

CHAPTER 3

Theories and Developments guiding Constitutional Democracy

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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.¹

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.

¹ 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.² 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.³ 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.⁴

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

³ *Ibid.*

⁴ *Ibid.*

Democratic legitimacy/legitimate governance is said to exist when there is public participation or consent in the law-making process. The author Ocheje⁵ 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.⁶

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.⁷ 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.⁸ This was recently reiterated in the 2010 Ibrahim Index of African Governance Summary,⁹ which stipulated that ‘the ability of citizens to participate in the political process is a vital gauge of the legitimacy of government ...’¹⁰ 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

⁵ 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.

⁶ *Ibid.*

⁷ Ocheje (1999) 166.

⁸ Ocheje (1999) 188.

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

¹⁰ *Ibid* 21.

opportunity it creates for the generation and the sharing of knowledge regarding issues which people care about.¹¹ 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.¹² They define legitimacy as ‘the normatively conditioned and voluntary acceptance by the ruled of the government of their rulers’.¹³ 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.¹⁴

This requirement of consent as the basis of legitimacy, has been challenged by Barnett in his book, ‘Restoring the Lost Constitution’,¹⁵ 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,¹⁶ 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.¹⁷ 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

¹¹ *Ibid.*

¹² 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).

¹³ Bellamy 5.

¹⁴ *Ibid.*

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

¹⁶ Barnett (2004) 11-21.

¹⁷ 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’.¹⁸

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.¹⁹

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’.²⁰

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

¹⁸ *Ibid* (own emphasis).

¹⁹ Barnett (2004) 44.

²⁰ 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.²¹

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.²²

The contractarian philosophy is based on the social contract theory that will be discussed in greater detail below.²³ 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

²¹ Encyclopaedia II – State: Philosophies of the State, available at http://www.experiencefestival.com/a/State_Philosophies_of_the_state/id/5157401 (accessed on 9 November 2009).

²² *Ibid.*

²³ 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.²⁴

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.²⁵

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.²⁶

The last philosophy to be mentioned here is that of the anarchists.²⁷ 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

²⁴ *Supra*; amongst the modern proponents of liberalism are Dworkin, Ackerman.

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

²⁶ 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.

²⁷ 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.²⁸ 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.²⁹ 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 King³⁰ (in the case of a monarchy), a Council (in the case of an oligarchy) or the Majority³¹ (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.³² 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

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

²⁹ ‘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).

³⁰ *Ibid.*

³¹ Rousseau JJ & Cranston M (1972) *The Social Contract*.

³² Hobbes, Hegel, Rousseau and the rest of the theorists differ on this.

as representation, majoritarianism, or tacit consent.³³ 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.³⁴

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.³⁵

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’.³⁶ 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’.³⁷ 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,³⁸ 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.³⁹ 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

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

³⁴ *Ibid.*

³⁵ 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.

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

³⁷ Boucher & Kelly (1994) 37.

³⁸ Boucher & Kelly (1994) 38.

³⁹ *Ibid.*

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

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.⁴¹ 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.⁴² 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.⁴³ Forsyth feels that only such a foundation can create or constitute rule that binds or obliges those who are naturally free.⁴⁴

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.⁴⁵ 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.⁴⁶

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

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

⁴¹ Boucher & Kelly (1994)38.

⁴² *Ibid.*

⁴³ This is explained in more detail subsequently.

⁴⁴ Boucher & Kelly (1994) 38.

⁴⁵ *Ibid.*

⁴⁶ Boucher & Kelly (1994) 38 – 39.

political philosophy in the seventeenth, eighteenth and even early nineteenth centuries.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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’,⁵⁰ 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.

⁴⁷ Riley (1982) 8.

⁴⁸ Riley (1982) viii.

⁴⁹ *Ibid.*

⁵⁰ 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*⁵¹ (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.⁵² 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'.⁵³ 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.⁵⁴ 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.⁵⁵

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

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

⁵² *Ibid.*

⁵³ 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.

⁵⁴ Boucher & Kelly (1994) 43.

⁵⁵ McClelland (1996) 195.

men'.⁵⁶ 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.⁵⁷

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.⁵⁸ 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.⁵⁹

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.⁶⁰ 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*.⁶¹

⁵⁶ Boucher & Kelly (1994) 43.

⁵⁷ *Ibid.*

⁵⁸ Rousseau (1972).

⁵⁹ *Ibid.*

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

⁶¹ 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’.⁶² 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).⁶³

In another of his writings, the *Second Treatise*, Locke classifies the history of each territorial society into two distinguished eras.⁶⁴ 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.⁶⁵ 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.⁶⁶ These are institutions such as legislatures, courts, socially sanctioned property arrangements and others.⁶⁷ 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’.⁶⁸

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

⁶³ Laslett (1967) 61.

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

⁶⁵ *Two Treatises*, II Chap II, quoted in Hyland (2003) 155.

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

⁶⁷ *Ibid.*

⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷² 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.⁷³ 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,

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

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

⁷² Boucher & Kelly (1994) 52; McClellan (1996) 234-235.

⁷³ 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.⁷⁴

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,⁷⁵ 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'.⁷⁶ 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.⁷⁷

⁷⁴ McClelland (1996) 239.

⁷⁵ 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.

⁷⁶ Locke, *Two Treatises*, II, 164 in Waldron (1994).

⁷⁷ 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.⁷⁸ 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'.⁷⁹

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.⁸⁰ He saw 'man' as neither inherently good nor bad in the state of nature, but that the growth of society⁸¹ 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.⁸² This laid double pressure on man and threatened his survival and freedom.⁸³ 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

⁷⁸ See generally Boucher & Kelly (1994) 70.

⁷⁹ *Ibid.*

⁸⁰ McClellan (1996) 250.

⁸¹ He saw the growth of society as inimical to man.

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

⁸³ 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.⁸⁴

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’.⁸⁵ 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.⁸⁶ 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.⁸⁷

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

⁸⁴ Rousseau (1954) 17-18.

⁸⁵ Riley (1982) 100.

⁸⁶ McClelland (1996) 259.

⁸⁷ Riley (1982) 101.

be happy, when all its members suffer'.⁸⁸ 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'.⁸⁹

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.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ This he refers to as the 'original position'.⁹⁴ The principles of justice held under such conditions of original position are the basic principles,

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

⁸⁹ Riley (1982) 101, translating Rousseau in *Contrat social*, 58.

⁹⁰ Rawls (1971) *A Theory of Justice* 3.

⁹¹ *Ibid.*

⁹² Rawls (1971) 4.

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

⁹⁴ Rawls (1971) 102.

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

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.⁹⁶ 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.⁹⁷

3.3.1.5 Robert Nozick

In *Anarchy, State and Utopia*,⁹⁸ 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).⁹⁹ 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.¹⁰⁰ Such state is formed solely due to the need to have an avenue for the

⁹⁵ Gordon (1976) 84(3) *Journal of Political Economy* 576.

⁹⁶ Rawls (1971) 4.

⁹⁷ 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.

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

⁹⁹ See generally Nozick (1974); Gordon (1976) 578.

¹⁰⁰ *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.¹⁰¹

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.¹⁰² 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.’¹⁰³

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.¹⁰⁴ 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.’¹⁰⁵

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

¹⁰¹ Nozick (1974).

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

¹⁰³ Rawls (1971) 13.

¹⁰⁴ Boucher & Kelly (1994) 55.

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

theory as Nozick has put it, as ‘fact-defective’ characterizations.¹⁰⁶ 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.¹⁰⁷ 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’.¹⁰⁸

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.¹⁰⁹ 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.’¹¹⁰

¹⁰⁶ Nozick (1974) 7-9.

¹⁰⁷ 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.

¹⁰⁸ Rawls (1971) 13.

¹⁰⁹ Boucher & Kelly (1994) 51.

¹¹⁰ 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.¹¹¹

A modern day criticism of the social contract theory is found in the work of Barnett referred to earlier.¹¹² 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).¹¹³

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

¹¹¹ *Ibid.*

¹¹² Barnett (2004) 44.

¹¹³ *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.¹¹⁴ 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.¹¹⁵ 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

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

¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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*’.¹¹⁹ 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

¹¹⁶ Cleveland (2002-2003) 81 *Texas L. Rev.* 20.

¹¹⁷ *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.

¹¹⁸ Cleveland (2002 – 2003) 81 *Texas L. Rev.* 21.

¹¹⁹ 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.¹²⁰

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 ...’¹²¹

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’¹²²

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,¹²³ thus evidencing the idea of a people who agree freely to be

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

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

¹²² Preamble to the 1999 Constitution of the Federal Republic of Nigeria (own emphasis).

¹²³ 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,¹²⁴ the question remains to be asked, ‘does it really reflect the hopes and aspirations of the people

¹²⁴ 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.¹²⁵

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,¹²⁶ 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

¹²⁵ 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.

¹²⁶ 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.¹²⁷

There have been comments by some authors on this process whereby received laws become assimilated into the indigenous laws.¹²⁸ 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.¹²⁹ 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*.¹³⁰ 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.¹³¹ 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.¹³²

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.¹³³ 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

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

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

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

¹³⁰ Ogwurike (1979) 174.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

law.¹³⁴ 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.¹³⁵ 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.¹³⁶ 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.¹³⁷

¹³⁴ Ogwurike (1979) 176.

¹³⁵ Ogwurike (1979) 176-177.

¹³⁶ 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.

¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ Ogwurike feels that much of the unrest in Africa is due to the legal, political and social arrangements which

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.

¹³⁸ 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.

¹³⁹ Ogwurike (1979) 195.

¹⁴⁰ Ogwurike (1979) 195.

do not reflect the wishes and desires of the people of Africa.¹⁴¹ 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,¹⁴² 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.

¹⁴¹ *Ibid.*

¹⁴² 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,¹⁴³ one of the pre-eminent jurists of the analytical school of jurisprudence, advocated what he referred to as the 'Pure Theory of Law'.¹⁴⁴ 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.¹⁴⁵
- 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.¹⁴⁶

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.'¹⁴⁷

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'.¹⁴⁸ 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

¹⁴³ 1881-1975.

¹⁴⁴ 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.

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

¹⁴⁶ *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.

¹⁴⁷ See generally Kelsen (1961) 115 – 118.

¹⁴⁸ *Ibid*.

invalidated in the way in which the legal order itself determines.¹⁴⁹ 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.¹⁵⁰ 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*,¹⁵¹ 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*.¹⁵² This case was later affirmed by the Privy Council in London on appeal thereto.¹⁵³ 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'.¹⁵⁴

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

¹⁴⁹ *Ibid.*

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

¹⁵¹ (1958) PLD 530.

¹⁵² (1966) EALR 514 at 538.

¹⁵³ 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.

¹⁵⁴ 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.¹⁵⁵ It has been said to be a historical process, the result of human scientific innovation and technological progress.¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸ 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

¹⁵⁵ 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.

¹⁵⁶ 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).

¹⁵⁷ Okoye (2004).

¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶²

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

¹⁶⁰ Kura (2005).

¹⁶¹ *Ibid*

¹⁶² *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.¹⁶³

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.¹⁶⁴

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.¹⁶⁵

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.¹⁶⁶ Democratisation and integration into the world economy (a form of globalisation) have been described as mutually reinforcing.¹⁶⁷ This is

¹⁶³ See, generally, Kura (2005).

¹⁶⁴ Nsibami (2001) 3.

¹⁶⁵ *Ibid.*

¹⁶⁶ Akinboye SO 'Globalisation and the Challenge for Nigeria's Development in the 21st 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.

¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹

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

¹⁶⁸ Kura (2005).

¹⁶⁹ Kura (2005).

¹⁷⁰ Akinboye (2008) 7.

¹⁷¹ Joseph (1999) 96.

advance their growth and their self-interest, whether national or personal.¹⁷² 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.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵

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

¹⁷² Nsibambi (2001) 2.

¹⁷³ UNDP Human Development Report 1999, 25.

¹⁷⁴ 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.

¹⁷⁵ 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.¹⁷⁶

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

¹⁷⁶ *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.¹⁷⁷ 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.¹⁷⁸

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.¹⁷⁹ This engenders distrust of the democratisation process by the people,¹⁸⁰ 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

¹⁷⁷ Nsibami (2001).

¹⁷⁸ *Ibid.*

¹⁷⁹ 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,

¹⁸⁰ 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,¹⁸¹ 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.¹⁸²

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.¹⁸³ 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

¹⁸¹ 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 20th century (sourced from Collins English Dictionary, 10th edition, 2009).

¹⁸² Nsibambi (2001).

¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶

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

¹⁸⁴ 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.

¹⁸⁵ 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.

¹⁸⁶ Nsibambi (2001).

dependent on the goodwill of their creditors,¹⁸⁷ 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’.¹⁸⁸ 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’.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹

¹⁸⁷ 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.

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

¹⁸⁹ 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*.

¹⁹⁰ Huntington (1991) 7.

¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴ In dealing

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

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

¹⁹⁴ 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).¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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

¹⁹⁵ Young (1999) 15.

¹⁹⁶ Young (1999) 16.

¹⁹⁷ *Ibid.*

¹⁹⁸ 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.¹⁹⁹

Even though powerful forces, within and outside the continent, converged to create the initial African wave of democratisation,²⁰⁰ this was unfortunately not sustained, and after independence, support for democratic government began to evaporate on all fronts.²⁰¹ 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.²⁰² 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’.²⁰³

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

¹⁹⁹ Young (1999) 17.

²⁰⁰ 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.

²⁰¹ Young (1999) 17.

²⁰² 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.

²⁰³ 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.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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.²⁰⁸ 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

²⁰⁴ 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.

²⁰⁵ Young (1999) 18.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *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.²⁰⁹

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.²¹⁰ With this loss of appeal, African states went through different ways of gradually experimenting with changes to the system.²¹¹ 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,²¹² for example, the case of Ghana (1969-70),²¹³

²⁰⁹ 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.

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

²¹¹ 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).

²¹² 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.

²¹³ 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)²¹⁴ and Sudan (1965 and 1986).²¹⁵ This led to the belief both in and out of Africa that democracy was an improbable, if not impossible dream for the continent.²¹⁶

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.²¹⁷ 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.²¹⁸ These came in the form of rigorous economic liberalisation programs such as Structural Adjustment Programs (SAPs).²¹⁹

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

²¹⁴ 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.

²¹⁵ 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 2nd civilian war in Sudan.

²¹⁶ Young (1999) 20.

²¹⁷ 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.

²¹⁸ Boyce (2005); Parfitt (1989).

²¹⁹ 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.²²⁰ 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.²²¹ 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

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

²²¹ 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'.²²² 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.²²³ 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.²²⁴ 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.²²⁵ Instances of these are the 1990 crisis

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

²²³ 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*.

²²⁴ 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.

²²⁵ 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,²²⁶ the inter-ethnic and inter-regional violence in Uganda and Ethiopia.²²⁷

Young asserts that democratisation in Africa is made up of and seen through different special circumstances.²²⁸ 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.²²⁹ 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

²²⁶ 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).

²²⁷ 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.

²²⁸ 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.

²²⁹ 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.²³⁰ 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’.²³¹ 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.²³² 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

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

²³¹ Olukoshi (1999) 458.

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

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

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.²³⁵

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.²³⁶ 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.²³⁷ 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.²³⁸ These issues are being addressed already as democratisation continues to gain grounds.

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

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

²³⁵ Olukoshi (1999) 459.

²³⁶ *Ibid.*

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

²³⁸ 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'.²³⁹ 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.²⁴⁰ 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'.²⁴¹ By other entities, reference is being made to international organisations

²³⁹ Merriam-Webster's Dictionary of Law, Merriam-Webster, Inc. available at http://dictionary.reference.com/browse/international_law (accessed on 11 September 2009).

²⁴⁰ 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*.

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

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

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’.²⁴³

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’.²⁴⁴

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.²⁴⁵ In the *Reparations for Injuries Suffered in the Service of the United Nations case*,²⁴⁶ the

²⁴² *Ibid.*

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

²⁴⁴ Britannica Concise Encyclopaedia, 1994 – 2008, Encyclopaedia Britannica, Inc.

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

²⁴⁶ (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.’²⁴⁷

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.’²⁴⁸

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.²⁴⁹

²⁴⁷ *Ibid.*

²⁴⁸ *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.

²⁴⁹ 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.²⁵⁰ These provisions are expressed in terms of the function of the Court, but they also represent the previous practice of arbitral tribunals.²⁵¹ 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.²⁵² 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 treaty²⁵³ 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’.²⁵⁴ 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’.²⁵⁵

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’.

²⁵⁰ 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.

²⁵¹ 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.

²⁵² Brownlie (2003) 5.

²⁵³ 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.

²⁵⁴ 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.

²⁵⁵ 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.²⁵⁶ 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*.²⁵⁷

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.²⁵⁸ This may lead non-parties, through their conduct, to consent to be bound by the provisions contained in such multilateral treaties.²⁵⁹ 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.²⁶⁰

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.

²⁵⁶ 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.

²⁵⁷ 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.

²⁵⁸ Brownlie (2003) 13.

²⁵⁹ 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.

²⁶⁰ *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.²⁶¹ 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.²⁶² 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.²⁶³ 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.²⁶⁴ 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*).²⁶⁵

- 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.²⁶⁶ 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

²⁶¹ Brierly (1963) *Law of Nations* 61.

²⁶² Wallace (2006) 4-5.

²⁶³ Brownlie (2003) 6 & Wallace (2006) 5.

²⁶⁴ Dugard (2005) 29.

²⁶⁵ *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.

²⁶⁶ 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*²⁶⁷ case stated that a practice must constitute ‘constant and uniform usage’ before it would qualify as a custom.²⁶⁸ 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’.²⁶⁹

- 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.²⁷⁰ The requirement of this psychological element has been emphasised by the ICJ in the *North Sea Continental Shelf Cases*,²⁷¹ where the Court held that despite state practice in favour of a provision requiring the continental shelf

²⁶⁷ *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.

²⁶⁸ *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 ...’

²⁶⁹ *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.

²⁷⁰ Dugard (2005) 33; Brownlie (2003) 8.

²⁷¹ 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.²⁷²

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.²⁷³ 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.²⁷⁴ Examples are principles of ‘unjust enrichment’,²⁷⁵ ‘*res judicata*’,²⁷⁶ ‘state responsibility for

²⁷² *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.

²⁷³ Dugard (2005) 38.

²⁷⁴ Dugard (2005) 37.

²⁷⁵ *Lena Goldfields Arbitration* (1930) 5 AD 3.

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

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

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.²⁷⁹ These tribunals exercise their discretion in the matter, as the application of rules from domestic legal systems, does not always lead to appreciable results.²⁸⁰

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.²⁸¹ An example of this is the *South West African* case,²⁸² 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

²⁷⁷ *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.

²⁷⁸ 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’.

²⁷⁹ 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.

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

²⁸¹ 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’.

²⁸² *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’²⁸³ 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

²⁸³ 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.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ The trend is felt to challenge the legitimacy of traditional international law which was embedded in state consent and sovereignty.²⁸⁸

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

²⁸⁵ 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.

²⁸⁶ 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.

²⁸⁷ *Ibid.*

²⁸⁸ 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.²⁸⁹ 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.²⁹⁰ 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)*.²⁹¹

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

²⁸⁹ 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.

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

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

law'.²⁹² 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.²⁹³ 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.²⁹⁴ 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.²⁹⁵

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.²⁹⁶ 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

²⁹² 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.

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

²⁹⁴ 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).

²⁹⁵ 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.

²⁹⁶ 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.²⁹⁷ 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.²⁹⁸

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.²⁹⁹ 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.³⁰⁰

²⁹⁷ Sections 231, 232 and 233 of the 1996 Constitution of the Republic of South Africa.

²⁹⁸ Maluwa (1999) 33.

²⁹⁹ 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.

³⁰⁰ *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.³⁰¹ 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).³⁰² 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.³⁰³

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.³⁰⁴ 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.³⁰⁵ However, if it is a rule of customary international law, the approach is different and even controversial to an extent.

³⁰¹ 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.

³⁰² Maluwa (1999) 34; Olivier (LLD Dissertation) *ibid*.

³⁰³ Maluwa (1999) 35.

³⁰⁴ *Ibid*.

³⁰⁵ 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.³⁰⁶ 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.³⁰⁷

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.³⁰⁸

In Nigeria, the position of the law relating to the adoption of treaties is explicitly stated in the constitution.³⁰⁹ 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.³¹⁰ This adopts the

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

³⁰⁷ Maluwa (1999) 35.

³⁰⁸ Sections 39, 231, 232 and 233 of the 1996 South African Constitution.

³⁰⁹ Section 12 of the 1999 Constitution of the Federal Republic of Nigeria.

³¹⁰ 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 Kingdom³¹¹ 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.³¹² 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.³¹³ 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.³¹⁴

³¹¹ *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.

³¹² 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’.

³¹³ Maluwa (1999) 41.

³¹⁴ 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.³¹⁵ 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.³¹⁶ 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.³¹⁷ 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.³¹⁸ 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

³¹⁵ Maluwa (1999) 61.

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

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

³¹⁸ 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.³¹⁹

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.³²⁰ 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.³²¹ 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.³²² 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.³²³ This theory has over time

³¹⁹ Maluwa (1999) 63.

³²⁰ *Ibid.*

³²¹ Shaw (1997) 683; Dugard (2005) 421.

³²² Maluwa (1999) 69; Dugard, *Ibid.*

³²³ 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.³²⁴ 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’.³²⁵ 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.³²⁶ This theory is supported in the Vienna Convention on Succession of States in Respect of Treaties.³²⁷

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,³²⁸ 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

³²⁴ Ong (2000); Dugard (2005), 421.

³²⁵ Maluwa (1999) 70; Shaw (1997) 694.

³²⁶ 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.

³²⁷ Article 16 of the Convention.

³²⁸ 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.³²⁹ 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.³³⁰

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;

³²⁹ Maluwa (1999) 67-68.

³³⁰ *Ibid.*

iv) and the successor issuing a declaration concerning treaties.³³¹

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.³³² 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.³³³

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.³³⁴

³³¹ International Law Association Report of the 52nd Conference in 1966.

³³² 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.

³³³ Maluwa (1999) 78.

³³⁴ 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.

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).