

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”.¹ 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.² Regrettably, the extent of these varied definitions has often resulted

¹ 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.

² 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.³ 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’,⁴ 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’.⁵ 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.⁶

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 1885.⁷ 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

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

⁴ Fukuyama (2010) 21(1) *Journal of Democracy* 33 at 34.

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

⁶ 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.

⁷ Dicey AV (1996) (8th 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’.⁸

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.⁹ 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.¹⁰ 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.¹¹ 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

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Bedner (2010) 2 *HJRL* 48 at 50-51.

¹¹ ‘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’.¹²

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.¹³ 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).¹⁴ Matshiqi explains formal definitions of the rule of law as dealing with specific observable criteria of

¹² 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.

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

¹⁴ *Ibid.*

the law or the legal system.¹⁵ 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.¹⁶

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.¹⁷

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.¹⁸ Yet another classification divides the rule of law definitions to ‘thin’ (restricted) and ‘thick’ (elaborate) definitions.¹⁹

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.²⁰ These are seen to go from the least to the most significant. Two of the

¹⁵ 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.

¹⁶ *Ibid.*

¹⁷ Craig (1997) *Public Law* 467.

¹⁸ Bedner (2010) 2 *HJRL* 48 at 54.

¹⁹ *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.

²⁰ 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’.²¹

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.²²

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.’²³

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

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

²³ 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’.²⁴

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.²⁵

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,²⁶ or is there a fundamental, structural (or otherwise) problem that can explain Africa’s false starts?

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

²⁵ By virtue of the process through which such constitutions were made.

²⁶ 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...’²⁷

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.²⁸ This view is now being contested by arguments that law cannot be treated as an exogenous constraint on actions.²⁹ 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.³⁰ 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:

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.

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

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

²⁹ *Ibid.*

³⁰ *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.’³¹

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.³² 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.³³ Furthermore, Africa is technologically far behind the rest of the world. One example illustrates this

³¹ Fukuyama (2010) 21(1) *Journal of Democracy* 33.

³² 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 (first accessed on 16 August 2005).

³³ 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 (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.³⁴

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.³⁵

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'.³⁶ 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.³⁷ 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

³⁴ IPA report, *ibid*.

³⁵ Countries like Botswana, Ghana, to name a few.

³⁶ 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 (accessed on 27 August 2007).

³⁷ *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.³⁸ 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.³⁹ 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.⁴⁰

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.⁴¹ 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.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ 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.⁴²

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.⁴³ 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).⁴⁴ 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.⁴⁵ African governments will be expected to adhere to principles of constitutional democracy, the rule of law, the separation of

⁴² IPA joint report, *ibid*.

⁴³ *ibid*.

⁴⁴ Declaration 1 (XXXVII) of the 37th 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.

⁴⁵ 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.⁴⁶ 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

⁴⁶ 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,⁴⁷ 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,

⁴⁷ 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.⁴⁸ 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 reserves⁴⁹ 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.⁵⁰

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

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ 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 (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.⁵¹ 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.⁵² English language is common to both Nigeria and South Africa. In Nigeria, the constitution recognises English as one of the languages for communication.⁵³ 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.⁵⁴ 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

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

⁵² 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.

⁵³ 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.

⁵⁴ 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.