2.0 - 2.8
139	Belarus	2.4	4	2.0 - 2.8
139	Pakistan	2.4	7	2.1 - 2.7
139	Philippines	2.4	9	2.1 - 2.7
143	Azerbaijan	2.3	7	2.0 - 2.6
143	Comoros	2.3	3	1.6 - 3.3
143	Nepal	2.3	6	2.0 - 2.6
146	Cameroon	2.2	7	1.9 - 2.6
146	Ecuador	2.2	5	2.0 - 2.5
146	Kenya	2.2	7	1.9 - 2.5
146	Russia	2.2	8	1.9 - 2.4
146	Sierra Leone	2.2	5	1.9 - 2.4
146	Timor-Leste	2.2	5	1.8 - 2.6
146	Ukraine	2.2	8	2.0 - 2.6
146	Zimbabwe	2.2	7	1.7 - 2.8
154	Côte d'Ivoire	2.1	7	1.8 - 2.4
154	Papua New Guinea	2.1	5	1.7 - 2.5
154	Paraguay	2.1	5	1.7 - 2.5
154	Yemen	2.1	4	1.6 - 2.5
158	Cambodia	2.0	8	1.8 - 2.2
158	Central African Republic	2.0	4	1.9 - 2.2
158	Laos	2.0	4	1.6 - 2.6

<b>Rank</b>	<b>Country/Territory</b>	<b>CPI 2009 Score</b>	<b>Surveys Used</b>	<b>Confidence Range</b>
158	Tajikistan	2.0	8	1.6 - 2.5
162	Angola	1.9	5	1.8 - 1.9
162	Congo Brazzaville	1.9	5	1.6 - 2.1
162	Democratic Republic of Congo	1.9	5	1.7 - 2.1
162	Guinea-Bissau	1.9	3	1.8 - 2.0
162	Kyrgyzstan	1.9	7	1.8 - 2.1
162	Venezuela	1.9	7	1.8 - 2.0
168	Burundi	1.8	6	1.6 - 2.0
168	Equatorial Guinea	1.8	3	1.6 - 1.9
168	Guinea	1.8	5	1.7 - 1.8
168	Haiti	1.8	3	1.4 - 2.3
168	Iran	1.8	3	1.7 - 1.9
168	Turkmenistan	1.8	4	1.7 - 1.9
174	Uzbekistan	1.7	6	1.5 - 1.8
175	Chad	1.6	6	1.5 - 1.7
176	Iraq	1.5	3	1.2 - 1.8
176	Sudan	1.5	5	1.4 - 1.7
178	Myanmar	1.4	3	0.9 - 1.8
179	Afghanistan	1.3	4	1.0 - 1.5
180	Somalia	1.1	3	0.9 - 1.4

Source: Transparency International Corruption Perception Index (CPI) at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table)



**Table 3**

List of Sanctions against South Africa between 1960 – 1989

	<b>Military</b>	<b>Trade</b>	<b>Finance</b>
<b>MULTILATERAL</b>			
UN General Assembly	1962-63; 1983	1962, 1965	1966, 1969
UN Security Council	1977, 1984	1985 voluntary	1985 voluntary
Commonwealth	1971	1985-86	1985-86
European Community	1985	1986	1986
Nordic Countries	1977, 1985	1985-87	1979, 1985-86
Organisation of African Unity	1963	1963	1963
<b>BILATERAL</b>			
United States	1963, 1977	1978, 1985-86	1985-87
	1985, 1986		
Britain	1985	1986	1985-87
West Germany	1986	1977	1977 informal
France	1985-86	1986	1985
Japan	1986	1986 informal	1969, 1985-86

*Source:* Klotz, 5