

CHAPTER 5

Regional Case study: South Africa

5.1	Introduction	252
5.2	History	253
5.2.1	Pre-colonial South Africa and the people of the land	254
5.2.2	Colonial South Africa: arrival of the Europeans	258
5.2.3	Inward spread of the Europeans	260
5.2.3.1	Consequential disintegration of the Khoikhoi	260
5.2.3.2	Further colonial incursion and conquest	262
5.2.3.3	Resistance from the Xhosa to white expansion	268
5.2.3.4	The great trek	270
5.3	Apartheid South Africa	275
5.3.1	Opposition to apartheid: peaceful resistance	284
5.3.2	Opposition to apartheid: violent resistance	287
5.3.3	The end of apartheid	289
5.3.3.1	International pressure (apartheid contributing to the development of international law)	290
5.3.3.2	Moderation of apartheid policies	292
5.4	Post Apartheid South Africa: An analysis of the Constitutions	297
5.4.1	Interim Constitution	297
5.4.2	Constitution of the Republic of South Africa, 1996	300
5.4.2.1	Constitution-making process	300
5.4.2.2	Content of the 1996 Constitution	302

5.4.3	South African Constitution in light of the social contract theory and the positivist school of thought	303
5.4.4	Connection with Kelsen's theory	307
5.5	Mechanism for the rule of law: The South African Legal System	308
5.5.1	Customary (Indigenous) law in South Africa	309
5.5.1.1	Customary law during colonial times	311
5.5.1.2	Proof and ascertainment of customary law	312
5.5.1.3	Impact of international law on customary law	314
5.5.1.4	Customary law, the constitution and the Constitutional Court	315
5.5.1.5	Legislative reform of customary law and South African Law Reform Commission	320
5.5.2	Common law and statutory law in South Africa	320
5.5.3	Statutory law	324
5.6	Impact of the Legal System on the rule of law in South Africa	325
5.6.1	Entrenchment of the rule of law	325
5.6.2	Further Challenges to the rule of law	332
5.6.3	Assessing the resultant fall-out	337
5.7	International law in South Africa and its impact on the rule of law	341
5.7.1	International law in the legal system with specific reference to international human rights law	345
5.7.2	Impact of the APRM initiative on the rule of law in South Africa	351
5.8	Conclusion	354

5.1 Introduction

The previous chapter investigated the Nigerian situation as regards the constitutional system of governance, the way in which the country has evolved over the years, and the extent to which the many excursions by the military into governance have characterised the country presently. The damage that military rule has caused the society, structure and path of the country was also considered, as well as the resultant ethnic and religious solidarities that have concretised and continued over the years; including the impact and influence of international law (international community) on the exercise of its sovereign powers, in particular, the way in which globalisation continues to extend its reach into the operation of the rule of law in the country; and also its own history with the many resource control agitations over the years.

In this chapter, the focus is turned to South Africa. South Africa is regarded as having one of the biggest economies in Africa and is grouped as an emerging economy in the world.¹ It is the other of the two states to be examined in this thesis. This examination will be carried out using similar criteria as used in the case of Nigeria, to the extent that this is possible and appropriate. There is copious work on the history and origins of South Africa. Given its multi-ethnic, multi-cultural and multi-racial composition, and the peculiar history of the country, it is a country of immense interest to people all over the world. A lot has been documented by historians, archaeologists, social scientists and others, both within and outside the region. The purpose of this chapter is to examine South Africa as a country, its history, and the different ideologies that have operated to shape the rule of law of country presently.

This chapter will further look at international law and the rule of law in South Africa, and the ways in which either has influenced each other or been influenced by the other. This chapter will however not discuss globalisation again, as its

¹ 'Africa's Ten Largest Economies in 2007', ClickAfrique.com, available at <http://www.clickafrique.com/Magazine/ST014/CP0000002788.aspx> (accessed on 1 May 2010). With a Gross Domestic Product (GDP) of \$467.6 billion in 2007, South Africa is a middle-income emerging market with abundant supply of natural resources. Its economy is listed as ranking 27th in the world.

impact on Africa has been extensively discussed in chapters three and four. Even though South Africa has not escaped the effects of globalisation, as a topic, it is viewed to be more directly relevant to the state of the rule of law in Nigeria. This is especially because of the way in which the structural adjustment programs were used by international partners to force the country to face the effects of globalisation.

5.2 History

In this section, special emphasis will be placed on the historical development of law and forms of governance in the region now referred to as South Africa. It is therefore not an attempt to re-write the full history of the region, but only to emphasise how law has developed and been used as a tool of governance over the years and the impact this has had on the region itself.

Although there is copious documentation of the historical antecedents of South Africa, one is hard pressed as to the relevant and objective sources. One of the main pitfalls of any historical account is the tendency to be subjective (written from the authors point of view and stressing those points the particular author wants to buttress), and this has been observed in a number of the sources, books and documentation consulted on this topic. In this work, every attempt has been made to avoid this major pitfall, and as a result certain sources and books will not be used as it is observed that they tend to align more with subjective historical accounts. The ones used are those that appear to give a more balanced and objective account of the history of South Africa.

South Africa as it is known today is a country with a history of pre-colonial inhabitation by people, colonisation (during which there was massive movement of peoples from the 16th century), and apartheid (which enforced forced movement of people). These influences have resulted in a multi-racial, multi-ethnic society. The influence of apartheid in itself is far reaching in Africa and has led to the tensions, wars and struggles between the races over the years. These influences have given South Africa its distinctly peculiar history. The discussion will be started by taking a look at pre-colonial South Africa.

5.2.1 Pre-colonial South Africa and the people of the land

As the name implies, South Africa is situated on the southern part of the African continent. It covers a land mass of an area of 1,210,912 sq km. It is bordered on the left by the Atlantic Ocean and on the right by the Indian Ocean; on the northwest by the tropical grasslands and on the northeast by the Limpopo River.² Its coastline stretches more than 2,500 km from the desert border with Namibia on the Atlantic coast, southwards around the tip of Africa, then north to the border with subtropical Mozambique on the Indian Ocean.³ It was an isolated region before humanity's technological advances of the past few centuries,⁴ brought about by the successive waves of European expansion.⁵ The region has different environments; the coastline and its hinterland; the highlands rising to the escarpment; the grasslands of the eastern plateau; the area of good winter rainfall in the southwest; the arid lands of the Karoo and the Kalahari and Namib deserts.⁶

The climate in the southern part of the region is similar to that of northern-most parts of Africa. The climate of certain areas in the western part of the region is also similar to the climate in northern African countries, like Morocco.⁷ This makes it suitable for Europeans to survive in both these regions more easily than they could in the tropical hinterlands. Therefore, these two regions of Africa became the regions to receive the densest immigrations by European settlers. They acquired the largest colonies of people of European origin.⁸ Southern Africa was further attractive due to the fact that the region is rich in mineral deposits, like copper, tin, iron, coal, diamonds, gold and uranium.⁹

There were quite a number of different groups of people who were indigenous to the region. Although, their ways of life varied greatly in the different environments of the region, there were, however, certain general similarities to be

² Thompson L 'Southern Africa to 1795' in Curtin P et al (1995) *African History: From Earliest Times to Independence* 241.

³ See SouthAfrica.Info, South Africa's geography, available at <http://www.southafrica.info/about/geography/geography.htm> (accessed on 26 January 2010).

⁴ Thompson L (5th ed) (2000) *A History of South Africa* 3.

⁵ Beinart W (2001) *Twentieth-Century South Africa* 1.

⁶ Thompson (2000) 7.

⁷ North Africa is the closest to Europe, and has similar weather patterns.

⁸ See generally Thompson (1995) 242-250. The initial purpose of the settlement of Europeans was because it served a strategic importance to them in their trade further in the east. This will be explored in more detail later in this chapter.

⁹ *Ibid.*

found amongst them. Language is one of such similarities. Though different ethnic groups spoke different languages; it has become increasingly clear to linguists and anthropologists that the languages are distantly related.¹⁰ The peoples also operated socially in nuclear family units, which then formed bands numbering from about twenty to eighty people. They were very mobile, moving to wherever they found food, occupying caves and camps and moving from one foraging, watering and hunting area to another as the seasons dictated. They were also very adept in making tools, clothing and musical instruments from the materials they found, like wood, stone, animal hides, catgut, and even had their bows and arrows with tips smeared with poisons extracted from snakes, scorpions or plants.¹¹ Evidence of these skills has been detected in rock paintings and engravings that have survived over the thousands of years.¹²

Another trait than ran through these different groups of indigenous people was the oral tradition that guided their way of life. Communication was oral, expressed in words or through music. Law and order was interwoven with their traditions, customs and religious practices. These all existed together as one package as there were no separations or distinctions that we now see in the current civilisation. All of these were passed down (from generation to generation) and communicated through oral tradition.¹³

The indigenous people of the southern part of the country around the sixteenth century AD are reportedly the Khoikhoi and the San people (Khoisan). The Europeans referred to them as the 'Bushmen' and 'Hottentots'. It is believed that their ancestors had lived on the lands as early as the first millennium. The distinction between these two groups of people is said to be artificial, relating more to their modes of life than to any more fundamental difference.¹⁴ The Khoikhoi were essentially pastoralists (who only cultivated dagga), while the San people (Bushmen) were hunter-gatherers of edible plants for consumption, and with an intimate knowledge of the land.¹⁵ The Khoisan people are believed to have

¹⁰ Thompson (2000) 7.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See Chapter 2 for a comprehensive discussion of the life of indigenous African peoples and how law existed within these communities and how it was preserved by way of oral tradition.

¹⁴ Welsh F (1999) *South Africa: A Narrative History* 16.

¹⁵ *Ibid.*; see also Thompson (2000) 6.

contributed a high proportion of the genes of the so-called ‘coloured’ people (who constitute about 9 percent of the population of modern South Africa).¹⁶

In the western part of the region, where pastures were plenty (especially in the reliable winter-rainfall area in and near the Cape peninsula), people were herding sheep and cattle. These people were referred to as the pastoralists, and they were genetically similar to the hunter-gatherers.

To the northeast were the people who not only owned cattle and sheep, but also grew cereal crops (they started agricultural practices) and used spears and digging tools with iron tips. This earned them the name ‘mixed-farmers’. They were not migratory people, but had semi-permanent villages throughout the year and their social and political organisations were stronger and more complex. These spoke what is referred to as Bantu languages, had dark brown skins and robust physiques. They are known as the Bantu people, reportedly the ancestors of the majority of the inhabitants of present-day Southern Africa, who had descended from central Africa.¹⁷ They were negroids (blacks) who spoke the Bantu languages, and are believed to have later intermingled and inter-married with the Khoisan people.¹⁸ A pattern of mixed farming developed, as these settlers acquired livestock and lived as a rule in small villages.

The southward penetration of pastoralists brought about the moving of the Khoikhoi stock farmers to the Western Cape, where sheep can be traced to the early Christian era, and cattle to about the end of the first millennium AD.¹⁹ By A.D 1000, the mixed farmers had spread to much of the areas later known as Natal, the Cape Province, the Transvaal, Swaziland and eastern Botswana. They were very skilled in the production of pottery and metallic implements, and in most areas, they also integrated crop cultivation and pastoralism, as stated above. The mixed farming population then increased rapidly after this and expanded into the higher areas that their predecessors had neglected. This was due to the ability of

¹⁶ Thompson (2000) 6.

¹⁷ Thompson (2000) 10.

¹⁸ Welsh (1999) 68.

¹⁹ Davenport TRH *et al* (2000) *South Africa, A Modern History* 9.

these farmers to adapt to the specific opportunities and challenges of whatever environment they found themselves in.²⁰

It is believed that this expansion was part of a process of cultural transmission and gradual territorial expansion deriving ultimately from West Africa and from the area around Lake Victoria, where people began to adopt the iron-working, mixed farming way of life a few centuries before the Christian era.²¹ It is said to stand as an explanation for the way in which the Bantu languages spread widely.²² This is supported by the British archaeologist, David Phillipson, who surmised from the evidence at archaeological sites and evidence from artefacts, that

‘[t]he fact that so many important aspects of culture were introduced together over such a wide area and so rapidly makes it highly probable that the beginnings of iron-using in subequatorial Africa were brought about as a result of the physical movement of substantial numbers of peoplemost likely the speakers of Bantu languages.’²³

This gives a lucid explanation for the movement and occurrence of the Bantu speaking people around AD 1000, and their continued dominance of the region. It has however been cautioned that the movement was not due to massive waves of migration into the southern African region, but perhaps filtration into the region in small groups, best described as a migratory drift, or a gradual territorial expansion.²⁴ Another caution is that this is not the comprehensive story, and many aspects of the origins and spread of the indigenes of sub-Saharan Africa remain unresolved.²⁵ There exist many postulates by archaeologists as to the changes in the waves of immigration or movement of the peoples across the continent.

²⁰ Thompson (2000) 12. See also Thompson (1995) 243.

²¹ *Ibid*; Kopytoff I (ed) (1987) *The African Frontier: The Reproduction of Traditional African Societies*.

²² Thompson (2000) 12.

²³ Phillipson D (1993) *African Archaeology* 171.

²⁴ Thompson (2000) 13; Jones PA (1984) ‘Mobility and Migration in Traditional African Farming and Iron Age models’ in Hall M *et al* (eds) *Frontiers: Southern African Archaeology Today* 289-296.

²⁵ *Ibid*.

5.2.2 Colonial South Africa: arrival of the Europeans

The second influence mentioned above is colonialism. This spanned over a longer period of almost three centuries, from the late seventeenth century to the mid-twentieth century. The people of the southern African region had remained undiscovered by the west until the end of the fifteenth century. The Portuguese on their explorations and excursions from Europe had been moving further and further along the western coast of Africa.²⁶ During the sixteenth century, they set up fortified bases in India in order to enhance their trade. They engaged in the nefarious export of slaves to the Americas from West Africa, and parts of East Africa, namely Mombasa and Mozambique, in the eighteenth century. Their activities, however, barely touched the territory of South Africa, as they were fearful of the navigational hazards of the Cape of Good Hope.²⁷ It was their activities that opened up the area to the Dutch traders who landed at the Cape in 1652. By the end of the sixteenth century, European merchant mariners²⁸ were using the sea route to Asia. They would intermittently land at the Cape peninsula to refresh their supplies of water and food, and to barter animals from the local Khoikhoi pastoralists in return for iron and copper goods.²⁹

The Dutch East India Company, the *Vereenigde Oost-Indische Compagnie* (VOC), was a trading establishment formed in 1602 by Dutch merchants, with a charter from the government of the Netherlands. It was actually the result of a merger of smaller companies that had pioneered the first voyages to the East Indies.³⁰ The company was given a monopoly to trade from the Cape of Good Hope eastward. They decided to establish a fort at the Cape of Good Hope, in order to supply their fleets with water, fruit, vegetables and meat and to land their sick to recuperate on their way to and from Asia, where they had established an eastern empire. Thus, their initial intention was for the Cape station to serve as a stop-over, a refreshment centre, a victualling station and trading post.³¹ In furtherance of this, in 1652, Jan van Riebeeck arrived as the commander of an expedition of eighty company

²⁶ Thompson (1995) 257.

²⁷ Tempestuous seas, strong currents and perilous shoals had earned the area the name of the Cape of Storms.

²⁸ Mainly the Dutch, English, French and Scandinavian.

²⁹ Thompson (200) 32; Thompson (1995) 258.

³⁰ Welsh (1999) 12.

³¹ Welsh (1999) 20.

employees to settle in Table Bay in order to fulfil this purpose. However, through various processes of settlement of the employees of the company (who happened to come from all over Europe), the Cape began to grow as a colony with a degree of autonomy and also unfortunately as a racially stratified society.³²

The company in 1657 released nine of its employees from their contracts and gave them land to establish private farms at certain areas of the Cape to produce fruits, vegetables and goods that were needed by the ships that would make the stop-over for re-supplies. These were given the status of ‘free burghers’.³³ Further in 1679, more settlers were granted land in the area that became the district of Stellenbosch. This granting of land to private European citizens encouraged the migration of more women and more settlers generally from large areas of Europe, including France and Germany. The Dutch settlers were more dominant, and settlers from other parts of Europe were required to learn, worship and communicate through the Dutch language.³⁴ They married Dutch women and their children were brought up to imbibed the Dutch way of life and religion. Thus an originally European settler population was coaxed into conformity with the language and religion of the Netherlands. This amalgam of European nationalities in the Cape came to be known as the ‘Afrikaner people’.³⁵

The company also relied heavily on ‘slaves’ to do the manual work of creating the infrastructure of the colony. They thus started the importation of slaves by sea to Cape Town in 1657, with the first consignment of slaves arriving from Angola.³⁶ The slaves came from the eastern countries where the company already had footing, such as Indonesia, India, Malaysia, Sri Lanka and even Madagascar.³⁷ The company used slaves for their purposes and sold them to the free burgher community as well. By the 1780s, French and English vessels were allowed in, and they brought in slaves from mainly Madagascar and East Africa. The economy of the Cape and its surrounds (wherever the Afrikaner people spread to) thus became dependent on slave labour. Slaves worked as everything from

³² Thompson (1995) 257-262; see generally Welsh (1999) 21-50.

³³ Thompson (1995) 258.

³⁴ Davenport (2000) 22.

³⁵ Davenport (2000) 22.

³⁶ Welsh (1999) 35.

³⁷ Thompson (1995) 260.

domestic servants, artisans, farm workers, to manual labourers and so on.³⁸ The combination of these peoples of European, Eastern, Asian and black races (including the Khoikhoi) was the start of the coloured population of the region.³⁹

5.2.3 Inward spread of the Europeans

As more and more settlers arrived at the Cape, they engaged in agriculture, with stock rising on the side. This resulted in a situation by the end of the seventeenth century, in which they were producing more wheat and wine than the company needed for the garrison and its passing ships.⁴⁰ Supply began to outstrip demand, and this affected the livelihood of the people. In a bid to make a better life for themselves, some of the settlers then began to move further inland, taking possession of land from the indigenes and spreading away from the Cape. They specialised in cattle and sheep raising, became more self-sufficient, as they traded their sheep and cattle for whatever goods they needed with their black counterparts for hides and ivory. This early dispersion started the spread of the settlers (referred to as 'voortrekkers/trekboere' due to their nomadic way of life) northward towards the Orange River. Other factors that will be discussed below led to the major spread of the settlers eastward on either side of the arid Great Karoo and Little Karoo.⁴¹

5.2.3.1 Consequential disintegration of the Khoikhoi

The Khoikhoi, who were the indigenous people of the Cape, noticing the incursion of the settlers; the taking over of their lands, cattle, building of the fort, planting of the crops and other activities of the settlers, realised with displeasure that they were facing a challenge to their very essence. Conflict ensued between the indigenes on the one hand, and the company officials and free burghers on the other hand. The conflicts quickly degenerated into military campaigns against the

³⁸ *Ibid.*

³⁹ Welsh (1999) 35.

⁴⁰ Thompson (2000) 46.

⁴¹ Thompson (2000) 46.

Khoikhoi, resulting in the disintegration of the Khoikhoi chiefdoms during the eighteenth century in the Cape colony.⁴²

Many of the Khoikhoi were incorporated into the colonial society as slaves and servants working on the herds, and in the fields of the colonialists. Some of the Khoikhoi joined forces and became mixed bands that traded on the fringes of the area occupied by the trekboere (white nomadic stock farmers who had moved there by the beginning of the eighteenth century).

The outbreak of smallpox epidemics in 1713, 1755 and 1767, dealt a big blow to the Khoikhoi⁴³ and further decimated their numbers, thus making it easier for the incursion of the trekboere recorded above, as they moved deeper and deeper into the interior, to edge more and more of the indigenous people out of control of their land. They encountered very little resistance from the Khoikhoi and the indigenous people, and whatever resistance there was, they were able to quell with their superior weapons and ammunition.⁴⁴ The progression of the years saw the trekboere spread out thinly over a vast area extending in 1745 in the north-eastern direction beyond the current Graaff-Reinet. In this process, they drew more and more people from the indigenous pastoralists, hunting and gathering communities into their service as slaves.⁴⁵

For more than a century, the trekboere were left to their own devices as they spread inland.⁴⁶ They established their own communities and very rarely concerned themselves with the officials at the Cape.⁴⁷ They had large families (sometimes with ten or more children), and ownership of land for farming was regarded as a birthright for each of the children, and a measure of social equality. This meant that they continued to occupy more and more land both to the east and the north as their families increased.⁴⁸

⁴² Van Jaarsveld FA (1975) *From Van Riebeeck to Vorster 1652 – 1974: An introduction to the History of the Republic of South Africa* 19.

⁴³ Welsh (1999) 62. Smallpox was a foreign disease brought to the region by the colonials. It thus found room to flourish in this region as there was no immunity to it at that time. This was the situation of the Khoikhoi, who had never experienced it and thus who had no inbuilt resistance to it.

⁴⁴ Davenport (2000) 24.

⁴⁵ *Ibid.*

⁴⁶ Welsh (1999) 64.

⁴⁷ Only for purposes such as marriage solemnisations, baptisms and death records did they have to do this.

⁴⁸ Welsh (1999) 65.

Law and order, over the colony in the form of formal authority, was exerted by the Dutch officials through the Dutch East Indian Company, receiving orders from the highest echelon in Amsterdam. The judiciary and other administrative bodies were made up of officials of the company, and even the religious establishment was controlled by the company. The ministers and members of the clergy were employees of the company, drawing a salary.⁴⁹

Senior officials of the VOC also engaged in agriculture and stock-owning. They possessed large portions of the best lands,⁵⁰ slaves and even exploited their positions to control access to the ships and external markets by making sure that their produce was first bought up by the fleet ships before those of the free burghers and colonial farmers could be considered. This was in breach of company policy, as officials were prohibited from owning land or partaking in the economy. They were meant to survive on the goodwill of the substantial colonial farmers.⁵¹ This level of corruption was evident in the Cape colony all through the period of dominance of the company. The colonist farmers were highly dissatisfied with this position and made several attempts to get the directors of the company to curb the excesses of its officials. Their efforts, however, yielded little if any results, due to the fact that the company itself was slowly drifting into bankruptcy at that time. The lack of action or inadequate action taken by the company to put an end to the corrupt practices of its officials furthered the discontent felt by the colonist farmers and the free burghers and paved the way for the lack of great resistance that the British encountered when they captured the Cape from the Dutch in 1795.

5.2.3.2 Further colonial incursion and conquest

In 1795, during the time of the French Revolution when the whole of Europe was thrown into turmoil, Great Britain became dominant and easily took over control of the Cape from the Dutch. The Dutch were not done away with, but were engaged on salaried basis. The control of the British in the Cape continued, except for a

⁴⁹ Thompson (2000) 41.

⁵⁰ Welsh (1999) 34 records that company officials feathered their own nests and neglected the farmers' interests, as even Van Riebeeck was recorded to have the richest farm in the whole settlement.

⁵¹ Thompson (2000) 42.

brief spell during 1803 to 1806, when the Cape returned to the Dutch briefly.⁵² For the British, it initially was to be a stepping stone to Asia, where the English East India Company was conducting a highly profitable trade. They later realised that regardless of their intent in taking possession of the Cape, they would have to introduce measures to effect law and order on the society at the Cape.⁵³

Law and order was stepped up by the new British authorities. Amongst these were: the abolition of slave trade; the introduction of circuit courts⁵⁴ (through which judges travelled regularly on circuit to bring justice nearer to the people), which came about between 1807 and 1811;⁵⁵ the appointment of British magistrates to replace the Dutch district courts which had been controlled by the colonists; the introduction of English trial procedures (including the jury system); the introduction of government schools in towns and villages;⁵⁶ and the introduction of ‘perpetual quitrent title’ in land (aimed at restricting expansion that had prior to then been at the pleasure of the trekboere).⁵⁷ They also abolished many of the Dutch concessions and monopolies and registered private property in land.⁵⁸

The steps taken by the British affected the place of Dutch law in the Cape because it took on second place (for a period), as it was increasingly replaced by British laws and modes of justice. Roman-Dutch law, however, survived this onslaught and actually thrived over the years. It became a reasonable, well-compacted, elastic and adaptable system. In the early eighteenth century, it was noted that in South Africa, the tradition of Roman-Dutch law was ‘continuous, its pre-eminence unchallenged’.⁵⁹ Even though the adaptability of Roman-Dutch law is seen in its development through the years, it still maintains its uniqueness as a legal system.⁶⁰

⁵² Davenport (2000) 41.

⁵³ *Ibid.*

⁵⁴ These courts enabled black employees to formally lodge complaints against ill-treatment from their white employers.

⁵⁵ In 1807, Britain passed the Promulgation of the Abolition of the Slave Trade Act in Britain, which amongst other things, banned slave trading which included the importation of slaves to the Cape.

⁵⁶ These schools had English as a medium of instruction and had syllabi that taught and emphasised British history and culture.

⁵⁷ Davenport (2000) 43.

⁵⁸ Thompson (1995) 274.

⁵⁹ Lee RW ‘The Fate of Roman-Dutch Law in the British Colonies’ (1906) 7(2) *J Soc. Comp. Legis. n.s* 356-370 at 370 (Cohen A. commented on this inaugural lecture in the journal).

⁶⁰ Lee (1906) 7(2) *J Soc. Comp. Legis. n.s* 356 at 369.

One is careful to say that this is still the position, as Roman-Dutch law still has a great deal of influence in the South African legal system.⁶¹

A British character was further promoted throughout the Cape and beyond, as numbers of British merchants began to move through the region. These numbers were not very high, as only a small fraction of the number of emigrants who left the British Isles before 1870 chose to settle in the Cape colony. This, however, boosted the white population to an extent. The white population that was already in the region were primarily the descendants of the early settlers who had left Europe in the Dutch period, many of whom were of French and German origin.⁶² With time, they began to be referred to as the ‘Afrikaners’. They were distinct in their language called ‘Afrikaans’, which had emerged from the interaction amongst the diverse inhabitants of the colony. It has a core Dutch vocabulary and syntax and included elements from the languages of the Asian slaves and the Khoikhoi people.⁶³ This is how the language ‘Afrikaans’ developed, has survived still the present day and remains the language of the Afrikaner people. The two white communities, the Afrikaners and the English people chose to maintain their ethnic dichotomy, sustained by linguistic and cultural differences. This situation has persisted right into the twenty-first century white South Africa.⁶⁴

The author Thompson notes that the British regime introduced laws and rules to alleviate the lot of the slaves and the lower class Khoikhoi and ultimately to set them free.⁶⁵ A strong reform movement seeped in evangelical religion and morality had risen in Britain during the industrial revolution. It exerted pressure on the parliament for reform, including reform of the slave trade. The repeal of the Corn Laws in 1846 brought agitation to the fore to put an end to the slave trade (which, even though it had been declared illegal by virtue of the 1807 Act of the British banning slave trade, was still practised); to ‘ameliorate’ the institution of slavery and finally to outlaw it.⁶⁶

⁶¹ This will be discussed later in this chapter.

⁶² Welsh (1999) 105.

⁶³ Thompson (1995) 274.

⁶⁴ *Ibid.*

⁶⁵ Thompson (2000) 57; Davenport (2000) 43. He comments that these were initially normative changes introduced by the British.

⁶⁶ Thompson (2000) 57.

The 1807 Act of the British Parliament banning British participation in the slave trade (which was at that time an international trade conducted by all of the international powers) was not welcomed by the colonial farmers in the Cape. This was because they had built their fortunes on the labour of the slaves. They responded by increasing the workload of their existing slaves, since they could not get fresh supplies of labour. In 1823, in an attempt to improve the lot of those who were serving as slaves, the British government introduced a law in the colony, prescribing minimum standards of food and clothing and maximum hours of work and punishments. By this, they tried to control the behaviour of slave-owners and to eliminate their grave abuses of power.⁶⁷ In 1833, the British parliament passed a law emancipating the slaves throughout the British Empire, effective from the 1st of December 1834. This law provided for a four-year apprenticeship period after which the slaves became legally free in 1838.

Prior to the 1833 Act of parliament, the 50th Ordinance had been promulgated in 1828. This repealed previous legislations relating to the Khoikhoi and made ‘Hottentots and other free people of colour’ equal with whites before the law. They thus enjoyed ‘all the rights of law ... to which any other of His Majesty’s subjects was entitled.’⁶⁸ They were free from the obligation to carry passes; given a legal right to own land, and their employers were required to grant only short-term contracts, for up to a month if oral, and for up to a year if written, so that coloured employees and their children could break free from intolerable work situations.⁶⁹ In the light of this, the emancipation of the slaves in 1833 gave them the same legal status of freedom won by the Khoikhoi people in 1828.⁷⁰

This ‘freedom’, however, was more legislative than anything else. It freed them from overtly discriminatory legislation, but did not translate into better conditions of living for them; neither did it elevate them from their poverty, which was as a result of an entrenched domination of the economy by the white population. Economic and political power in those preindustrial times revolved around and was bound in land ownership. Land was an essential basis for individual and group autonomy, and by 1828, whites were the legal owners of nearly all the productive

⁶⁷ *Ibid.*

⁶⁸ Welsh (1999) 133.

⁶⁹ Davenport (2000) 48.

⁷⁰ Thompson (2000) 60; quoting Marais, *Cape Coloured People*, chap 5.

land in the colony. Thus the emancipated Khoikhoi and the slaves had very few alternatives but to continue working for the whites.⁷¹ The few attempts to help the Khoikhoi people and the ex-slaves were choked and frustrated by the actions of the burghers and other Europeans (who made up the white establishment), and who ensured that the Khoikhoi and the ex-slaves did not succeed in their private ownership of land.⁷²

Davenport notes that British conceptions of justice were not necessarily superior to that of the Dutch; just that the English common law system was more adapted to liberal interpretation than the Roman-Dutch system was.⁷³ This made the difference in the modes of law and justice as it appeared.

By this time in the mid-nineteenth century, Great Britain was divesting itself of its colonies and was devolving power to the people of the colonies. This was due partly to the desire and sentiments expressed by British colonists in the empire (New Zealand, Australia, North America and even South Africa), to have the fullest possible control over the colony and its internal affairs. White businessmen in the Cape Colony had also begun to question the rationale for their colonial dependency and why their payments in terms of tax had to go to administering and policing overseas territories, when they could very well determine with whom and how they did business. The British divestment was also due to the fact that the economic cost of continuing to run the colonies was no longer justifiable. Based on these sentiments, the British government was at a dilemma as to the form of government to adopt in the Cape Colony.⁷⁴ It had the option of adopting the Canadian system of self-government, which had become precedent in other British settlement colonies, or adopting the Indian system, which remained a dependency

⁷¹ *Ibid.*

⁷² Thompson (2000) at 62 reports that in 1829, about 400 square miles of fertile land (formerly occupied by the Xhosa, who had been dispersed as a result of the *Mfecane*), on the upper end of the Kat River was granted as a settlement for the Khoikhoi and ex-slaves. Almost 2114 Khoikhoi and mixed settlers ended up on the land in 1833. Initially, things went well and the Khoikhoi were flourishing. However, the effects of the frontier wars in which the settlement was caught, the raids carried out by the Xhosa and other tribes from across the border rendered the chances of prosperity impossible. The British immigrants had also set their sights on the Kat River land because it was fertile, and all the while the Khoikhoi and ex-slaves held the land, they continued to agitate for portions of the land. Eventually, the British government yielded to the pressures of the British immigrants and opened up the fertile Kat River valley to white settlement. Whites flocked into the area, and with official support and relatively easy access to capital, they gradually edged the Khoikhoi people out of the land.

⁷³ Davenport (2000) 115.

⁷⁴ Thompson (2000) 63.

with a preponderance of alien inhabitants to be ruled autocratically for the foreseeable future.⁷⁵

The Canadian model was followed and in 1853, the colony was granted a representative government through a revised draft constitution which provided for a bicameral parliament (a legislature with two houses, both consisting entirely of elected members).⁷⁶ It was empowered to legislate on domestic matters subject to British veto, and in 1872, it acquired a responsible government with a cabinet responsible to the legislature.⁷⁷

Election to both houses of the Cape bicameral parliament was open to all races and all ethnic backgrounds, based on a minimum level of either property ownership or employment.⁷⁸ This was significant as it built on the constitutional theory of non-racialism. However in practice, it was entirely different. Most Africans did not qualify based on these criteria as they were handicapped by poverty. They were too poor to meet the requirements for eligibility into the parliament.⁷⁹ They were also hindered by the white control and domination of the press and the voting machinery to register voters and conduct elections.⁸⁰ They were also disenfranchised in the implementation of the system that continued to be manned by whites, and were never able to become members of the Cape cabinet or parliament; these were made up of whites only. Thus, even though the British government had the best of intentions in insisting on equality and everyone of whatever colour having access to enjoy the exercise of political rights, the criteria for qualification had the effect of restricting the participation of the Africans. The parliament elected in 1854 was thus a good mix of Afrikaners and English, easterners and westerners, liberals and conservatives, young and old.⁸¹

In 1856, the Cape parliament passed a Masters and Servants Act, which criminalised breach of contract and refusal to work or insulting of an employee.⁸² This was a big step back for the Khoikhoi and former slaves who had been granted

⁷⁵ Thompson (1995) 276.

⁷⁶ Welsh (1999) 200.

⁷⁷ Thompson (1995) 276.

⁷⁸ Welsh (1999) 201.

⁷⁹ *Ibid.*

⁸⁰ Thompson (2000) 65.

⁸¹ Welsh (1999) 202.

⁸² *Ibid.*

same rights as the whites by Ordinance 50. It signified that the passing of Ordinance 50 had not been sufficient to redress the inhumanity shown to the Khoikhoi and other slaves. As long as the white colonists continued to have the economic power, they were guaranteed political power and thus could continue to lord it over the other people. Even though emancipation had come to the other coloured people, the facts still spoke of exploitation. Soon after emancipation, the Khoikhoi and the former slaves began to be referred to together as the ‘Cape Coloured People’. This term has stuck right through to twenty-first century South Africa. The traditional culture and social networks of the Khoikhoi had been destroyed over the years by the process of conquest and subjection; they thus had no means of contesting the new social order.

As Thompson has espoused, the Afrikaners conceived of themselves as a superior race, and this led to the Dutch-Reformed church of the colony separating the coloured from white congregations, and the coloured were provided with a distinct and subordinate mission church by 1861. Furthermore, coloured children were banned from the public schools, and only a few had access to the mission schools to receive an education.⁸³ Thus, despite the non-racial terminology in the constitution, the coloured people were treated as an inferior and distinct community of people, dependent on white employers.⁸⁴ This stratification in the Cape appears to be the basis on which the apartheid laws in the second half of the twentieth century were built.

5.2.3.3 Resistance from the Xhosa to white expansion

At the same time during the operation of the Cape as a British colony, the British colonists decided to expand the borders of the colony, but it was confronted by one of the Bantu-speaking mixed farming communities, the Xhosa chiefdoms along Algoa Bay (about four hundred miles east of Cape Town). Conflict and fighting ensued as the Bantu-speaking Xhosa refused to give up their land without a fight, and up until 1811, the Xhosa and the colonists were evenly matched. The Xhosa chiefdoms managed to impede the expansion of the colonists through the interior to the east up until 1811. Thereafter, the colonists with the aid of their superior

⁸³ Thompson (2000) 66.

⁸⁴ *Ibid.*

power in the form of horses, guns and military troops, gradually began to conquer the Xhosa, until all the southern Nguni (comprising of the Swazi, Zulu and Ndebele people) was under White administration.⁸⁵ 'Nguni' represents a collective name for the group of African people of the negroid racial group.

The conquest of the Xhosa marked the destruction of their traditional society. As they were confronted with the influences of the whites, in terms of law and justice, trade and religion, they were unable to hold onto their traditional way of life, culture, values, customs that were so fundamental to the African social solidarity. Foreign commodities like sugar, tea, iron pots; mission churches and schools (which taught western education and Christian theology together with British values, and also introduced literacy, but condemned African cultural practices such as initiation, polygamy and others) had been introduced.⁸⁶ The change opened up new divides amongst the Nguni people, as some decided to reject the white's way of life, while others had accepted it whole-heartedly. Mostert reports that by 1856, following

'the longest, cruellest, and most penalizing of all the frontier wars, the frontier Xhosa were in a severe state of spiritual, political and economic crisis after a century of progressive land loss, strenuous assault upon their traditions and customs, and military defeat.'⁸⁷

The total destruction of the way of life, traditions and values of the Africans, led many of them to seek employment for labour with the white settlers. Ultimately by 1872, when the Cape had responsible government, the division in the society was one along racial and class criteria. The White population - both the British settlers and Afrikaners - were already seeped in the racist ideology.⁸⁸

Despite the fact that they were the members of the white community who had the upper hand, the Afrikaners, (especially those in the eastern parts) were still unsatisfied with the changes made in the society by the British government. This was considerably different to what was obtained during the time of the Dutch East

⁸⁵ Thompson (1995) 278.

⁸⁶ *Ibid.*

⁸⁷ Mostert N (1992) *Frontier: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* 1177.

⁸⁸ Thompson (1995) 280.

India Company. The British government had imposed new laws⁸⁹ and changed existing ones,⁹⁰ which all had the effect of curtailing the ‘freedom’ the Afrikaner community previously had. As stated above, the introduction of circuit courts by the British moved legal justice closer to the oppressed slaves and natives. By 1834, the district administrative system also started to change and the British began to introduce their own system. Magistrates without any local affiliation were appointed to replace the Dutch officials.⁹¹

5.2.3.4 The great trek

As indicated earlier, factors arose which led to the inland spread of the Afrikaner community. The changes by the British government in particular made the Afrikaner community uneasy. A large number of the farmers in the eastern region of the colony decided to leave the colony for the hinterlands in the hope that they would find land on which they could settle. They were those mostly affected by the new laws concerning slaves and the Khoikhoi, as they were more heavily dependent on slave labour. They left with their families, wagons, cattle, sheep, slaves and all moveable property, and began to journey inwards into the interior in a remarkable exodus that has now come to be known as the ‘Great Trek’.⁹² They were in search of a place where they could regulate their own affairs with each other and with their servants, and not have to be dictated to by the British policies and government which were alien to them. As indicated above in section 5.2.3, these Afrikaner immigrants came to be known as the *Voortrekkers* (pioneers).

The *Voortrekkers* had a number of violent encounters with African kingdoms of the Zulu, Xhosa, Ndebele and others on their journey which spanned many years.⁹³ Some of them settled in Natal, whilst others went on across the Drakensberg, from

⁸⁹ Laws, such as Ordinance 50 in 1828 and the Emancipation Law in 1834 strongly curbed the rights that the Afrikaners had apportioned to themselves.

⁹⁰ Under the Dutch dispensation, Afrikaners were free to expand into new areas on payment of a nominal fee. This was changed to the quitrent system by the British, which meant that land ownership was more secure, and also much more expensive.

⁹¹ Thompson (2000) 68.

⁹² Thompson (2000) 69.

⁹³ These encounters were reported to be violent. The structure of the African communities and chiefdoms in those days was one in which they were loosely tied together with no proper cohesion. There were mainly pastoralist and mixed farmers, and so remained semi mobile, moving from area to area, land to land. In a bid to retain and repossess their lands, they led many attacks against those they perceived as white invaders. However, the *Voortrekkers* were able, due to their superior gun power, horses, machines and ammunitions, to overcome them and take over their livestock and lands, leaving just the survivors to flee.

the Orange River in the southwest to the foothills of the Soutpansberg Mountains near the Limpopo River in the north, an area referred to as the Transvaal.⁹⁴ These lands had been heavily populated by the African communities of northern Nguni, and the Sotho-Tswana communities respectively prior to the *Voortrekkers* arrival; however, the unrest (*Mfecane*) caused by King Shaka of the Zulus had caused these communities to disperse.⁹⁵ The land that the *Voortrekkers* met was sparsely populated at the time, and they had little difficulty in overcoming the inhabitants. They were able to take possession of the lands and to settle in these areas.⁹⁶

In 1852, British government entered into a convention with the *Voortrekkers* that settled in Transvaal, recognising their independence. The same was done two years later with representative of the *Voortrekkers* that settled in Bloemfontein (now the Orange Free State). These two settlements became republics: the Orange Free State (between the Vaal and Orange Rivers) and the South African Republic, also called the Transvaal (between the Vaal and Limpopo Rivers). The Natal settlement had been able to run itself until 1843, when it was annexed by Britain, thus marking an end to the *Voortrekker* republic there, and transforming it into a British colony. Surrounding these colonies and republics were independent territories inhabited by Africans that had been displaced, from the Tswana chiefdoms in the northwest, the Venda in the north, and the Swazi, Zulu and Mpondo in the east. These were able to exercise effective control over their own lives and to produce enough grain for their own subsistence. Wherever the Afrikaners settled, they practiced their scarce tolerance of any social interaction with black people, except as masters and servants, thus preserving the patriarchal relationships that had originated in the seventeenth century. This was followed by the British settlers in the region, who merely copied and followed these established mores.⁹⁷

⁹⁴ Thompson (1995) 285.

⁹⁵ *Mfecane* refers to a period of unrest, of dispersion caused by chaos. King Shaka of Zulu, a mighty warrior of his time, had his own men trained in the art of warfare, compared to other Bantu-speaking people. The Zulu's had waged war against other African communities in an attempt to expand their lands. This had resulted in chiefdoms, villages and people fleeing from their homes in a bid to escape the wrath of Shaka's murderous army.

⁹⁶ Thompson (2000) 81-87 and Davenport (2000) 14-15 and 16-20 have written extensively about the *Mfecane*, its causes and its effects on the African communities that were in those areas.

⁹⁷ Thompson (2000) 108.

Under British rule in Natal, there was a substantial influx of British immigrants, soon outnumbering the *Voortrekkers* who had remained in Natal. Nevertheless, the entire white population only counted for about 7 percent of the total population, the rest were Africans. By 1870, sugar was being produced in Natal on a commercial scale for export, and there was need for more labourers to work on the sugar plantations. The refusal of the then administrator of the region to force the Africans to work on the plantations for next to nothing, led to the importation of labourers from India. Many of these never returned to India at the end of their work contracts. They settled in Natal and became engaged in the work force and ended up effectively excluding the Africans from such occupations.⁹⁸ This explains the way in which Indians came to dominate in Natal, especially Durban and Pietermaritzburg.

Various discoveries of natural minerals led to rounds of influx of people from all over the world to dig for precious stones.⁹⁹ Alluvial diamonds found near the confluence of the Vaal and the Harts Rivers in arid country west of Bloemfontein in 1867 led to the birth of Kimberley, the diamond city. Most of the people digging were white, while nearly all their assistants were black. The manual way of digging for the precious stones soon gave way to huge machinery and industrial processes being erected at the different venues of exploitation, and led to the establishment of mines. The influx thus began the migrant labour system in South Africa. Even on the mines, racial segregation continued. African men were denied training to acquire skills to work more efficiently.

Law was used during this period to further racial segregation that had already been underlying. In Kimberley in 1872, proclamations were made to the effect that any black person was *de facto* excluded from owning diamond or trading in diamonds and was liable to imprisonment or corporal punishment if found 'in precincts of the camp without a pass signed by his master or by a magistrate'.¹⁰⁰ African men who looked for employment in these mines were detached from their families in the homelands, as they were housed in hostels under tight discipline, and stayed there

⁹⁸ Thompson (1995) 288.

⁹⁹ Particularly in 1867 in Kimberley and in 1886 in Pretoria.

¹⁰⁰ Worger WH (1987) *South Africa's City of Diamonds: Mine Workers and Monopoly Capitalism in Kimberley, 1867 – 1895* at 116.

for the duration of their contracts, usually spanning from six to twelve months.¹⁰¹ The migrant labour had not only physical implications on the African families, by virtue of the absence of the men, but also social and economic effects. Family life was disrupted for long periods, and women became responsible for the economic and social management of households, thus causing a breakdown of family life amongst the Africans.¹⁰² This can be linked as part of the root cause of the dysfunctionality seen in the African societies and families of South Africa till date.

Between 1870 and the end of the century, African societies of Southern Africa came under intense pressure from both white farmers and business people, traders and missionaries, to British regiments, colonial militia and Afrikaner commandos. They were all unified by one common goal of subjecting the Africans, appropriating their remaining lands, exploiting their labour and dominating their markets. Thus by the end of the century, all the indigenous peoples of Southern Africa were incorporated into states under the domination of the whites. This marked the completion of the process of conquest which begun with Van Riebeeck centuries earlier.¹⁰³

The discovery of gold, diamond and other minerals; and the competition the British government was encountering from other economic and military powers, especially Germany, prompted the colonial government to begin the annexation of the mineral fields, along with the annexation of the other republics (Transvaal, Orange River, Natal and Cape Colony), with the aim of forming the Union of South Africa. This was achieved in 1910 when the colonies and republics joined to form the Union of South Africa by virtue of the South Africa Act of 1909.¹⁰⁴

This act (which served as the constitution for the new Union of South Africa) was an adoption of the Westminster system, like the constitutions of other African countries with British colonial history. It provided for the executive government of the Union to be vested in the King of the United Kingdom, to be administered

¹⁰¹ Thompson (2000) 119.

¹⁰² *Ibid.*

¹⁰³ Maylam P (1986) *A History of the African People of South Africa.*

¹⁰⁴ Thompson (2000) 115.

by a representative referred to as a Governor-General.¹⁰⁵ The legislative power of the Union was vested in the Parliament of the Union, which comprised of the King, Senate and House of Assembly.¹⁰⁶ The judicial power of the Union was vested in the courts, headed by the Supreme Court of South Africa.¹⁰⁷ By this act, the supreme courts of the different colonies became provincial divisions of the Supreme Court of South Africa.¹⁰⁸

The preceding paragraphs have attempted to explain the history and origins of South Africa and its many diverse and multi-racial, multi-ethnic, and multi-coloured peoples. As stated at the beginning, South Africa's history is peculiar and unique in Africa. White power (colonial and settler power) in South Africa was more efficient and often more uncompromising than in many other colonial contexts. It had deep foundations in the region, but, even at its height in mid-century, the settler state was shaped by its African context. In Africa as a whole, colonial rule, though far-reaching in its consequences, was a relatively short-lived historical moment. In South Africa this phase was longer, and more radical social transformations (industrialisation, urbanisation, and agricultural expansion) took place.

Part of what made this phase longer in South Africa, as stated above, can be attributed to the fact that its climate, its diseases, and natural resources allowed for substantial early European settlement, despite the fact that there was no vacant land, as the Khoikhoi and other African peoples had populated the areas known today as South Africa. However, the Khoikhoi and other Africans were weak and naïve in the face of the armoury and cunning of the white man, and were unfortunately susceptible to foreign diseases like smallpox which they had never encountered before, and had not built resistance to it. It wrecked havoc on their numbers, and paved the way for the appropriation of the land by the white population and for the domination of the whites.¹⁰⁹

¹⁰⁵ Part III, sections 8 and 9 of the 1909 Act.

¹⁰⁶ Part IV, sections 19 to 20 of the 1909 Act.

¹⁰⁷ Part VI of the 1909 Act.

¹⁰⁸ Section 98(1) of the 1909 Act.

¹⁰⁹ Beinart (2001) 3-4.

This part of the history shows how the foundations for the next stage of influence in South Africa were laid. In the early twentieth century after the National Party came to government (predominantly Afrikaners), a deliberate crackdown on Africans and their rights began. This is the era usually referred to as the apartheid era.

5.3 Apartheid South Africa

The third influence indicated at the beginning of this chapter is ‘apartheid’. *Apartheid* is an Afrikaans term for ‘separate-ness’ or ‘apart-ness’. It refers to the system of racial discrimination and white political domination adopted by the National Party while it was in power from 1948-1994.¹¹⁰ It depicts the process by which Africans were separated from the white population and made to live their daily lives in separation. It is important to note the role that the ‘law’ as promulgated played in enabling the apartheid system. Segregation was implemented first by way of promulgation of laws that restricted the rights of the African population. The discussion on how apartheid operated in South Africa, will illustrate how law was used as an instrument of oppression, and was used to set the stage for apartheid.¹¹¹ This use of law was abhorrent and illegitimate because it stripped a group of people of their inalienable rights.¹¹²

Apartheid was an elaboration of earlier segregationist traditions derived partly from the thinking of the Broederbond in the 1930s.¹¹³ Apartheid in South Africa was enforced by laws and legislation, which sought to reconstruct South African society on the basis of race distinctions. Apartheid was a policy of the government from the 1940’s. Apartheid laws determined who could vote, who could receive an education and whom one could marry.¹¹⁴ In the practice of apartheid, the state also established a racial register of the population, prohibited sexual intercourse between the races, and restricted ownership of land, property and businesses. All

¹¹⁰ Beck RB (2000) *The History of South Africa* 125.

¹¹¹ See Abel RL ‘Legality without a Constitution: South Africa in the 1980s’ in Dyzenhaus D (ed) (1999) *Recrafting the Rule of Law: The Limits of Legal Order* 66-80.

¹¹² *Ibid.*

¹¹³ Davenport (2000) 373. The ‘Broederbond’ was an Afrikaner organisation that aimed to further Afrikaner nationalism, interests, culture and ultimately aimed to gain control of the South African economy.

¹¹⁴ Hlisi CRD & O’Meara ‘South Africa’ in Martin & O’Meara (ed) (1995) *Africa* 395.

of these steps were taken in a bid to preserve the supremacy of the whites. In this process, the law was used to define and enforce apartheid, and fundamental human rights violations (such as detention without trial, carrying out searches without a warrant) became the norm of the day.¹¹⁵

Prior to the adoption of apartheid as state policy, the foundations of apartheid had been laid in the racial segregation and discrimination that had been evident and was being practised right from the time Van Riebeeck landed at the Cape.¹¹⁶ The state, under the leadership of President Louis Botha and Jan Smuts as Minister for the Interior, (both of the South African party which was dominated by Afrikaners) continued its policy of racial segregation and discrimination by passing various laws which limited and prevented the interaction of the African population with whites. This had the effect of principally stripping the African population of all its land, and resources and making it dependent on the work it found with white farmers or white industrialists on the mines. For instance, in 1913 the Natives Land Act was enacted.¹¹⁷ This Act created areas for Africans which it called 'African reserves'. It prohibited Africans from purchasing or leasing land outside the reserves from people who were not Africans, and also prohibited sharecropping in certain places. The effect of the act was to give the black population about 7 percent of the land area of the Union of South Africa. This was later increased to 11.7 percent in 1939.¹¹⁸ The Act thus had the effect of converting the black population into a great labour pool.¹¹⁹

Over-cropping (due to the large numbers of the African population) meant that the land allocated to Africans failed to yield after a while. This increased the already existing levels of poverty amongst the African population. Death due to

¹¹⁵ *Ibid.*

¹¹⁶ As indicated in the discussion of the history above, the Europeans (comprising mostly of the Dutch, with some of French indigene, British and otherwise) felt they were superior to the indigenes of the land and they implemented policies to keep the indigenes apart, and to keep them in servitude. After South Africa became a Union in 1910, with the South African Party as the party in government, it continued its racist practices, by applying a comprehensive program of racial segregation and discrimination and gained control over the African peasantry. Laws limited land ownership by Africans to demarcated reserves, transformed blacks who lived in rural areas outside the African reserves into wage or tenant labourers for white farmers, and ensured white dominance in the industrial cities and rural townships, thus reducing the African population to a proletarian status in their own lands. These laws will be discussed later.

¹¹⁷ Black (or Native) Land Act No 27 of 1913.

¹¹⁸ The Black (Native) Laws Amendment Act No 46 of 1937.

¹¹⁹ Welsh (1999) 376.

malnutrition became common place especially amongst the children. The African population was then forced to seek jobs with the whites. Many left for the cities to look for work on the mines or as domestic workers in white homes or on the farms to work as labourers. The situation in the reserves forced the African population to greater levels of servitude to the whites. Thus, the South African economy developed the unique characteristic of a complex racial segregation that met white economic needs by making a high proportion of the African people labour for whites.¹²⁰

The huge influx of Africans into the cities looking for jobs led to the introduction of measures to curb the influx by the government. As a result, various laws were introduced to stem the flow of Africans into the cities.¹²¹ These laws required that an African needed a document of identification, ‘a pass’, allowing him to enter into the city (which were predominantly white) for the purposes of work.¹²² It also limited the time interval within which they could be in the cities. Any breach of the ‘pass’ conditions resulted in expulsion from the cities (if they were lucky) or jail time. These laws, however, did not necessarily reduce the number of Africans seeking work in the urban areas. Further, laws also attempted to separate ‘native’ from European administration, with separate legislative bodies and administrations for blacks. This was the recipe for what fully later became known as the system of apartheid.¹²³

¹²⁰ Thompson (2000) 165.

¹²¹ This is similar to what happened with the phenomenon of the ‘poor white question’ that arose in South Africa in the early decades of the 20th century. From about 1886 to about 1932, this question came out in the public domain, as concerns arose about the existence of ‘very poor’ white families. There was a lot of concern about this as it was thought to be a bad reflection on the white race that had considered themselves superior. A Commission of Inquiry (the Carnegie Commission) set up to look into the phenomenon, recommended steps to be taken to address the problem in 1932. However, some commentators have opined that the problem was never as severe as was made to be, as it was more a case of rural poverty (which had existed all along) being brought into the open. See also, Fourie J ‘The South African poor white problem in the early 20th century: Lessons for poverty today’ *Stellenbosch Economic Working Papers*: 14/06. Fourie notes that even though there are many causes that have been adduced for this problem of poor whites (amongst which includes the colonial exploitation of the British, the Anglo-Boer war and others), the problem developed due to a multitude of different exogenous and endogenous factors and cannot be pinned to one cause in itself. Amongst the possible factors are educational attainment, labour policies, environmental and demographic changes, culture, and political development, to name a few.

¹²² The origin of the pass laws can be traced to the Transvaal and the Orange Free State, which had passed discriminatory pass, trading and property laws as early as the 1880s, when strict limitations had been enforced on Indian immigration and enterprise.

¹²³ Welsh (1999) 384.

Between 1910 and 1924, more and more segregation laws were implemented, with the specific purpose of separating black and white lives and development. Strikes by African labour was prohibited; categories of work were reserved for white people;¹²⁴ skilled trades were made more accessible to white youths;¹²⁵ and in labour relations, collective bargaining machinery was restricted to whites and coloureds only.¹²⁶

By 1923, the Natives (Urban Areas) Act¹²⁷ was enacted, which authorised the establishment of African ‘locations’ within urban areas. By this Act, government could then order all Africans in the town or city to reside in the locations. This gave rise to the ‘locations’ which now exist in South Africa. Thus over the years, South African towns developed a characteristic dual form. The modern town with its business sector and suburbs owned by white families and served by black domestics on the one hand, and the ‘locations’ where mud, clapboard, or corrugated iron buildings, with earth latrines, stood on tiny plots of land.¹²⁸

Economically, the mining industry was the backbone of South African. In the mines, the largest group of workers were the Africans both from within South Africa, and from neighbouring countries like Swaziland, Tanganyika (now Tanzania), Northern Rhodesia (Zambia), South West Africa (Namibia), Angola and other countries. Racial discrimination was practiced also. There was a huge disparity in the conditions of employment of the Africans and the whites in the mines. Mine labour was split on a hierarchical and racial basis, with the white miners being better paid by up to eleven times more than the Africans; they were also entitled to paid leave, pension and other benefits which Africans were not entitled to.¹²⁹ This practice of racial discrimination was extended by the state to the manufacturing industries and public works sector also.

With the electoral victory of the National Party (NP) in 1948, D. F. Malan became the Prime Minister of South Africa. His government was the first to consist of

¹²⁴ Mines and Works Act of 1911.

¹²⁵ Apprenticeship Act of 1922.

¹²⁶ Industrial Conciliation Act of 1924.

¹²⁷ No 21 of 1923.

¹²⁸ Thompson (2000) 170.

¹²⁹ Thompson (2000) 167.

Afrikaners only in the history of the Union.¹³⁰ The legal entrenchment of white privilege and racial domination thus became the guiding principle of public policy in South Africa.¹³¹ Apartheid was formally introduced as a government policy and it was applied in a plethora of laws and executive actions.¹³² It became evident in the National Party's creation of unequal and separate education, job reservation for the whites and residential segregation. The NP in seeking to safeguard the interests of the whites, who only formed about 17 percent of the population used the so-called pass laws to control the movement of the black people. It began a systematic process of eliminating any vestige of black participation in the central political system. In 1956, it placed the coloured voters in the Cape Province on a separate roll and gave them the right to elect whites to represent them in Parliament.

The NP used its influence and control of government to fulfil its Afrikaner ethnic goals. All state institutions were 'afrikanised'. Afrikaners were the only ones being appointed to the civil service, army, police and state corporations.¹³³ The Population Registration Act of 1950¹³⁴ led to the racial categorisation of every person, resulting in the breaking up of homes in cases where one parent was classified as white and another as coloured. It was preceded by the Prohibition of Mixed Marriages Act of 1949¹³⁵ and the Immorality (Amendment) Act of 1950,¹³⁶ which made marriage and sexual relations across the colour line illegal.

The legal system that existed under the apartheid system was designed to cater to the white minority. This minority made laws for themselves and others in the society, without any participation by the others in the society in the lawmaking

¹³⁰ Davenport (2000) 377.

¹³¹ Martin & O'Meara (1995) 395. Various laws were passed in furtherance of legally entrenching apartheid, and suppressing any uprising amongst the people. These include the Suppression of Communism Act of 1950, the Riotous Assemblies Act of 1956, the Unlawful Organisations Act of 1960, the General Laws Amendment Act of 1962 (Sabotage Act), and the Terrorism Act of 1967.

¹³² For a list of apartheid legislation passed by the Nationalist Party Government, see 'Apartheid Legislation in South Africa', available at <http://africanhistory.about.com/library/bl/blsalaws.htm> (accessed on 4 May 2010).

¹³³ This practise of favouring one racial group over the other in employment and other areas has been replicated in the economic empowerment laws that are now in force in South Africa. The effectiveness of these laws in re-dressing the wrongs of the past will need to be assessed over a longer period of time.

¹³⁴ Act No 30 of 1950.

¹³⁵ Act No 55 of 1949.

¹³⁶ Act No 21 of 1950.

process.¹³⁷ These laws were for the purpose of enforcing the system and thus lacked legitimacy due to the disenfranchisement of a majority of the society in the process of law-making. As a result, the rule of law (as we know it) became one of the greatest and most serious casualties of the apartheid system.¹³⁸ The principle of Parliamentary sovereignty was in practice then in the country and the courts had little or no say in the legislation that parliament passed and in the actions of government.¹³⁹ This meant that there was no constitutional authority to check the dictatorial, arbitrary and draconian legislation passed by a Parliament which saw itself above the law.¹⁴⁰

This meant that the courts did not have the power or option to review or reverse unjust laws; rather they had to implement and administer the laws as they were. Thus, the majority began to view the courts as instruments in the hands of the government to enforce its laws. Despite this, the attitudes of judges when confronted with cases of discrimination varied, as some were sympathetic to the plight of those suffering human rights abuses, whilst others epitomised the state in their judgements.¹⁴¹

In 1953, the South Africa parliament passed the Reservation of Separate Amenities Act¹⁴² in response to an Appellate Division's critique that segregation was not lawful if public facilities for different racial groups were not equal.¹⁴³ The court's criticism was not received well by the government and prompted the overhauling

¹³⁷ Madala J 'Rule Under the Apartheid and the Fledging Democracy in Post-Apartheid South Africa: The Role of the Judiciary' (2000-2001) *N.C.J. Int'l L & Com. Reg.* 743 at 745.

¹³⁸ Madala (2000-2001) *N. C.J. of Int'l L & Com Reg.* 743 at 748.

¹³⁹ Dyzenhaus (1999) 75.

¹⁴⁰ Madala (2000-2001) *N.C.J of Int'l L & Com Reg* 743 at 756.

¹⁴¹ Spiller PR 'Race and Law in South Africa in the Nineteenth and Twentieth Centuries' in Watkin TG (ed) (1989) *Legal Record and Historical Reality* 215. In what he refers to as 'the tension between race and law', the author discusses how the courts in the then Natal responded to the discriminatory legislation of the apartheid system. He noted that the contrary pull operating on the courts by the two issues have resulted in a confusing and sometimes uneven record of judicial attitudes towards race. Madala (2000-2001) *N.C.J. of Int'l L & Com Reg* 743 at 750, while writing as one who experienced the rawness of apartheid as a black lawyer, mentions how the courts were used to further enforce and give a semblance of 'legitimacy' to the system. He cites instances in which judges went as far as to sanction discrimination in their courthouses even in the absence of laws compelling them to do so.

¹⁴² Act No 49 of 1953.

¹⁴³ This was in direct response to the decision of the Appellate Division in the case of *Abdurahman* 1950 (3) SA 136 (A), which emphasised the need for equality of facilities, following the earlier decision of the court in the case of *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, where the Appellate Division had enshrined the doctrine of 'separate but equal' development in its response to the issue of racial segregation of public facilities.

of the judiciary, by an act of parliament to increase the number of appellate judges from five to eleven, the additional six judges being Afrikaners with the same separatists' ideology.¹⁴⁴

By 1954, more restrictions were imposed through the 'pass laws', as black women were then required, together with their men, to carry a 'comprehensive identity book' (pass/permit), which sought to provide details of their residential and employment status, and which set a time limit within which they could remain in the urban areas.¹⁴⁵ Failure to comply with these restrictions resulted in imprisonment.

The policy of apartheid and its implementation has been referred to as more than a mere system of racial repression; it was designed to prevent black economic competition and to ensure the supply of cheap black labour to farms, mines, and industry.¹⁴⁶ Africans were barred from skilled mining jobs with the passage of the Mine and Works Act as far back as in 1911. This left the white mine workers to gain the economic advantages that rose from the enactment of racial privilege, especially in the gold-mining industry.¹⁴⁷ Black trade unions were prevented from operating and thus the low wages and the exclusion of blacks from health, training and unemployment benefits could not be challenged by the individual workers. After 1948, under the premiership of Verwoerd, apartheid intensified as a system and became a tool for social engineering. It was exercised with a great deal of precision and determination on the part of the government. It extended to the control of the educational system, as better facilities were provided for the education of the whites as opposed to the education of the Africans, which suffered immensely.¹⁴⁸

Beinart notes that apartheid became so dominant a feature of life in South Africa over the next forty years that for one to understand South Africa in this period, one

¹⁴⁴ Thompson (2000) 190-191.

¹⁴⁵ Martin & O'Meara (1995) 395; Davenport (2000) 401.

¹⁴⁶ Martin & O'Meara (1995) 396.

¹⁴⁷ Martin & O'Meara (1995) 397.

¹⁴⁸ The government spent ten times as much *per capita* on white students as on African students, and African classes were more than twice as large as white ones, with most of the teachers in African schools less qualified than the teachers in white schools. Even when they did have the same qualifications, African teachers were paid less than Whites, and they had to teach African school children from text books and to prepare for examinations that expressed the government's racial views.

must understand the system also.¹⁴⁹ Apartheid gave South African society a distinctive profile and a bad reputation amongst the international community. He notes that though there were other segregationist and authoritative regimes in the world, the intensity of the apartheid system, the commitment of the government to pursue it with every resource available to it, and the timing of apartheid (it was happening in an era of decolonisation and majority rule all over the world) made it an anathema in the post-holocaust and post-colonial world.¹⁵⁰

In 1950, the Group Areas Act¹⁵¹ was introduced to empower the government to proclaim and designate certain areas as residential and business areas for particular race groups.¹⁵² This allowed the government to carry out forced removals, in which Africans and other races were forced out of their lands and relocated elsewhere, while their lands were rezoned for white occupation. Sophiatown (four miles west of Johannesburg centre) was one of the few townships where Africans had owned land. In 1955 the inhabitants of Sophiatown were removed to Meadowlands, a further 8 miles away. It was then rezoned for white occupation and renamed Triomf (Triumph). District Six in the Cape was another notorious forced removal case. It had been home to a vibrant coloured community since the early nineteenth century. Inhabitants of District Six were relocated to the sandy wind-swept Cape flats. The same experience was felt by the Indians in Durban also, as their homes and businesses were lost in areas rezoned for whites.¹⁵³

The government grouped the ‘reserves’ set apart for Africans to live, into ten territories. Each territory became known as a ‘homeland’ for a potential African ‘nation’ administered under white tutelage by a set of Bantu authorities.¹⁵⁴ The reserves were thus turned into homelands, with the promise of a granting of independence by government based on the Bantu Homelands Constitution Act of 1971. The homelands created were Transkei (Umtata), Venda (Thohoyandou), Ciskei (Bhisho), Gazankulu (Giyani), KaNgwane (Louieville), KwaNdebele

¹⁴⁹ Beinart (2001) 144.

¹⁵⁰ *Ibid.*

¹⁵¹ Act No 41 of 1950.

¹⁵² Davenport (2000) 378

¹⁵³ Thompson (2000) 194; Lodge T (1983) *Black Politics in South Africa since 1945* 91.

¹⁵⁴ Lodge (1983) 91.

(Siyabuswa), KwaZulu (Ulundi), Lebowa (Lebowakgomo), Qwaqwa (Phuthaditjhaba) and Bophuthatswana.¹⁵⁵

With this, the plan of the government under apartheid to herd the African populations into the homelands (with the exception of those needed as labourers by white employers) began to materialise. This included rigid and sophisticated controls over all black South Africans, through which they were prohibited from visiting an urban area for more than seventy-two hours without a special permit. Officials arrested those who did not have such documentation.¹⁵⁶

This myth of separate territories was used to deny the African citizenship rights throughout the country.¹⁵⁷ By claiming to have established ‘self-governing homelands’ in which Africans could vote and participate in their own political process, the government was hoping to deflect the black opposition at home and international criticism abroad.¹⁵⁸ The homeland policy, however, did not accomplish this goal, as black South Africans saw this policy as a further erosion of their rights, and the international community did not recognise the homelands.¹⁵⁹

Beck argues that in order to enforce its draconian measures, the apartheid regime created the ‘best equipped and best trained’ police force in Africa. It expanded and equipped the South African Defence Force (SADF) and created a bureau of State Security (later known as the National Intelligence Service). The bureau operated secretly; interrogating political suspects, carrying out clandestine military operations against anti-apartheid opponents and organisations.¹⁶⁰ It went as far as destabilising neighbouring independent countries because those countries were sympathetic and giving support to the anti-apartheid movements.¹⁶¹

¹⁵⁵ Martin & O’Meara (1995) 398.

¹⁵⁶ On the average, more than a hundred thousand Africans were arrested each year.

¹⁵⁷ Martin & O’Meara (1995) 397.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* Transkei was the first of four homelands to be granted complete independence. It did not, however, receive diplomatic recognition from any country other than South Africa. The same happened with the homelands of Bophuthatswana (1977), Venda (1979) and the Ciskei (1981).

¹⁶⁰ Such operations included acts of torture, brutality and assassinations in a bid to quash the anti-apartheid movements.

¹⁶¹ Beck (2000) 130. Those countries did in fact host ANC camps and training grounds after the ANC was banned and many of its members had fled the country.

5.3.1 Opposition to apartheid: peaceful resistance

Opposition to the apartheid policy of government came from different sectors and directions. Various groups emerged in the fifties who opposed the apartheid laws and policies. As would be expected, Africans were in the forefront of the struggle, led by the middle class Africans who had managed to get an education and to make a living in the midst of the repressive laws of the government. As early as 1912, a formation of African leaders had begun. It later became known as the African National Congress (ANC). The party together with other organisations demanded justice and equality through peaceful and non-violent protests and petitions to the government, following the style adopted by Gandhi in his fight against the oppression of Indians by the British. These included marches, peaceful boycotts of buses (in protest of hike in bus fares for blacks), of schools (in protest of ‘bantu education’), even of ‘potatoes’ (in protest of the mistreatment of farm workers).¹⁶² These measures did not achieve their desired outcomes, and instead, the government at every turn responded with the imposition of more stringent and restrictive laws, arrests and banning of those involved in the struggle.¹⁶³

Other groups involved in the struggle include the South African Indian Congress, the South African Coloured People’s Organisation, student groups and women’s groups (like the Black Sash) were all involved in the struggle against the racist and discriminatory laws that were being implemented by the government in the name of separate development of the cultures. There was also white opposition to apartheid from church leaders,¹⁶⁴ white academics, staff and students in English-medium universities (particularly the universities of Cape Town and Witwatersrand),¹⁶⁵ artists, authors,¹⁶⁶ and various groups. Groups like the predominantly white Congress of Democrats, the South African Communist Party, the multiracial South African Congress of Trade Unions, and the National Union

¹⁶² Beck (2000) 141.

¹⁶³ Martin & O’Meara (1995) 400.

¹⁶⁴ Notable amongst which were the Anglican priest, Trevor Huddleston, and the Dutch Reformed church leader, Beyers Naude, both of whom were later banned by the South African government from leaving their houses or engaging in any public speaking.

¹⁶⁵ These held large rallies in the late 1950’s against the Extension of University Education Act which forbade Black students from attending White universities.

¹⁶⁶ Authors like Alan Paton of *Cry the Beloved Country* (1947) and *The People Wept* (1958); others like Andre Brink, Nadine Gordimer, and Athol Fugard were able to depict in their novels and plays, the suffering and pain caused by officially sanctioned racism and brutal government oppression.

of South African Students (NUSAS) were all party to the opposition to apartheid.¹⁶⁷

In 1952, the ANC launched Defiance against Unjust Laws Campaign, in which apartheid laws were deliberately broken by the people in a carefully-prepared programme of non-violent passive resistance.¹⁶⁸ This was again met with the usual high-handedness of the government, as over eight thousand arrests were made and a good number of deaths occurred.¹⁶⁹ In a bid to succinctly articulate its demands and desires, the members of these groups formed an alliance and met together in a Congress of the People on 26 June, 1955 at Kliptown, where they adopted the Freedom Charter.¹⁷⁰ This was a defining moment in the struggle against apartheid, and even though there were some criticisms of the Freedom charter,¹⁷¹ it became the platform on which the decades-long struggle of the ANC and other groups stood, even after it came into power in 1994. Another result of the campaign was that it inspired international sympathy.¹⁷²

The government's unsurprising reaction to the adoption of the Freedom Charter was that it imposed more repressive laws, and arrested and tried the alliance leaders for treason. Citing the charter as a communist manifest, the government charged them for attempting to overthrow of government.¹⁷³ They were later acquitted in 1961 by the Supreme Court on the grounds that the government had failed to prove its case. During this time, the main opposition party, the ANC, experienced a number of splits, with the more important one being the formation of the Pan Africanist Congress of Azania (PAC) by members of the ANC who

¹⁶⁷ Initially formed in 1924 by both English and Afrikaner students, the Afrikaner students left the organisation when it became increasingly liberal in its condemnation of apartheid. The organisation invited US senator Robert Kennedy in 1966, and he gave a series of lectures denouncing apartheid. Even after it was banned, NUSAS continued to educate generations of white students about the evils of apartheid.

¹⁶⁸ Martin & O'Meara (1995) 400.

¹⁶⁹ Welsh (1999) 432.

¹⁷⁰ Thompson (2000) 208. The Freedom Charter emphasised and boldly stated that 'South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people'. It enumerated the demands of the resistance to equality, protection of human rights, political, economic and social rights and many others.

¹⁷¹ Some of the critics felt that the Freedom Charter was communist inspired because it called for the redistribution of land and nationalisation of the economy; workers felt that it did not make reference to the protection of their rights to strike; and Africanists felt that the charter was faulty in recognizing all 'national groups' rather than Black supremacy.

¹⁷² Welsh (1999) 432.

¹⁷³ Beck (2000) 140.

believed that the cooperation with other nationals was weakening the African position, and they were weary of white radicals and socialist ideology.¹⁷⁴ Anti-apartheid demonstrations went on despite the treason trial, and the government continued its crackdown on the demonstrations. The Sharpeville massacre of 1960¹⁷⁵ and other events round the country marked the turning point for the anti-apartheid organisation in their adoption of non-violent means of protest.

In 1961, the Republic of South Africa Constitution Act¹⁷⁶ was passed which declared the former Union of South Africa a republic. It was largely based on the 1909 Constitution, with substitution of the terms and terminologies under the 1909 act that indicated allegiance to the United Kingdom with the word 'state'.¹⁷⁷

It must be noted that due to the disenfranchisement of the African members of the population, they could not at this time contribute anything to the making of both the 1909 and 1961 constitutions. These documents were purely the act of the white members of the population; firstly done under colonial authority in 1909, and then even under minority rule in 1961. These documents were therefore only reflective of the wishes of a small fraction of the people.

As has been discussed in the previous chapters, for a constitution to claim legitimacy, it should be the product of the people. There should be a process whereby the people (represented by the majority, as there will always be dissenting voices) will be able to come up with provisions of the constitution, and agree on the resultant document to bind them. It is in this that we are able to see to the legitimacy of the process. The 1909 and 1961 Constitutions of South Africa did not meet this criterion of legitimacy. They were impositions on the majority of the population.

¹⁷⁴ Beck (2000) 141.

¹⁷⁵ Demonstrations had been organised by the PAC all over the country against the pass laws. The idea was for people to gather at police stations without their passes and to invite arrest, hoping to fill the jails and clog the justice system. In the African township of Sharpeville south of Johannesburg, the white dominated police force opened fire on the demonstrators, killing about sixty-nine of them and wounding many more. This led to a spiral of demonstrations and arrests all over the country. The government declared a state of emergency, mobilised its army reserves, and outlawed the ANC and PAC.

¹⁷⁶ Act 32 of 1961.

¹⁷⁷ '1961 Republic of South Africa Constitution Act No 32', available at <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01904.htm> (accessed on 5 May 2010).

5.3.2 Opposition to apartheid: violent resistance

After the events in 1960, the ANC and the other opposition parties were quick to realise that nonviolent methods had not achieved what they desired (which was freedom for the Africans). In 1961, the ANC and the SACP formed *Umkhonto we Sizwe* (Spear of the Nation), the militant wing of the ANC, an underground guerrilla army, to conduct an armed struggle against the regime.¹⁷⁸ It engaged in acts of sabotage against symbolic targets like the post offices, other government buildings, railroads and electrical installations and various others, while disavowing terrorism and attacks on whites.¹⁷⁹

The PAC also formed its own military wing, Poqo. The apartheid government launched a crack-down on these organisations, succeeded in infiltrating them, and by July 1963, the government had succeeded in arresting all the leaders, including Nelson Mandela. This pushed the resistance further underground and many of the members of the resistance who had not been arrested, fled into exile in other countries to further the work of sensitising the international community of the injustices in South Africa.¹⁸⁰

The arrested leaders were tried and found guilty of sabotage and sentenced to life imprisonment.¹⁸¹ By 1964, the leaders of the Poqo and other groups had also been arrested and imprisoned, and the government succeeded in effectively crushing the anti-apartheid movement at that time.¹⁸² Another decade of more repressive laws and brutality by the apartheid government would pass before the masses could again confront the regime. During this period, the arts was used as a medium of rising the awareness of Africans to their rights; the rapid growth of the economy also meant that more and more black semi-skilled and unskilled workers were present (since they were needed in the economy). This raised the level of consciousness of the blacks as to their situation.

¹⁷⁸ Martin & O'Meara (1995) 401.

¹⁷⁹ Thompson (2000) 211; Martin & O'Meara (1995) 401.

¹⁸⁰ The ANC, under its president Albert Luthuli, sent Oliver Tambo and others abroad to establish offices in London, Dar es Salaam, and an ANC headquarters in exile in Lusaka, Zambia.

¹⁸¹ These men included Nelson Mandela, Walter Sisulu, Govan Mbeki, Raymond Mhlaba, Elias Motsoaledi, Andrew Mlangeni, Ahmed Kathrada and Dennis Goldberg.

¹⁸² Beck (2000) 146.

The banning of the opposition parties and the imprisonment of their leaders and others even remotely associated with them had left Africans relatively voiceless, leaderless and also vulnerable to the social engineering evidenced in the Homeland policy of the apartheid government. In the late sixties, a new approach to the problem of apartheid emerged. This was less optimistically liberal than the ANC had been before Sharpeville, more realistic in its appraisal of political forces than the PAC, and less vulnerable to the charge of collaborationism with the ‘white apologists’ in general. This approach was epitomised in the philosophy of Black Consciousness movement.¹⁸³

Drawing on earlier South African traditions, the Black Consciousness movement emphasised a strong sense and pride in being African, black self-esteem, self-assertion and psychological emancipation for the black man from generations of conditioning to see himself as the underdog and an inferiority complex instilled over the years. The philosophy focused on race rather than class as the central issue in the liberation struggle. This philosophy was devised by black intellectuals, led by Steve Biko, a student at Natal University’s ‘non-white’ medical school.¹⁸⁴ Biko was able to look beyond his fellow Africans to include in his black spectrum all the oppressed groups of South Africa. He led a breakaway of black students from the National Union of South African Students (NUSAS) and formed the South African Students Organisation (SASO) in 1968 to provide black students with a vehicle entirely on their own.¹⁸⁵

The philosophy gained grounds in black universities, among educated African elites and in schools. Its effects could be seen by the early 1970s in the growth in the number of literate blacks who could emotionally connect and appreciate the ideas of the movement. In 1972, it organised a Black People’s Convention, which acted as an umbrella organisation for groups advocating Black Consciousness principles. Initially, the apartheid government accommodated it because it seemed to be at par with their agenda of promoting separateness amongst blacks, however, following the 1973 Durban strikes, Biko and other leaders were banned for

¹⁸³ This philosophy drew inspiration from the notions of ‘Black Theology’ or ‘Black Power’, which had their origin in the civil rights movement in America, and also from the writings of Frantz Fanon in Algeria.

¹⁸⁴ By segregating black students in black universities, Verwoerd had unintentionally created a hotbed for black resistance, from which emerged this new movement.

¹⁸⁵ Davenport (2000) 437.

organising rallies in support of the new Frelimo government in Mozambique. The leaders were tried and convicted under the Terrorism Act and imprisoned on Robben Island.

The ideology of Black Consciousness, however, penetrated the urban schools, and in 1976 erupted in another uprising, this time starting from the schools in Soweto township. It started with a peaceful march organised by the scholars demanding the abrogation of the compulsory use of Afrikaans as a medium of instruction in black Transvaal schools.¹⁸⁶ About 15,000 secondary school children took part in the march. The government reacted in its usual use of force and opened fire on the students, killing at least two and injuring many others. What followed was a clampdown on the students and organisers of the march, as they were arrested, detained and tortured by the security services.

The violence which met the march sparked off a spate of violent rioting that spread across the country, from Soweto to the Cape. Indian and coloured teens also partook of the protests and government buildings came under attack. Arrests followed in which the government forces did not offer any of the protection meant for ‘under-aged’ suspects, and the casualty figures were high.¹⁸⁷ These were the largest and most widespread outbreaks of racial violence in South Africa, and it marked the beginning of the end for the apartheid regime. The government in its reaction placed the blame for the uprising on the Black Consciousness movement, and arrested Steve Biko in August 1977. He died in police custody in September that year, of so-called ‘natural causes’ according to the usual government explanation.¹⁸⁸

5.3.3 The end of apartheid

Around Africa, changes were taking place. African nationalism had swept through the continent and had started a course of events in which political power started to flow in the opposite direction. Africans were agitating for independence. As a

¹⁸⁶ Davenport (2000) 449.

¹⁸⁷ Many of the victims were children that were arrested, denied access to their parents or lawyers. Many died, according to official explanations, while allegedly trying to ‘escape’ or ‘committed suicide’, or simply of ‘unknown causes’.

¹⁸⁸ Beck (2000) 162.

result, colonialism was coming to an end as more and more African countries were gaining independence. In 1957, Britain transferred power to African nationalists in the Gold Coast (Ghana) as the first African country to gain independence in those times.¹⁸⁹ From 1960 Britain started to transfer its colonial powers to nationalist parties in many of the African countries where that it had been a colonial power. In West Africa, countries like Nigeria, Sierra Leone and the Gambia gained independence, followed by other countries, such as Tanganyika (Tanzania), Uganda, Kenya, Malawi, Northern Rhodesia (Zambia), Basutoland (Lesotho), Bechuanaland (Botswana) and Swaziland over the next four years. An attempt by the white settler community in Rhodesia to prevent such an outcome by unilaterally declaring independence in 1965 led to a bloody civil war between the white minority and the black majority, and eventually ended in 1980 with the election of its first African leader in the person of Robert Mugabe. All of these events put pressure on the apartheid government of South Africa.¹⁹⁰ In 1975, Angola and Mozambique also gained independence.

5.3.3.1 International pressure (apartheid contributing to the development of international law)

The international reaction to apartheid was slow to build up. Many of the developed countries in Europe and the United States were principal trading partners with South Africa, for its minerals. The huge resource of diamonds, gold and other minerals in South Africa made the country almost indispensable to the international community. South Africa at the time had very substantial foreign trade, and foreign investment in the country was substantial also.¹⁹¹ This situation created vested interests, which despite the apartheid policy of the government, and despite the segregation that had begun as far back as the early century, ensured that there was initially no reaction by the international community.¹⁹² When eventually the international community began to react to apartheid, it was initially inconsistent as those countries which were trade partners were anxious to protect

¹⁸⁹ Thompson (2000) 214.

¹⁹⁰ Thompson (2000) 214

¹⁹¹ Reddy ES 'Apartheid and the International Community' (1974) 4(3) *Issue: A Journal of Opinion* 20.

¹⁹² *Ibid.*

South Africa.¹⁹³ At the first session of the UN in 1946, India raised the issue of the treatment of its nationals in the Union of South Africa, and the refusal of the South Africa government to grant them citizenship rights.¹⁹⁴

The Sharpeville massacre of 1960 further turned the attention of the international community on South Africa. The UN Security Council, Britain, and other European governments all condemned the actions of the state police. In 1952, the United Nations General Assembly (UNGA) started passing annual resolutions condemning apartheid.¹⁹⁵ This was usually passed by a majority vote, with some of the developing countries voting against the resolution or abstaining.¹⁹⁶ As more and more African and Asian countries (former colonies) gained independence and joined the UN, the UNGA became increasingly outspoken in condemning apartheid and taking measures to eradicate apartheid.¹⁹⁷ After the Sharpeville massacre, however, the tide changed with the almost unanimous adoption of Resolution 1598 (XV).¹⁹⁸ Between 1962 and 1963, it passed resolutions calling for the breaking of all ties with South Africa, and for instituting an arms embargo;¹⁹⁹ it also formed a Special Committee on Apartheid, a Unit on Apartheid to denounce the regime. South Africa was removed from the membership of various UN agencies like UNESCO in 1956, the ILO in 1961 and the WHO in 1965. The UNGA kept up its campaign against the apartheid regime as more and more events and unrest unfolded in South Africa. In 1974 it rejected the South African delegation's credentials at the UNGA, so that the delegation could no longer speak at the gathering, even though they retained their membership.²⁰⁰

¹⁹³ Welsh (1999) 433 at 454, where he refers to how even after the Sharpeville killings, President Eisenhower of the United States was quoted to have said he felt that the US should not sit in judgement on a *difficult social and political problem* six thousand miles away.

¹⁹⁴ Klotz A (1995) *Norms in International Relations: The Struggle against Apartheid* 41. These were those who had migrated to South Africa as indentured labourers, meant to be sent back home after their term of service. The South Africa government, however, claiming not to be able to afford the return ticket cost settled them with land, but refused to grant them citizenship rights.

¹⁹⁵ Klotz (1995). This was based on a motion put forward by India. It was the first motion before the UN that specially dealt with the practice of apartheid.

¹⁹⁶ For example, Resolution 1248 (XIII) of 1958 was adopted 70-5-4, with Australia, Belgium, France, Portugal and Britain voting against it. The Dominican Republic, Luxembourg, the Netherlands, and Spain abstained.

¹⁹⁷ Welsh (1999) 433. The Gold Coast (Ghana) was the first to gain independence in 1957, as Britain demonstrated its commitment to advancing all her African possessions to independence.

¹⁹⁸ Adopted 93-1-0, with Portugal as the only country voting against it.

¹⁹⁹ Beck (2000) 149.

²⁰⁰ *Ibid.*

At the regional level, calls were made by the Organisation of African Unity (OAU) on all African countries to isolate and destroy the apartheid state. Many African countries denied South African Airways landing rights and air space, and most refused to give the country diplomatic recognition. The OAU set up a Liberation Committee with headquarters in Dar es Salaam, Tanzania. This committee provided camps, education and military training for South African refugees, but they lacked the means to eradicate apartheid. The African countries were themselves weak regimes, struggling for survival.²⁰¹ South Africa's neighbours, in particular, were in varying degrees economically dependent on South Africa. Their work force mostly worked in South African mines and factories and farms; and on the military front, they were no match for South Africa's military power.²⁰²

In the year in which the Soweto riots happened, the reaction of the world to the Soweto riots was unprecedented in the history of the international community's engagement with the apartheid issue. The UN passed a mandatory arms embargo on South Africa in 1977.²⁰³ The US and its European counterparts insisted on majority rule and universal suffrage in South Africa. The economy went into recession as international investors in South Africa began to disinvest in the economy of the country in large numbers. This led to considerable capital out flow from the country.²⁰⁴ All of this affected the whites greatly as their businesses failed and they started emigrating in huge numbers.²⁰⁵ Consequently, the impact and pressure on the apartheid government led it to start considering change, with the caveat that white rule be maintained.

5.3.3.2 Moderation of apartheid policies

The government, headed by P.W Botha in 1978, began its reforms to the apartheid system by scrapping some of the apartheid laws and practice that were *not*

²⁰¹ Thompson (2000) 215.

²⁰² *Ibid.*

²⁰³ Refer to annexure 1 for a tabulation of the sanctions against SA 1960-1989.

²⁰⁴ Companies and banks like Barclays Bank, Chase Manhattan, Ford, Polaroid, and GM Motors began to pull out of the country. The banks had made loans available to South Africa to bolster its economy. These investments, loans and credit facilities were the life line of the South African economy.

²⁰⁵ Beck (2000) 163-164. Beck reports that in 1977 alone, South Africa experienced a net loss of more than 3,000 highly skilled and educated white professionals.

essential to the maintenance of white supremacy (emphasis mine).²⁰⁶ By the early 80's, black trade unions that had existed illegally were legalised and free to prescribe membership rules. The Congress of South African Trade Unions (an umbrella body for trade unions) was formed as a result; it was a large and increasingly powerful trade union.²⁰⁷ Mines and industries were allowed to hire Africans to long-term contracts (as opposed to temporary employment); they were also allowed to bring their families into the urban areas as permanent residents; public places like hotels, restaurants and many others became open to all races; sports became integrated; the amount of spending on African, coloured and Indian schools increased as the demand for more skilled workers increased; by mid-1980s up to about 30 percent of enrolments in former white only universities were students from previously disadvantaged groups.²⁰⁸

In 1983, a new constitution was promulgated by the government. The Republic of South Africa Constitutional Act 1983 (Act 110 of 1983) provided for the position of a 'President' as opposed to a Governor-General.²⁰⁹ The executive authority of the government was made up of the President and the members of cabinet (ministers appointed by the State President to perform such functions). The legislative powers of the Republic were vested in the State President and Parliament of the Republic, which was the sovereign legislative body and could make laws for any purpose in the republic.²¹⁰ The 1983 Constitution provided for three uni-racial chambers; a House of Assembly (comprising of whites elected by whites); a House of Representatives (comprising of coloureds elected by coloureds) and a House of Delegates (comprising of Indians elected by Indians).²¹¹

The separate houses were allowed to deal only with problems and legislation pertaining to their own population groups. Africans, who formed 75 percent of the country's population, were totally excluded from the process, and the House of Assembly on its own formed the majority, accordingly when joint sessions were

²⁰⁶ This meant that the intent for real reform was lacking, and the action(s) of government were geared towards giving the impression, especially to the international community, that reform was taking place.

²⁰⁷ Beck (2000) 167.

²⁰⁸ Beck (2000) 169.

²⁰⁹ Section 6 of Act 110 of 1983.

²¹⁰ Part VI of Act 110 of 1983.

²¹¹ Section 37; sections 41-43 of Act 110 of 1983.

held, the whites still held the majority.²¹² This new constitutional system was unsatisfactory for the blacks, coloureds and Indians, especially as the coloureds and Indians realised that they did not really have power under this system, only a semblance of power, and the Africans were out rightly excluded from the system. These groups were greatly dissatisfied with the developments and considered it a slap in the face.

This general feeling of dissatisfaction led to black resistance mounting and erupting once again in the country, only this time around, it was on an unprecedented scale and was more formidable than ever as the culture of protest had grown in the country.²¹³ Out of this feeling of dissatisfaction, the United Democratic Front (UDF) in 1983 was born. It was to coordinate internal opposition to apartheid, since the ANC and other political parties were still banned. Delegates of all races, trade union, sports bodies, community groups, women's and youth's organisations gathered under this umbrella body, and in their own way, in their various dynamics, organised resistance to the apartheid government.²¹⁴ The UDF also functioned as a national anti-apartheid political voice at a time when government had silenced all the official groups by banning them.²¹⁵ The nature of the UDF and its structure (the fact that it was an affiliation of over 500 organisations), made it difficult for the government to deal with. As an ephemeral organisation, it lacked formal leaders or property, or any real base.²¹⁶ This culture of protest coupled with international criticism,²¹⁷ led to divestment by foreign companies in the South African economy.²¹⁸ Economic sanctions imposed by the

²¹² Thompson (2000) 225- 226.

²¹³ Thompson (2000) 228; Beck (2000) 170. It erupted as a culture of protest pervading the black population of South Africa. Any and every opportunity that presented itself was used as a form of protest, especially funerals. Blacks became openly defiant, wearing and waving the banned ANC colours and flags, singing ANC songs, and toyi-toying. *Amandla ngawetu* ('the power is ours!') became a popular refrain amongst the people.

²¹⁴ Thompson (2000) 228-229.

²¹⁵ Beck (2000) 171.

²¹⁶ *Ibid.*

²¹⁷ The commonwealth was very vocal in condemning apartheid, and in 1986 sent an Eminent Persons Group (EPG) composed of senior British Commonwealth politicians on a policy recommendations mission. This mission proposed the withdrawal of the military from townships, freedom of assembly and discussion and the release of Mandela as recommendations. It was abruptly cut short when South Africa carried out air raids on its neighbouring countries. Its report was scathing and resulted in the Commonwealth intensifying its sanctions.

²¹⁸ South Africa's economy was heavily reliant on foreign investment. Thus, when many state governments, universities and businesses withdrew from South Africa, or sold their investments in companies that did business in South Africa between 1984 and 1986, the South African economy

international community²¹⁹ added pressure on the apartheid government, resulting in the government's attempt at reform.

In 1986, in continuing with the 'reforms' of the government, over thirty-four legislative enactments relating to pass laws were repealed, and a policy of 'orderly urbanization' was implemented to allow mixed-race areas. Segregation laws were repealed to allow multiracial political parties, interracial sex and marriage and many others. However, the apartheid government was not ready for the power to slip from the control of the whites, thus government's response to the protests by the blacks continued to be one of a total clampdown. The economic meltdown and the resulting pressure from white businesses, the loss of confidence in the government by the white electorate, the continuous unrest within the country, and the pressure from the international community, all ultimately contributed to the collapse of the apartheid system of governance in 1989.²²⁰

In January 1989, President Botha suffered a stroke and resigned temporarily as president. However in August, he resigned completely after a Cabinet revolt, when it became clear to him that he no longer had the support of his cabinet. This led the way for FW de Klerk, a younger member of parliament to assume office as state president following the House of Assembly elections. The following year, in February, de Klerk announced in his speech in parliament the lifting of the ban on the ANC, and other political parties, the freeing of political prisoners, and the suspension of capital punishment.²²¹ It marked a watershed moment in the history of South Africa. The speech was an encapsulation of the preconditions for

plummeted. Chase Manhattan bank in the US created a financial crisis in South Africa when it refused to roll over its short-term loans and other banks followed suit.

²¹⁹ The commonwealth had imposed sanctions, and in October 1986, the US Congress passed the Comprehensive Anti-Apartheid Act over President Reagan's veto, banning new investments and bank loans, ending South African air links with the US, prohibiting South African imports, threatening to cut off military aid to allies suspected of breaching the international arms embargo against South Africa.

²²⁰ Thompson (2000) 240; Beck (2000) 180. See Tafel HL 'Regime Change and the Federal Gamble: Negotiating Federal Institutions in Brazil, Russia, South Africa, and Spain' (2010) *Publius* 1-29 at 14-17, in which he discusses *inter alia* the events that led to the collapse of the apartheid system, and how the negotiations to bring about a new democratic system evolved. See also Jung C & Shapiro I 'South Africa's Negotiated Transition: Democracy, Opposition and the New Constitutional Order' (1995) 23(3) *PAS* 269-308; and Corder H 'Towards a South African Constitution' (1994) 57(4) *Mod. L. Rev.* 491-533.

²²¹ See De Klerk Foundation website for the full speech, titled 'Opening of 2nd Session of 9th Parliament of the Republic of South Africa', available at https://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=73749&cat_id=1595 (accessed on 5 May 2010).

negotiations that had been set out in both Mandela's letter to the President²²² and the Harare Declaration²²³ of August 1989.²²⁴ Nine days later, on the 11th February 1990, Nelson Mandela was released unconditionally from prison after twenty-seven years in jail.²²⁵

After this, negotiations were entered into by the leaders of the white establishment and by those of the black resistance under the umbrella of the Convention for the Democratic South Africa (CODESA). This was a difficult and thorny period in the history of South Africa which saw many more acts of violence being committed by the state and state sanctioned agencies, by the whites and also by the Africans on one another.²²⁶ At different times, negotiations were called off between the parties due to lack of trust and the politically explosive situation in the country then.²²⁷ Unrest continued in various areas of the country, and deadly physical struggles for power continued even though negotiations for a peaceful settlement were on at that time.²²⁸

Between 1990 and 1994 (when the democratic elections took place) the number of deaths due to political violence in the country multiplied.²²⁹ Amidst all these acts of violence and the situation in the country, negotiations resolved that April 27, 1994, be chosen as the date for South Africa's first democratic election, that an interim constitution be put in place for the elections, and that a final one was to be drawn up by an elected Constitutional Assembly after the elections.²³⁰ The elections itself witnessed a massive turn out of the African population, who were enfranchised for the first time in their lives. The ANC won with the largest margin

²²² Nelson Mandela had written a ten page memorandum to the president in early 1989, which set out his pre-conditions for the suspending of the armed struggle and the opening of formal negotiations with the government.

²²³ This document was the result of a meeting of the ANC executive in exile, in Zimbabwe in August 1989. It was a cautious document setting out five conditions to be satisfied for them to enter into negotiations with the apartheid government to end apartheid.

²²⁴ Thompson (2000) 246.

²²⁵ Thompson (2000) 247.

²²⁶ For an analysis of the increase in the rate of violence during this period, see article of Sisk T, 'The Violence-Negotiation Nexus: South Africa in Transition and the Politics of Uncertainty' (1993) 9(1) *Negotiation Journal* 77 – 94; Jung (1995) 23(3) *PAS* 269; and Corder (1994) 57(4) *Mod. L. Rev.* 491.

²²⁷ Beck (2000) 181; covert operations had continued against the ANC and other members of the resistance for another two years after this time.

²²⁸ Thompson (2000) 248; Corder (1994) 57(4) *Mod. L.Rev.* 491; Tafel (2010) *Publius* 1.

²²⁹ South African Institute of Race Relations Survey Report 1996 – 1997, 600; Sisk (2009) 9(1) *Negotiation Journal* 77.

²³⁰ Sisk (2009) 9(1) *Negotiation Journal* 77.

of 62.65 percent, and the National Party (NP) won 20.4 percent. This meant that the NP held the position of deputy president in the five-year transitional government. On the 10 May 1994, four years after leaving jail, Nelson Mandela was sworn in as the president of South Africa, with Thabo Mbeki (of the ANC) and FW de Klerk (of the NP) as deputy presidents, signalling the dawn of the new democratic South Africa.

5.4 Post Apartheid South Africa: An analysis of its Constitutions

This period after the swearing in of the country's first democratically elected president is one that has introduced big changes in the South African legal system. The changes have been so far reaching that it could be described as an entire 'overhaul' of the legal system. The change and the contingent adjustments are still ongoing, and this particularly in the way people perceive the law, also the legitimacy it holds during apartheid, immediately after apartheid; and even now some 16 years after apartheid. These developments and changes will be explored in the following sub-sections.

5.4.1 Interim Constitution

The 1993 Constitution of South Africa (Act 200 of 1993) famously referred to as the 'Interim Constitution', was passed into law on the 25th January 1994. It was a transitional document, used as the vehicle to move South Africa from a racial autocracy to a non-racial democracy.²³¹ The need for such a document which acted as a 'stop-gap' was apparent because the negotiating parties at that time were not democratically elected, and did not have any democratically proven

²³¹ Sachs A (Justice of the Constitutional Court of South Africa) 'Constitutional Developments in South Africa' (1996) *N.Y.U.J.Int'l L. & Pol.* 695-709 at 695; see also Jung & Shapiro (1995) 23(3) *PAS* 269-308; Corder (1994) 57(4) *Mod. L. Rev.* 491-533 gives an expansive explanation of the contents of the 1993 Constitution in terms of the provisions for fundamental rights, executive, legislative and judicial powers and other provisions also.

constituencies.²³² It was also conceived in order to mitigate the different demands from different parties that came through during the negotiations of 1990 to 1993.²³³

Principal to these demands was the push by the whites to seek to protect their interests under the new process (government), in light of the fact that they constituted the minority in the society.²³⁴ They wanted the ‘self-appointed’ negotiators to be the ones to write the new constitution for the country, and then for it to be put to a referendum in order for it to gain legitimacy. The ANC and other liberation parties, however, were of the view that such a document would lack legitimacy, and that a constitution had to be drafted by a democratically elected Constitutional Assembly, which would be representative of the people.²³⁵ They insisted that the only purpose of the negotiations was to arrange conditions for general elections to establish a constituent assembly, with the purpose of drafting a new constitution.

These differences in demand gave rise to a compromise position: the interim constitution provided a framework of the basic principles, agreed to by the parties, governing the country within the transitional period, and upon which the 1996 Constitution was to be built.²³⁶ These principles were to be justiciable by a future Constitutional Court, which would verify that the 1996 Constitution had been formulated in accordance with the constitutional principles laid out in the interim constitution.²³⁷ According to the interim constitution itself, it was a ‘historic bridge between the past of a deeply, divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of

²³² Lemmer E & Olivier M ‘The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom’ (2000) 33(1) *De Jure* 138 at 141; Sarkin J ‘The Drafting of South Africa’s Final Constitution from a Human Rights Perspective’ (1999) 47(1) *The American Journal of Comparative Law* 67-87 at 68.

²³³ Sachs (1996) *N.Y.U.J. Int’L & Pol* 695. The parties to the negotiations included the then South African government (together with other white parties), and some of the appointed heads of some of the homelands on the one hand, and on the other hand, the ANC and other liberation parties.

²³⁴ *Ibid*; Sarkin (1999) 47(1) *The American Journal of Comparative Law* 67 at 68; see generally Basson DA (1994) *South Africa’s Interim Constitution: Texts and Notes*.

²³⁵ Gross A, ‘The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel (2004) *Stan. J. of Int’l L.* 46-104 at 59.

²³⁶ *Ibid*; Sachs (1996) *N.Y.U.J. Int’L & Pol* 695; principles such as a commitment to a multiparty democracy based on universal adult franchise, individual rights without discrimination, and separation of the powers of government amongst others.

²³⁷ Sachs (1996) *N.Y.U.J. Int’L & Pol* 695.

human rights, democracy and peaceful co-existence for all South Africans,
...²³⁸

Sachs sees the interim constitution as a vehicle to ‘establish new institutions of democracy that would take over responsibility for government and for drafting the new constitution with the mandate of the whole nation, and also to function in terms of a bill of fundamental rights within which government and executive action could take place and legislation could be adopted’.²³⁹

The preamble of the interim constitution reflected its history and the forces that brought it to being.²⁴⁰ It indicated that the document was being adopted in the interim while a more representative constitution was being drawn up, for the promotion of national unity and restructuring and governance of South Africa.²⁴¹ Amongst other things, the Constitution provided for a Government of National Unity²⁴², a five year transition²⁴³ and a bicameral parliament made up of the Senate and National Assembly. Both houses of parliament also formed the Constituent Assembly in order to draft a new constitution. An important inclusion in the interim constitution was the chapter on fundamental rights (the Bill of Rights). This was particularly necessary in view of the past history of the country. Chapter three (sections seven to thirty-five) guaranteed internationally accepted basic human rights.²⁴⁴

Historic provisions were also included in the 1993 Constitution, amongst which were the creation of public institutions as a mechanism to safeguard the new democratic system. Institutions such as the Office of the Public Protector, the Human Rights Commission, the Commission on Gender Equality, the Public Service Commission were created in chapter 8 of the interim constitution, to serve

²³⁸ Chapter 16 (Provision on National Unity and Reconciliation) of the Constitution of South Africa Act 200 of 1993.

²³⁹ Sachs (1996) *N.Y.U.J. Int’L & Pol* 695 at 696; see also Dugard J ‘International Law and South African Constitution’ (1997) 8(1) *EJIL*. 77-92.

²⁴⁰ ‘We, the people of South Africa declare that-

WHEREAS there is a need to create a new order ... so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;...’

²⁴¹ Preamble to the 1993 Constitution.

²⁴² Chap 6, S. 84-95 of the interim constitution.

²⁴³ Section 38 of interim constitution.

²⁴⁴ Corder (1994) 57(4) *Mod. L. Rev.* 491-533 at 511-514 explains these rights in the 1993 Constitution, and how they came to be.

as ‘watch dogs’ in protecting the new democratic system.²⁴⁵ Also the nine provinces of the country were provided for.²⁴⁶

5.4.2 The Constitution of the Republic of South Africa, 1996

5.4.2.1 Constitution-making process

As indicated above, the agreement of the negotiating parties was that once the interim constitution was in place, a Constituent Assembly would be elected to adopt a more representative constitution. Despite having a legitimate mandate from the people to draft such constitution (as a result of being an elected body), the Constituent Assembly knew this was insufficient. The Assembly felt that the process of constitution-making had to be transparent, open and credible. The resultant constitution had to have an enduring quality and had to enjoy the support of all South Africans.²⁴⁷ They felt that the credibility of the resultant constitution depended on a process through which people could claim ownership of the constitution.²⁴⁸ The people not only had to feel a part of the process, but the content of such constitution had to be representative of the views of the people.²⁴⁹ This constitution came to be known as the 1996 Constitution.

The Constituent Assembly thus adopted a process whereby public meetings (especially in rural areas, where the people did not have access to the web or print media), workshops, community based awareness campaigns, and extensive radio and television campaigns were rolled out. A free monthly newsletter was also published by the Constitutional Assembly, called *Constitutional Talk*. This

²⁴⁵ Section 110-123 of the 1993 Constitution of South Africa; see also Corder (1994) 57(4) *Mod. L. Rev.* 491-533.

²⁴⁶ Schedule 1 to the 1993 Constitution.

²⁴⁷ This was also necessary in order to placate the fears and concerns of minority groups, and yet satisfy the majority also.

²⁴⁸ Chapter 13 (Public Participation Process) of Ebrahim H (1998) *The Soul of a Nation: Constitution-Making in South Africa*. Also available at <http://www.sahistory.org.za/pages/library-resources/online%20books/soul-of-nation-constitution/soul-of-nation-index.htm> (accessed on 7 May 2010);

²⁴⁹ For a full explanation of the participatory system adopted by the Constituent Assembly, see Chapter 13 of Ebrahim; see also Sarkin (1999) 47(1) *AJCL* at 69-87 where he divides the process of making the 1996 Constitution into three distinct time periods: a) negotiations from May 1994 leading to the adoption ceremony in May 1996, b) the first Constitutional Court certification process ending in September 1996, and c) the second round of negotiations leading to certification by the Constitutional Court in December 1996.

reviewed in detail the submissions, committee activities and debates in the Assembly.²⁵⁰ This ensured that the people were informed of the proposals for the 1996 Constitution, and they were invited to share their views on the document. It was a very rigorous process, at the end of it, about 1.7 million submissions were received, of which just about 11 000 were substantive to the issue of the 1996 Constitution.²⁵¹

In the second phase, the Constituent Assembly produced a Refined Working Draft, based on the comments and submissions that had been made to it. This document was then circulated, and comments received. After the incorporation of the comments made, the constitution was then agreed upon by the assembly.²⁵² On the 8th of May 1996, the Constituent Assembly completed two years of work on a draft of the 1996 Constitution that replaced the interim constitution. It was then sent to the Constitutional Court to fulfil part of the requirement of the negotiations that before a new constitution was passed into law, the document would have to be certified by the Constitutional Court to be in accordance with the principles elaborated in the interim constitution.²⁵³ The court insisted on certain amendments and subsequently granted certification,²⁵⁴ after which the final document was signed into law.

This has resulted in the 1996 Constitution being the product of a highly consultative process, which has ensured its entrenchment as the basic law of the nation. The making of the current constitution in particular involved participation and agreement, which allowed many parties in South Africa to sense that they had a share in shaping of the country's new structure.²⁵⁵ The ability of parties and political factions with differing views, perceptions and concerns to coexist in the

²⁵⁰ Hovell D and Williams G 'The Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melb. U. L. Rev.* 101.

²⁵¹ Chapter 13 of Ebrahim; though Hovell & Williams (2005) 29 *Melb. U. L. Rev.*, quoting from *Constitutional Talk*, the Official Newsletter of the Constitutional Assembly, contend that the figure amounts to some over 2.5 million submissions received from the public.

²⁵² Ebrahim, chapter 13.

²⁵³ See Gross (2004) *Stan. J. of Int'l L.* 46–104 at 61. Gross notes that the requirement that the Constitutional Court certifies the 1996 Constitution to be in accordance with the principle agreed on in the interim constitution, was aimed at guaranteeing to all involved parties that the 1996 Constitution was based on the agreed principles as opposed to only reflecting a majority decision by those who happened to control the Constitutional Assembly.

²⁵⁴ CCT 37/96 Ex parte Chairperson of the Constitutional Assembly: In re: *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996, 1997 (2) SALR 97 (CC).

²⁵⁵ Gross (2004) *Stan. J. of Int'l L.* 46–104 at 62.

consultative processes carried out, strengthened feelings of belonging and participation. Also the hearings before the Constitutional Court and the rulings of the court showed that there were alternative ways of engagement that did not require violent confrontations that had characterised the society in the past.²⁵⁶

The 1996 Constitution has been described as masterpiece of post-conflict constitutional engineering in the post cold war era.²⁵⁷ Its design in the context of South Africa's transition to democratic rule which started with the release of Mandela in February 1990 has enabled it to completely reconfigure South Africa's political institutions. It effectively ended decades of oppressive white minority rule.²⁵⁸

5.4.2.2 Content of the 1996 Constitution

The 1996 Constitution itself was not very different from the interim constitution, especially as far as the constitutional protection of human rights is concerned.²⁵⁹ The contents of the documents remained basically the same, except for a few changes.²⁶⁰ Amongst the changes evident in it was the replacement of the Government of National Unity by a majoritarian government.²⁶¹ The party with the greater number of votes at election and with a majority in parliament would be the one in government. Such party (acting through the president) would appoint the cabinet members and other officials without necessarily consulting the minority parties that would be represented in the National Assembly.²⁶²

²⁵⁶ *Ibid.*

²⁵⁷ 'South Africa: Constitutional Development in the 1990s', available at <http://www.constitutionnet.org/en/countrysouth-Africa> (accessed on 6 May 2010).

²⁵⁸ *Ibid.*

²⁵⁹ See Sarkin (1999) 47(1) *AJCL* at 69-87 for an analysis of the provisions of the 1996 Constitution in relation to the Bill of Rights.

²⁶⁰ Amongst the changes is the provision for socio-economic rights in sections 24, 26, 27 and 29. Another change under the new constitutional dispensation is the abolition of the death penalty by the Constitutional Court in *S v Makwanyane* 1995 BCLR 665, despite the outcry in certain quarters for its retention. See Milton *et al* 'Demise of the Death Penalty: The Constitutional Court Pronounces' (1995) 8 *S. Afr. J. Crim. Just.* 188-204; Sarkin J 'Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation of its Decisions on Capital and Corporal Punishment' (1996) 113 *S. African L. J.* 71.

²⁶¹ This was been rebutted by Lijphart A 'South African Democracy: Majoritarian or Consociational?' (1998) 5(4) *Democratisation* 144, where he argues that though the permanent constitution of 1996 moved away from 'strict power sharing' as a formula, it is, however, still much closer to consociational than to majoritarian democracy.

²⁶² Sections 86 and 91 of the 1996 Constitution.

The Constitution also introduced changes to the legislative structure of the country. According to section 42 of the Constitution, parliament consists of both the National Assembly and the National Council of Provinces (not the Senate as seen under the interim constitution). The National Council of Provinces represents the provinces²⁶³ to ensure that provincial interests are taken into account in the national sphere of government.²⁶⁴

5.4.3 South African Constitution in light of the social contract theory and the positivist school of thought

The basis of state formation in western liberal democracies is the theory of the social contract. This is the point that runs through the body of this thesis. The social contract theory explains why and how governments are formed, and what makes them legitimate or illegitimate, and thus sets the standard against which to measure the legitimacy of a constitution. Regarding the 1996 Constitution, Heyns observes as follows:

‘... [T]he new constitution must be truly legitimate; it must reflect the soul of our nation; it must be an expression of our history and of our deepest values, because only then will it have the spontaneous support of all our people. And to do this, it must surely be rooted in African soil’.²⁶⁵

This emphasises the fact that the legitimacy of the constitution means that it must be owned by the people and should reflect the wishes and values of the people. In this will the constitution have the support of the people.

As indicated above, the 1996 Constitution was the outcome of a broadly participatory process, in which South Africans were given the opportunity to make their input in the constitution. The provisions contained in the Constitution were negotiated by the Constituent Assembly, and these provisions were further

²⁶³ Provided for in Schedule 1 of the 1993 (Interim) Constitution.

²⁶⁴ Section 42(4) of 1996 Constitution.

²⁶⁵ Heyns C ‘Where is the Voice of Africa in our Constitution?’ *Occasional Paper 8*, (1996) Centre for Human Rights, University of Pretoria, available at http://www.chr.up.ac.za/centre_publications/occ_papers/occ8.html (accessed on 13 May 2010).

validated (or in some cases removed) by the input of the people of South Africa. This is reflected in the preamble to the Constitution which reads as follows:

‘We the people of South Africa, recognise the injustices of our past; ...
We therefore, *through our freely elected representatives*, adopt this
Constitution as the supreme law of the Republic so as to’²⁶⁶

This participation and ownership by the people is echoed by Professor Dugard when he says:

‘Great care was taken in the drafting of the South African Constitution of 1996 to ensure that it was, and was seen to be, *a constitution of the people, for the people, by the people*. The Constitutional Assembly that drafted the Constitution *had legitimacy* as it comprised of the elected leaders of South Africa. But they did not draft the Constitution alone. On the contrary, they consulted widely with society. Members of the public were invited to make suggestions and they did, in the form of written representations. Moreover, members of the Constitutional Assembly travelled throughout the country to public meeting at which positions were expounded, clarified and defended ... at least the South African Constitution has the appearance of being a popularly accepted instrument. In this sense it differs from the constitutions which colonial rulers, notably Britain, imposed upon or granted to their erstwhile colonies on independence.’²⁶⁷

Lemmer and Olivier also observe of the 1993 Constitution (which laid the foundation for the 1996 Constitution) that

²⁶⁶ Own emphasis.

²⁶⁷ Dugard J ‘Twenty Years of Human Rights Scholarship and Ten Years of Democracy’ (2004) 20 *S. Afr. J. on Hum. Rts* 352-353. It is important to note that the allusion to the British colonies by Prof Dugard reflects what has been analysed in the preceding chapter as the imposition by the colonists of replicas of their constitutions on their colonies at independence, as was the case in Nigeria (author’s emphasis).

‘...these constitutions, which resulted from a negotiated peaceful settlement, should be regarded as ...a blueprint of and impetus for further transformation of ... The aforesaid negotiated peaceful settlement entailed that the break with the past would be achieved in an evolutionary and progressive fashion. The starting point was the granting of indemnity enabling political adversaries to unite in a negotiating process which would ultimately produce the 1993 Constitution. ... During a collective drafting process, *special care was taken to include all South Africans: historically marginalised groups such as women and traditional leaders were encouraged to voice their opinions and actively participate in the process*’.²⁶⁸

In applying the social contract theory to the South African scenario, it is seen that the constitution-making process that preceded the 1996 Constitution gives an indication of the extent of involvement of the citizens (‘We the people’) in the process. The preamble of the 1996 Constitution is therefore a valid representation of the participatory and consent-seeking process that was engaged in to get to the final document. The processes of consultation, whereby the desires, demands and needs of the people were considered and eventually factored into (or not) the final product, is essential for legitimacy. The preamble is an indication of the social contract, and it has been said to govern the rest of the Constitution in such a way that its contents become truly fundamental.²⁶⁹ By making it fundamental, it reflects the protection that the different groups that make up South Africa are guaranteed under the Constitution.

It has been noted that constitutions based on the consent and legitimate participation of the people translates into a sense of ownership by the people. Levy alludes to this when he says that such constitutions would ‘...emphasize a kind of democratic positivism, relaying on the constitution that a people did in fact agree to ordain and establish.’²⁷⁰ The people see it as their own document, binding on

²⁶⁸ Lemmer & Olivier (2000) 33(1) *De Jure* 138 at 141 (own emphasis).

²⁶⁹ Marasinghe L ‘Constitutional Reform in South Africa’ (1993) 42(4) *Int’l & Comp. L. Q.* 827-854 at 849.

²⁷⁰ Levy JT *Montesquieu’s Constitutional Legacies*, available on the Social Science Research Network website at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117087 (accessed on 12 May 2010).

them all and with which they all should comply. This is reflected in the saying ‘...for the people, by the people’. Such a situation of ownership means that the people are ready to defend the constitution, and do not approach it with the nonchalance that is seen in other jurisdictions where the binding documents lack legitimacy.

As mentioned in preceding chapters, participation by the people in the process brings about ownership of the constitution by the people. If this is the case, they do not see it as a strange or foreign document but rather as a document which sets out what they expect from their society, and what is expected from them in return. Whoever or whatever government is in power as a result of the constitutional process is viewed by the people as their own elected official(s). As a result, they accord such people or government their support and allegiance. This fosters a situation of compliance, in which the law is respected and obeyed, and in which government policies are geared towards the improvement of the wherewithal of the people.

This confidence in the constitution, and the sense of ownership that people have towards it and the system, is conveyed in the way and manner that the populace is ready and willing to defend the constitutional provisions and the underlying philosophy of the South African state. Deviant and unlawful behaviour is instantaneously frowned upon and questioned. The activism of the media and civic organisations as they expose ‘deviant’ behaviour (cases of breach of law, corruption, fraud and others, by those in positions of authority, as well as breaches of law by ordinary citizens), and advocate for the different purposes of their different organisations, is very vibrant. This provides a good check for the state as it acts as a constraint on leaders endowed with the authority to provide protection and to produce public goods, from using their authority for predatory purposes.²⁷¹ The recent issues that have arisen concerning media freedom will be discussed later in this chapter.

²⁷¹ Leeson PT ‘The Calculus of Piratical Consent: the myth of the myth of social contract theory’ (2009) 139(3/4) *Public Choice* 443-459 at 447.

5.4.4 Connection with Kelsen's theory

Another angle from which to examine the extent of the rule of law in South Africa is to juxtapose the issue against Kelsen's theory relating to the efficacy and efficiency of a legal system. According to Kelsen, as explained in the preceding chapter, one of the different ways in which a system (be it constitutional or not) is conferred with the status of legitimacy, is if the people that it seeks to bind, act or behave by and large, in such a way as to show that they believe that they are bound by it.²⁷² This belief is played out in the actions of the people, in the way and manner in which the citizenry and people living within a system are able to rise in defence of the legal system that they have fashioned and which emanates from them.

The fact that South Africans have been part of the fashioning of the post-apartheid constitution and that the legal system that South Africa operates is in line with the demands of the people makes it very easy for the citizenry to take ownership of the running of their country, its democracy, constitution and legal systems. This has recently been re-emphasised by President Zuma in his speech at the presentation of the 2010 budget before parliament on Wednesday, the 12th May 2010.²⁷³ Starting his speech, the president quoted the preamble of the Constitution of the Republic to signify the fact that government rested on the mandate of the people of South Africa as a collective. He traced the history back through the CODESA negotiations and the defeat of apartheid in order to buttress the fact that 'the people' were the decision makers and that the constitution was not imposed on them in any way.²⁷⁴

²⁷² Oqwurike (1979 112-113, see section 4.3.3 in the previous chapter.

²⁷³ 'Address by President Jacob Zuma on the Occasion of the Presidency Budget Vote for 2010/2011', from the Parliamentary Monitoring Group website at <http://www.pmg.org.za/briefing/20100512-presidency-ministers-budget-speech> (accessed on 15 May 2010)

²⁷⁴ *Ibid.*

5.5 Mechanism for the rule of law: The South African Legal System

This section will look more closely at the legal system of South Africa, in order to give a brief overview of the nature thereof. Due to the various external influences that the country has been exposed to in the last few centuries, South Africa has developed a multicultural society in which a multiplicity of legal systems exists and are observed. This is legal pluralism and it exists as a corollary of the prevailing cultural pluralism. Legal pluralism has been defined variously as ‘a state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs’,²⁷⁵ ‘a situation in which two or more legal systems coexist in the same social field’,²⁷⁶ or ‘a state whereby the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system’.²⁷⁷

Van Niekerk argues that legal pluralism can be defined widely or narrowly. Narrowly, it may be seen as the co-existence of various officially recognised state laws.²⁷⁸ State laws are said to refer to the Roman-Dutch common law as influenced by English law, adapted and developed through judicial decisions and legislation, as well as indigenous law incorporated into legislation or pronounced in judicial decisions.²⁷⁹ In the wider sense, ‘legal pluralism’ could be construed to include the living laws of religious communities, such as Hindu, Muslim and Jewish communities, as well as unofficial indigenous law and people’s law.²⁸⁰ All of these have been meshed together to form a unique system of law in the South African legal system, and it is only when one gets to different areas and units of the legal system that the different influences become more apparent.

²⁷⁵ Griffiths J ‘What is Legal Pluralism?’ (1986) 24 *J. Legal Pluralism & Unofficial L.* 1.

²⁷⁶ Merry SE ‘Legal Pluralism’ (1988) 22 *Law & Soc’y Rev* 870.

²⁷⁷ Merry (1988) 22 *Law & Soc’y Rev* 870 at 871.

²⁷⁸ Van Niekerk GJ ‘Legal Pluralism’ in Bekker JC (ed) et al (2002) *Introduction to Legal Pluralism in South Africa* 3.

²⁷⁹ Bekker (2002) 3.

²⁸⁰ *Ibid.* These are the laws that are being applied by unofficial indigenous institutions in the rural areas (like the court of the ward heads), and also being applied unofficially by state recognised institutions such as the chiefs’ courts.

5.5.1 Customary (indigenous) law in South Africa

As we have stated in the previous chapter, customary law has been defined as the practices of a particular group of people (which in many cases has been handed down over the years), which they believe in and submit to; or as the norms and values which operate amongst a people, in which they invest binding authority; and as deriving from social practices that the community concerned accepts as obligatory.²⁸¹ It has also been defined as ‘a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority’.²⁸² It is embodied in the culture of a people.

These unwritten laws are brought about and discovered in different ways; by questioning informants, by on-the spot observation, and by the spoken word. Due to the fact that it originates from the practices of the people, in its original form, customary law is oral, unwritten and passed down from generation to generation.²⁸³ It is thus evolving, allowing forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place.²⁸⁴ For the purposes of clarity, it is important to note that the reference to customary law in this context means Indigenous African law, which refers to the norms and practices of the indigenous inhabitants of South Africa that have developed and guided the way of life of the people even prior to the advent of the Europeans.

Over time, due to the effects of civilization and colonialisation, customary law has been reduced to writing in many instances. This has resulted in an ethnocentric summation of customary law in Africa, as the initial authors who penned down customary law were people of European origin. They tended to write what was told to them and what they observed from a European mindset, which included a predisposition to give a privileged status to the written as opposed to the spoken word.²⁸⁵

²⁸¹ Bennett TW (2004) *Customary Law in South Africa* 1.

²⁸² Hamnett I (1975) *Chieftainship and Legitimacy, an Anthropological Study of Executive Law in Lesotho* 14.

²⁸³ In which process a lot of it is lost, and replaced by the practises of generations coming after. Thus, customary law is ever changing and not static.

²⁸⁴ Bennett (2004) 3.

²⁸⁵ Bennett (2004) 2.

Ethnocentrism created a situation in which in colonial times, the West's attitude to indigenous people was marked by a deepening prejudice. It has been said that Western writers perceived the local institutions they were dealing with, at best as *exotica* and thus beneath concern.²⁸⁶ In cases where it was of concern, customary law was perceived through the positivist lens, which excluded any social or moral standards for judging the validity of commands or ideas. Instead, positivism claimed that 'law properly so called' emanated from the commands of a sovereign,²⁸⁷ and it thus concerned itself with the workings and implementation of the legal code by the courts, regardless of how the rules were implemented in society and whether they were morally or politically legitimate.²⁸⁸

When the process of colonising southern Africa began, all the customary laws of the region were unwritten,²⁸⁹ allowing for considerable variety. This did not suit the settler community who considered uniformity a primary goal to be achieved through the codification of customary law. Thus began the business of capturing oral custom in written texts.²⁹⁰ This capturing of customary law led to the existence of the 'official' version of customary law, which has its origins in the colonial administration's attempt to eliminate the uncertainties of custom by reducing it to writing.²⁹¹

The capturing of customary law in writing was done more to suit the purposes of the state in denigrating customary law. As such, the codification of customary law ended up describing less the customs of the people, and more what the government (and the 'chiefs' it had imposed on the people) thought they ought to be doing.²⁹² Also the codified version of customary law was cast in the language of western law, which further removed it from the living practices of the people. The more the social practices of the communities developed, the more the rules of customary

²⁸⁶ *Ibid.*

²⁸⁷ Austin (1999) *Province of Jurisprudence Determined* in *Lectures on Jurisprudence* 101.

²⁸⁸ Bennett (2004) 9.

²⁸⁹ Except for Madagascar, where the Merina monarchs had been codifying the law from around 1828.

²⁹⁰ For example, in 1869 much of the customary law on marriage and divorce amongst the Zulu was reduced to writing, and by 1891, an amended version was made binding law, referred to as the Natal Code of Zulu Law 19 of 1891.

²⁹¹ South African Law Reform Commission (SALRC) Project 90 – *The Harmonization of the Common Law and the Indigenous Law: Report on Customary Marriages* (August 1998) 19, available at http://www.justice.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf (accessed on 22 May 2010).

²⁹² SALRC Report on customary marriages, *ibid* 20

law applicable to them changed. The codified version, however, remained unchanged until it was formally changed by the law-maker.²⁹³

5.5.1.1 Customary law during colonial times

In South Africa, customary law was adversely affected by the advent of the settlers and the colonialists. At various times, the Dutch government in certain areas of the country refused to recognise the existence of customary law amongst the indigenes,²⁹⁴ whilst in certain areas, a system of indirect rule was imposed, through which the traditional leaders were allowed to continue leading the people, but receiving their instructions from the colonial government.²⁹⁵ In 1913 (after the unification of the country), the Natives Land Act²⁹⁶ was promulgated. This act prohibited Africans from buying or leasing land outside certain ‘scheduled’ areas, thus laying down a territorial framework for segregation.²⁹⁷

In 1927 the Native Administration Act²⁹⁸ was introduced, in which customary law was recognised and allowed to apply nation-wide, but only in a separate system of courts (created by the Act), constituted by traditional leaders and others constituted by native commissioners. The courts of traditional leaders could only apply customary law, along with the courts of native commissioners, but those of native commissioners had discretion to apply either customary or common law in suits between ‘natives’ involving questions of customs followed by ‘natives’.²⁹⁹ It has been said that though ostensibly it appeared that the purpose of the Act was to rejuvenate African tradition, this was not true, as its actual intention was to establish a separate system of justice to match segregation in land and society.³⁰⁰

²⁹³ *Ibid.*

²⁹⁴ South African Law Reform Commission (SALRC) Project 90 – *The Harmonization of the Common Law and the Indigenous Law: Report on the Conflict of Laws* (September 1999), Chapter 1, available at http://www.justice.gov.za/salrc/reports/r_prj90_conflict_1999sep.pdf (accessed on 17 May 2010).

²⁹⁵ Beall J & Ngonyama M (2009) ‘Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development: The Case of Greater Durban, South Africa’, Crisis States Research Centre Working Paper No. 55 (series 2) available at <http://www.crisisstates.com/download/wp/wpSeries2/WP55.2.pdf> (accessed on 17 May 2010).

²⁹⁶ Act 27 of 1913.

²⁹⁷ Bennett (2004) 41.

²⁹⁸ Act 38 of 1927.

²⁹⁹ Bennett (2004) 42; this was stipulated by section 11(1) of the Native Administration Act.

³⁰⁰ SALRC Report on Conflict of Laws, *supra* 10.

Over these courts, the Native Appeal Court was established for appeals from either the courts of traditional leaders or from the commissioners' courts. In applying its discretion as to when to apply customary law, the Native Appeal Court was guided by the decision of the Appellate Division in the case of *Ex parte Minister of Native Affairs: In re Yako v Beyi*,³⁰¹ in which the court held that in the exercise of its discretion, the court had to consider all the circumstances of a case, and without any prejudice, select the appropriate law to deal with the facts of the case.³⁰²

This system of dealing with customary law lasted from 1927 until the 1980's, when the Law of Evidence Amendment Act was promulgated³⁰³ in an attempt to 'de-racify' the terms for the recognition of customary law. Section 1(1) of the Act enabled any court to take judicial notice of the law of indigenous law... provided that it was not opposed to the principles of public policy or natural justice.³⁰⁴ This provision extended the sphere of the application of customary law to all courts in the country.³⁰⁵ However, in spite of this, customary law was still associated with race and treated as a subordinate element of the legal system.

5.5.1.2 Proof and ascertainment of customary law

Customary law derives from the practices of particular communities, which differ considerably from place to place, and change constantly over time. This makes it more challenging for a court to prove or ascertain customary law applicable in a particular case, in order to apply it. Another issue is the fact that customary law can be ambiguous (in the sense that it is uneasily poised on the boundary between law and fact),³⁰⁶ and thus the modes of ascertaining them are different. With law, such rules can be ascertained through authoritative texts, whilst with fact, such issues must be proved by leading evidence. Prior to 1988, the courts relied on existing precedents and texts, and where litigants alleged that there were other, more genuine rules, they were allowed to call witnesses to prove the evidence of such other rules.³⁰⁷

³⁰¹ 1948 (1) SA 388 (A).

³⁰² 1948 (1) SA 388 (A) at 397; SALRC, 12.

³⁰³ Act 45 of 1988.

³⁰⁴ Section 1(1) of law of Evidence Amendment Act of 1988.

³⁰⁵ SALRC, 13.

³⁰⁶ Bennett (2004) 44.

³⁰⁷ Bennett (2004) 48.

The 1988 Law of Evidence Amendment Act provides that all courts in the country should take judicial notice of customary law, subject to the qualification that ‘such law can be ascertained readily and with sufficient certainty’. Thus, the courts continue to rely on existing precedents and texts (so-called ‘official version’), and then also on evidence called by parties who disprove the position of the texts on the particular rule in question.

As indicated above, the Law of Evidence Amendment Act also provides for the condition of the repugnancy clause in the application of customary law by the courts. The repugnancy clause, as we have seen in chapter four, stipulates that any rule of customary law that is found to be ‘repugnant to natural law, equity and good conscience’ would be declared null and void and be struck down, and therefore not be applied. The repugnancy clause is one of the legacies of the colonial system in Africa, and is still applied in certain African countries.³⁰⁸

In South Africa (with its peculiar history of apartheid),³⁰⁹ the courts have over time exercised considerable restraint and moved away from the use of the repugnancy clause in relation to the application of customary law.³¹⁰ They applied the repugnancy clause only with regard to ‘such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence’.³¹¹ Though not yet repealed, courts have expressed views and sentiments to the effect that in the light of the provision of section 9 of the Constitution on the right to equality, it would be unconstitutional to strike down a particular rule of customary law on the basis of it being ‘repugnant to the principles of natural justice, equity and good conscience’.³¹² This would be tantamount to elevating the common law legal

³⁰⁸ Nigeria, South Africa, Ghana, Zambia and Zimbabwe are some of the African countries still using the repugnancy clause. Taiwo EA ‘Repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions – Some lessons for Nigeria’ (2009) 34(1) *J.J.S.* 89-115 at 91 notes that, in the case of South Africa, the courts now apply customary law subject to the Constitution and any legislation that specifically deals with customary law.

³⁰⁹ During apartheid, the repugnancy clause was used as a weapon to nullify anything indigenous in the country at that time. There was a deliberate effort (as was in every other area of life) to elevate the common law (comprising of English common law and the Roman-Dutch law) above the African customary law/ Indigenous law. It was all part of the attempt to mentally and physically subjugate the African population.

³¹⁰ *Chiduku v Chidano* 1922 SR 55; *Matiyenga & Another v Chinamura & Others* 1958 SRN 829 at 831.

³¹¹ *Chiduku v Chidano*, 1992 SR 55 at 58.

³¹² Two cases of *Mahaye v Mabuso* 1951 NAC 280 (NE); *Bhe v Magistrate of Khayelitsha* 2005 (1) BCLR 1 (CC).

system above the customary law legal system and would be a breach of the Constitution.³¹³

5.5.1.3 Impact of international law on customary law

The development of international law in the area of human rights brought to the fore issues dealing with customary law in communities all over the world, especially African countries. The Universal Declaration on Human Rights (UNDR)³¹⁴ emphasised a situation whereby human rights norms are universal and would have universal application all over the world.³¹⁵ This is also replicated in various international human rights instruments that South Africa has ratified over the years.³¹⁶ By ratifying these instruments, the application of international human rights norms in South Africa is mandated. This, however, poses difficulty in a culturally diverse society like South Africa.³¹⁷

The UDHR provides for every member of a society to be entitled to the realisation of his or her cultural rights³¹⁸ and to freely participate in the cultural life of the community to which he or she belongs.³¹⁹ These are also replicated in other international human rights instruments.³²⁰ It is the general belief that the South African Bill of Rights has been modelled after these international instruments.³²¹

³¹³ Commentators have diverse views on the clash between culture and equality. See the discussion on the different views in Grant E 'Human Rights, Cultural Diversity and Customary Law in South Africa' (2006) 1 *J.A.L.* 2-23 at 9; see also Kaganas F & Murray C 'The Contest between Culture and Gender Equality under South Africa's Interim Constitution 1994 (21) *J.L. & Soc'y* 409 at 427-428; Bennett (2004) 56-57, and Bronstein V 'Reconceptualising the Customary Law Debate in South Africa' (1998) *S.Afr.J. on Hum.Rts* 388 at 410.

³¹⁴ UN General Assembly (UNGA) Resolution 217A (III) of 1948.

³¹⁵ See also para 5 of the Vienna Declaration and Program of Action, UNGA, UN Doc.A/CONF.157/23, 12th July 1993.

³¹⁶ These include International Covenant on Civil and Political Rights, 1966 (ICCPR), ratified 10 March 1999; Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), ratified on 14 January 1996; International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD), ratified on 9 January 1999, and others.

³¹⁷ Grant (2006) 1 *J.A.L.* 2-23 at 3.

³¹⁸ Article 22 of UDHR.

³¹⁹ Article 27 of UDHR.

³²⁰ For example Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); Article 27 of ICCPR.

³²¹ Bennett (2004) 84, whilst noticing that article 27 of the ICCPR applies only to minorities, he notes also that the right to self-determination and doctrine of aboriginal right provide the international law background to the right to culture in South Africa.

The 1996 Constitution makes the consideration of international law mandatory for the courts when interpreting the Bill of Rights,³²² and makes application of customary international law automatic in South Africa, with certain exceptions.³²³ By these provisions, the Constitution enables international law to exert a strong influence on the status and development of customary law in South Africa.

5.5.1.4 Customary law, the Constitution and the Constitutional Court

Under the 1996 Constitution, the right to culture is restated. Sections 30 and 31 make special provision for this right, which in itself gives rise to the recognition and application of customary law. Culture has been defined to mean ‘a people’s store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society.’³²⁴ Section 30 guarantees everyone the right to use the language and to participate in the cultural life of their choice. It provides:

‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights’.³²⁵

The section gives individuals the right to their culture, whilst section 31 (which is similar to section 30 of the 1993 interim Constitution) grants group rights to communities or associations to practise their culture. Section 31 of the Constitution reflects the formulation of article 27 of the ICCPR and grants every person the right to participate in the cultural life of his or her choice. It provides not only for the right to participate in a cultural life, but also goes further to reinforce the right to culture, religion or language being enjoyed together with other members of the same community. It provides:

- (1) ‘Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
 - (a) to enjoy their culture, practise their religion and use their language; and

³²² Section 39(1) of the 1996 Constitution.

³²³ Section 232 of the 1996 Constitution.

³²⁴ Bennett (2004) 79.

³²⁵ Section 30 of 1996 Constitution.

- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.³²⁶

As far as recognition is concerned, section 211(3) of the 1996 Constitution, in addition, instructs that,

‘the courts *must* apply customary law when that law is applicable, subject to the provisions of the Constitution and any legislation that deals specifically with customary law’.

These sections indicate that the Constitution has made customary law a core element of the South African legal system, both in its recognition and application.³²⁷

In the exercise of its constitutional mandate under the interim constitution, the Constitutional Court, in a number of cases, has referred to the place of customary law in the current dispensation in South Africa. In *S v Makwanyane & Others*,³²⁸ the court in abolishing the death penalty had recourse to the customary law principle of *ubuntu*. The Court held, *inter alia*, that ‘to be consistent with the value of *ubuntu* ours should be a society that wishes to prevent crime ... [not] to kill criminals simply to get even with them.’³²⁹ The court further held, in explaining the concept of *ubuntu*, that ‘it placed value on life and human dignity, that the life of another person is at least as valuable as one’s own’. Respect for the dignity of every person is integral to this concept.³³⁰

The provisions also have (apart from the two normal restrictions implicit in fundamental rights) an ‘internal limitation clause’ in section 31(2) which states that

³²⁶ Sections 31(1) and 31(2) of the 1996 Constitution.

³²⁷ Bennett (2004) 43.

³²⁸ 1995 (3) SA 391 (CC).

³²⁹ Per Chaskalson J at para 131.

³³⁰ *Ibid*, para 225.

‘the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.’³³¹

The introduction of the constitutional system in South Africa necessitated a measure of reform of customary law. One of the most important reasons why this was necessary was because the official version of customary law (as found in written form) was lagging behind social practice.³³² In many cases, many aspects of customary law violated the internal control measure of section 31, and also violated certain provisions of the bill of rights in many aspects. It was quickly realised that if the courts were to strike down the aspects that were in violation, they would not be able to replace them with another form of customary law, thus leaving a gap.³³³ Legislative reform thus became necessary and came in the form of the work of the South African Law Reform Commission,³³⁴ discussed below.

Legislative reform has reduced the friction between customary law principles and the Constitution to an extent, but not absolutely. Recently, the Constitutional Court had to deal with the question of the compatibility of customary law and the right to equality. One of such cases was the joint cases of *Bhe v Magistrate Khayelitsha*, *Shibi v Sithole* and *South African Human Rights Commission v President of the Republic of South Africa* (commonly referred to as the *Bhe* case).³³⁵ These cases dealt with the similar issue of the rights of females to inherit under customary law. The principle of male primogeniture was central to the customary law of succession. This determined that as a general rule that only a male relative of a deceased could inherit in an intestate situation. Female members of the family did not qualify to inherit.³³⁶ This was in sharp contrast to the constitutionally guaranteed right to equality. The Constitutional Court in these cases had to determine the compatibility of the two opposing systems.

³³¹ Bennett (2004) 89. This has been upheld in the case of *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE) at 1100-1101; the High Court in upholding section 31 and refusing to allow corporal punishment in schools, felt that section 31 could not be read to permit practices that are specifically excluded by the legislation on corporal punishment.

³³² Bennett (2004) 96.

³³³ This was discussed by the constitutional court in the case of *Bhe* case as one of the options open to the court.

³³⁴ SALRC, *supra*; established in 1973 by Act 19.

³³⁵ 2005 (1) BCLR 1 (CC).

³³⁶ 2005 (1) BCLR 1 (CC), para 88 of the judgement.

In the *Bhe* case, a woman, upon her partner's death, launched an application in court challenging the appointment of the deceased's father as heir to the intestate estate of the deceased (based on the principle of male primogeniture). The widow showed evidence that she had jointly contributed to the estate, which included an uncompleted building. She and her children had lived with the deceased on their property for twelve years prior to his death. She thus sought an order of court that the exclusion of women from inheritance on the grounds of gender was in breach of the constitutional provisions guaranteeing equality.³³⁷

In the third related case of the *South African Human Rights Commission*, the appellants had sought, in addition to the reliefs in the first two cases, for the entire section 23 of the Black Administration Act (which determined the applicability of a legal system governing intestate succession simply on the basis of race) to be declared unconstitutional and inconsistent with the right to equality, human dignity and rights of children protected under sections 9, 10 and 28 of the Constitution respectively.³³⁸

The Constitutional Court unanimously found for the appellants on the two issues and declared that section 23 of the Black Administration Act was discriminatory and a breach of section 9(3) of the Constitution.³³⁹ This thus created a gap in the law, as the existing law had been struck down. On the issue of the male primogeniture rule, the court found that the exclusion of women from inheritance on grounds of gender was also in breach of sections 9(3) and 10 of the Constitution.³⁴⁰

Further to this decision, the court had to then decide on the appropriate remedy in this case. It could either allow the gap to be dealt with by legislature passing into law the appropriate law to fill the gap; or it could apply the Intestate Succession Act³⁴¹ (which was a law applicable to non-African people); or it could develop customary law in accordance with the provisions in section 39(2) of the

³³⁷ 2005 (1) BCLR 1 (CC), para 11-15 of the judgement.

³³⁸ 2005 (1) BCLR 1 (CC), para 31 of the judgement.

³³⁹ 2005 (1) BCLR 1 (CC), para 66 of the judgement.

³⁴⁰ 2005 (1) BCLR 1 (CC), para 91-92 per Langa, A.C.J and para 210 per Ngcobo J.

³⁴¹ Act 81 of 1987.

Constitution.³⁴² The majority of the learned justices of the court decided to opt for the second option of applying the Intestate Succession Act as a temporary measure to provide for cases that would fall into the category otherwise provided for under the ‘discriminatory’ section 23 of the Black Administration Act. This was meant to be a temporary measure until legislature was able to come up with the appropriate law to fill the gap.

In doing this, the court rejected the third option open to it of developing customary law.³⁴³ The reasons adduced for this were that whilst acknowledging that there was a difference between the ‘living’ customary law that communities experienced daily, and the ‘official’ customary law that was before the court, the court felt that there was a lack of evidence as to the content of the ‘living’ customary law.³⁴⁴ The court also felt that due to the non-uniformity of customary law, such development had to be done on a case by case basis.³⁴⁵

A more recent case that has dealt with this issue of compatibility of customary law and the right to equality is the case of *Shilubana & Others v Nwamitwa*³⁴⁶ that was decided by the Constitutional Court in 2008. It related to the customary law rule of male primogeniture, which stipulated that a female could not become ‘chief’ of a traditional community in Limpopo. In upholding the right of the female applicant to the chieftaincy, the Constitutional Court developed customary law, by upholding the constitutional provisions to equality.

It is worthy to note from all of this that the attempt by the colonial and apartheid governments to restrain the growth and applicability of indigenous law has now been rectified by the 1996 Constitution, which recognises and protects indigenous law, and urges the courts in sections 30, 31 and 211 to uphold the rights of people to practise their customs.³⁴⁷

³⁴² This mandated courts, whenever they were interpreting any legislation and/or developing common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

³⁴³ 2005 (1) BCLR 1 (CC), para 109-110 of the judgement.

³⁴⁴ 2005 (1) BCLR 1 (CC), para 109 of judgement.

³⁴⁵ 2005 (1) BCLR 1 (CC), para 111-113 of the judgement.

³⁴⁶ 2008 (9) BCLR 914 (CC).

³⁴⁷ This constitutional protection of customary law, and other legal sources in South Africa, has had a positive effect on the decisions that have come out of the judiciary, in relation to customary law. This ensures that the rights of people in the Bill of Rights are upheld and enforced.

5.5.1.5 Legislative reform of customary law and the South African Law Reform Commission

As indicated above, apart from the efforts of the Constitutional Court at reconciling customary law and the common law, legislative reform has also been explored through the work of the South African Law Reform Commission (SALRC). The SALRC was established by Act 19 of 1973. The commission was set up with the objective of doing research in all branches of law in order to make recommendations to government for the development, improvement, modernisation or reform of the law.³⁴⁸ The commission worked on different areas of law, especially where there was a conflict with the constitutional provisions.³⁴⁹

The commission made proposals over the years to government on changes that were necessary to be made to certain laws and new laws that needed to be promulgated.³⁵⁰ The proposals often led to the promulgation of new laws, such as the Recognition of Customary Marriages Act (RCMA),³⁵¹ based on the report of SALRC on customary marriages.³⁵² The promulgation of the act was in fulfilment of South Africa's international obligations and commitments under the relevant human rights treaties it had ratified.³⁵³ It was also meant to address the issue of the compatibility of customary law with the equality clause in the Bill of Rights.

5.5.2 Common law and statutory law in South Africa

The common law in South Africa is generally accepted to be Roman-Dutch law, as influenced by English law and adapted and developed through judicial decisions

³⁴⁸ South African Law Reform Commission website, available at <http://www.justice.gov.za/salrc/index.htm> (accessed on 21 May 2010).

³⁴⁹ The Committee worked on different aspects of customary law, such as the customary law of succession; the administration of estates under customary law; and the application and ascertainment of customary law, amongst others.

³⁵⁰ See the website of SALRC on the many reports and proposals that have been made to government over the years; see particularly in this respect, SALRC Project 90 report on Customary Marriages, *supra* 19.

³⁵¹ Act 120 of 1998 which came into force in November 2000.

³⁵² In the report, the SALRC suggested in bill form the Recognition of Customary Marriages Bill (in annexure A and B of its report on customary marriages).

³⁵³ See SALRC Project 90 report, *supra*. See especially the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) which specifically targeted discriminatory practices against women.

and legislation.³⁵⁴ Common law principles form part of the general legal principles that operate within a particular system. In South Africa, principles such as the fact that murder, robbery and rape are common law crimes; and that compensation must be paid for damages caused unlawfully, are examples of common law principles. South African courts do not only interpret legislation, but also common law.³⁵⁵ A more succinct definition of common law has been given by Kleyn and Viljoen to the effect that the South African common law is ‘*mainly Roman law of the Corpus Iuris Civilis as it was explained by the glossators and commentators and received in the local customary law of the Netherlands; and Roman-Dutch law*’.³⁵⁶

The common law in South Africa provides the basic framework of principles of most areas of law. It is to be noted that some of the most important fields of law are governed by what are, in effect, mini-codifications.³⁵⁷ For example, company law is to be found in the Companies Act 61 of 1973 and other associated legislation; the law dealing with insolvency is to be found in the Insolvency Act 24 of 1936.³⁵⁸ Thus, whilst legislation has altered and supplemented the common law in most areas, it is still a cardinal feature of South African law that the fundamental rules and principles of large parts of the law, especially the law of obligations and property law, are not contained in legislation, but rather in common law principles and concepts.³⁵⁹

It has been submitted that the common law should be seen as the central framework or core around which the other sources of South African law (namely statute, case law and custom) revolve.³⁶⁰ Even though the rules of common law may be abolished by statute, common law is still very much a foundational source to the legal system. It is used to comprehend and apply statutes and it forms the substratum of law in the land, which is the Constitution.³⁶¹ Where there is a gap in a statute, where a statute inadvertently fails to provide an answer for a particular

³⁵⁴ Bekker (2002) 12.

³⁵⁵ Kleyn D & Viljoen F (2002) *Beginners Guide for Law Students* 82-83.

³⁵⁶ Kleyn (2002) 87 (own emphasis).

³⁵⁷ Van der Merwe & Du Plessis(ed) (2004) *Introduction to the Law of South Africa* 40.

³⁵⁸ *Ibid.*

³⁵⁹ Van der Merwe *et al* (2004) 40.

³⁶⁰ Hosten *et al* (1995) *Introduction to South African Law and Legal Theory* 384.

³⁶¹ Hosten (1995) 385.

point that is raised, the courts conveniently fall back on the common law in order to determine the issue. The common law is flexible and changes to suit prevailing conditions.³⁶²

Prior to the 1993 Constitution, there was a defined division between private law and public law. The common law generally governed South African private law, whilst statutory law governed public law. However in light of the provisions of the 1996 Constitution, the division between private law and public law has been blurred as certain parts of the constitution, especially the Bill of Rights, are now applicable to both aspects of law, and the Constitution is now the supreme law of the land. It enjoins the courts to apply common law to matters before them, but this must be subject to constitutional principles. An example of this is the Bill of Rights.

The Constitution mandates the courts to interpret common law through its principles and through the elaboration of the framework of rights and duties contained in it. The courts carry out this mandate through their judicial decisions (precedent). Section 173 of the Constitution vests in the courts the mandate of developing the common law. It provides as follows:

‘The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.’

Section 39(2) of the Constitution also requires that courts, *when developing common law, to promote the spirit, purpose and objects of the Bill of Rights*. By this, the Bill of Rights is made applicable to bind private and juristic persons.³⁶³ This is embodied in section 8(2) of the Constitution which states that

‘a provision of the Bill of Rights binds a natural and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

³⁶² *Ibid.*

³⁶³ Sarkin J ‘The Common Law in South Africa: Pro-Apartheid or Pro Democracy?’ (1999) 23 *Hastings Int’l & Comp. L. Rev.* 18.

Thus, in giving effect to this mandate of the Constitution, we see a new common law methodology emerging, in which common law rules are being interpreted, abolished, extended and truncated to the extent that they have taken on a uniquely new South African flavour. This, especially in the case of the SCA, differs from the ever ready and historical recourse to Roman-Dutch legal principles, and results in a marked difference between the Roman-Dutch legal principles, and the common law that is being developed by the courts.³⁶⁴ Roman-Dutch law nevertheless constitutes the original core of the common law in the country.³⁶⁵

Part of the ways in which the courts give effect to the constitutional mandate is by following the system of legal precedent or *stare decisis*. By this is meant that a lower court is bound by the decisions of a higher court on similar causes of action. Put in another way, a higher court develops the law in such a way that it becomes a precedent for lower courts to follow.

For this system of judicial or legal precedent to be effective, the courts are structured in hierarchy according to the Constitution. Chapter 8 of the Constitution makes provision for the judicial authority of South Africa. Section 165 of the Constitution vests this judicial authority in the courts. The courts are independent organs, subject only to the Constitution and the law.³⁶⁶ The Constitution mandates other organs of state to assist and protect the courts to ensure this independence and the dignity, accessibility and effectiveness of the courts. Section 166 lists the courts in hierarchical order, starting with;

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal
- (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
- (d) the Magistrates' Courts; and

³⁶⁴ Van der Merwe *et al* (2004) 41.

³⁶⁵ Sarkin (1999) 23 *Hastings Int'l & Comp. L. Rev.* 18.

³⁶⁶ Section 165(2) of the 1996 Constitution.

- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.³⁶⁷

The Constitutional Court, Supreme Court of Appeal and High Courts are courts of superior record, whilst the Magistrate court and any other court established pursuant to section 166(e) are courts of inferior record. The other courts that have been created by Act of Parliament include the Labour Courts and Labour Appeal courts; Divorce Courts; Land Claims Court; Water Tribunal; Small Claims Court; Community Courts (and courts for Chiefs and Headmen).³⁶⁸

5.5.3 Statutory law

Statutory law refers to the law that is codified. These are contained in Acts, by-laws, and other pieces of legislation. Statutes are a very important part of the South African legal system. They form a majority of the sources of law and cover every conceivable field of social intercourse. Statutes stand as a source of first recourse whenever the content of the law on any particular topic is being sought. Section 44 of the Constitution confers on Parliament the power to make laws and to amend the Constitution. This power is further broken down in subsections (a) and (b), between the National Assembly and the National Council of Provinces.³⁶⁹ The Constitution provides rules for the enactment of statutes.³⁷⁰ These rules are to be followed by both the National Assembly and the National Council of Provinces in enacting statutes. All legislation made is however subject to the provisions of the Constitution and must be consistent with the Constitution.³⁷¹

³⁶⁷ Sections 166 (a)-(e) of the 1996 Constitution.

³⁶⁸ 'Courts in South Africa', available at

http://www.capegateway.gov.za/eng/pubs/public_info/C/32303/ (accessed on 24 May 2010).

³⁶⁹ Section 44 of the 1996 Constitution of the Republic of South Africa.

³⁷⁰ Sections 73 to 82 of the Constitution.

³⁷¹ Section 2 of the 1996 Constitution.

5.6 Impact of the Legal System on the rule of law in South Africa

The rule of law is fundamental to South African law. It is enshrined in the first section of the Constitution in section 1(c), which provides, *inter alia*, that ‘the Republic of South Africa is founded on ... supremacy of the constitution and on the rule of law’. This pivotal position of the rule of law in the Constitution signifies how important the concept is to post-apartheid South Africa.

However, despite the vantage position granted to the rule of law in the Constitution, it can only be effective if it is adhered to by the people and if the structures and institutions meant to foster the rule of law are properly operational and independent. There must be a collective effort by all persons in South Africa to foster and entrench the rule of law. Chapter 9 of the Constitution establishes and empowers certain institutions for the purpose of strengthening constitutional democracy (by inference the rule of law).³⁷² These institutions must be effective, vigilant and driven in the work that they have been assigned by the Constitution.

When the collective effort needed for the upholding of the rule of law is lacking; when actions of government, political, judicial and other leaders are contrary to the law and thus seen as undermining the rule of law, it signals the existence of a problem. Even though the legitimacy that guided the process of the 1996 constitution making was alluded to above, it is necessary to remember that the ‘ownership’ and allegiance of the people does not mean that there is an all around or a hundred percent allegiance, as there will always be the ‘deviant’ group within any society. These show their deviance by preferring not to conform to the law and looking for ways by which to flout the law to their own advantage. Deviant behaviour, if it is condoned can unfortunately become entrenched and widespread, and eventually become the norm.

5.6.1 Entrenchment of the rule of law

Activism by members of the society, institutions of democracy, and organs of state will work to counter the actions of the deviants. As the famous quote states,

³⁷² Sections 181-194 of the 1996 Constitution.

‘eternal vigilance is the price of freedom’,³⁷³ it is in the ‘watchfulness and attentiveness’ of the people to the ‘constitutional democracy’ building project that freedom is guaranteed.

As indicated above, after the formal transition from apartheid to democracy, much progress was experienced in building and enthroneing constitutional democracy and the rule of law in South Africa. This was evidenced by the enactment of the Constitution, establishment of the Constitutional Court, and the creation of the various institutions meant to strengthen the new constitutional democracy.³⁷⁴ Judgements of the Constitutional Court have to a large extent set the stage for the legal protection of the rule of law. The Court has been proficient in its judgements based on the provisions of the Constitution.³⁷⁵ It has established the fact that no-one is above the law, and that the law applies to everyone equally. For example, in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,³⁷⁶ the court held that whilst the President of the Republic was not granted immunity from giving evidence in court cases, ‘... the President should be required to give evidence orally in open court in civil matters relating to the performance of his official duties only in exceptional circumstances’.³⁷⁷

2) Another pointer to the entrenchment of the rule of law in South Africa is the freedom of the press (which comprises South African journalists of all races) which is very vibrant, critical and often times outspoken.³⁷⁸ The press here includes the print, audio and visual media. Freedom of the press is constitutionally

³⁷³ This quote is often attributed to Thomas Jefferson (1743 – 1826), the third president of the United States, though no evidence of this can be found in his writings. It is contended that the earliest reflection of the quote can be attributed to a John Philpot Curran in his speech on the Right of Election in 1790, contained in a 1808 publication, titled *Speeches*.

³⁷⁴ Institutions provided for in chapter 9 of the 1996 Constitution. They are listed in section 181 of the Constitution.

³⁷⁵ The court has over time declared a number of Acts of the president null and void on grounds that it is inconsistent with the Constitution. For instance, in the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC), in which the Court declared section 16A of the Local Government Transition Act 209 of 1993 (LGTA) an unconstitutional delegation of legislative power to the executive.

³⁷⁶ (1999) ZACC 11.

³⁷⁷ (1999) ZACC 11, paras 243-245.

³⁷⁸ Jowell Jeffrey ‘How Secure is the Rule of Law in South Africa?’ TimesOnline of March 5, 2009, available at <http://business.timesonline.co.uk/tol/business/law/article5840634.ece> (accessed on 24 May 2010).

guaranteed under section 16 of the Constitution.³⁷⁹ The press is thus designed to be independent, and not controlled or curtailed by the government or members of the public from expressing and reporting on news. This sector of society has consistently been at the forefront of exposing and bringing to light deviant behaviour amongst members of the public sector, private sector and particularly government.

The press has a duty to be responsible in all the news it reports. This is a tough balance that the press has battled to maintain since the beginning of the post-1994 period, but it is a balance that is necessary for the success of the constitutional democracy in the country and for the entrenchment of the rule of law. In recent times, there have been attempts by certain members of the society to curtail and censor the actions of the press. Principal amongst these are the Protection of Information Bill presently being discussed in Parliament and the proposed Medial Appeals Tribunal. These will be discussed further below.

The work of investigative journalists has produced results through publications such as *The Sunday Times*, *Mail & Guardian* and many others. Investigative journalism also comes through in TV programs like *Carte Blanche*, *Special Assignment* and *3rd Degree*. These have been prolific in exposing and drawing the attention of the public to the injustices and wrongs in the society, and to the actions of individuals in government, business, or politics.

Early in 2010, *The Sunday Times* published the story of how Julius Malema, the ANC Youth League president, was alleged to have been involved in lucrative government contracts totalling several millions of rands. These were allegedly awarded to his companies by the government, especially his home province, Limpopo.³⁸⁰ The newspaper report stated that proper tender awarding procedures were not followed and that in many cases, Malema's companies did not have the required expertise to do the jobs effectively, and did not even bother with the quality of the work they did.³⁸¹ The response of the ANC Youth League, apart

³⁷⁹ Section 16 states

‘everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas...’

³⁸⁰ ‘How Malema made his millions’, Front page, *Sunday Times*, 21 February 2010.

³⁸¹ *Ibid.*

from denouncing the story, was on the wider level, to order an investigation of the private lives of some members of the press. This was targeted at putting undue influence on journalists, probably with the purpose of getting them to ‘back down’ and leave the story. The allegations against Malema led to various media investigations and audit into his lifestyle and means.

After the story broke, the Office of the Public Protector and Auditor General were petitioned by various interested bodies to investigate the allegations.³⁸² This was done and in August 2010, the Public Protector issued a statement in which it found that it ‘could not determine’ whether tenders awarded to companies affiliated to Malema had complied with the relevant processes.³⁸³ The Public Protector determined that this was due to poor procurement record keeping by the authorities.³⁸⁴

Thus the progress of constitutional democracy in the country has lately been affected by a number of challenges that have surfaced. This had led those in certain quarters to proffer that constitutional democracy is in crisis in South Africa.³⁸⁵ While the populace continue to clamour for service delivery in terms of houses, health care, education, social infrastructure, there continues to be more cases of people (even the high-powered people) exhibiting ‘deviant’ behaviour (contrary to the Constitution and the laws of the land), becoming involved in corrupt practices and in many instances, being condoned.

The Julius Malema story above is just one of many such stories.³⁸⁶ The publication of the story was one of the things that resulted in a call for ‘lifestyle audit’ for public officers (starting with the members of the executive and ruling party).³⁸⁷ This call has been mostly ignored and rejected by ANC ruling

³⁸² ‘Auditor, Public Protector probes Limpopo tenders’, *The Times*, 29 March 2010.

³⁸³ ‘No Irregularities in Malema Tenders Contracts’, available at <http://www.iol.co.za/news/politics/no-irregularities-in-malema-tender-contracts-1.673142> (accessed on 9 October 2010).

³⁸⁴ *Ibid.*

³⁸⁵ Dodeck AM ‘State v Zuma: The Future of Constitutional Democracy in South Africa’ (2009) 3 *J.P.P.L* 121 at 121-122.

³⁸⁶ There abound different stories and cases of people amassing wealth ‘illegally’.

³⁸⁷ This call was made by COSATU General-Secretary, Zwelinzima Vavi, early in 2010.

government, and rather what we see is the vilification of those calling for lifestyle audits.³⁸⁸

The Sunday Times in April 2010 carried the story of the National Stadium Company of South Africa Company.³⁸⁹ The company had allegedly fraudulently indicated in a tender bid for the management of the stadia for the World Cup, that it met the requirements of the Broad Based Black Economic Empowerment (BBBEE) Act.³⁹⁰ It was discovered that the company's averment was false as the supposed 'BEE' board member was a mere stooge. It turned out that the directors of the company had included the details of one of its 'black' employees as a director in the company and a 25 percent shareholder of the company. This employee was in reality in no way connected to the running or management of the company.³⁹¹

It has become the practice now that whatever exposé the Sunday Times runs on Sunday, sets the pace for the discourse in the media for the coming week. The exposé by media achieves a two-fold purpose: firstly, it raises the level of awareness of the public to the different happenings in the country, and actions of government, public officials and even private citizens, when such actions are in contravention of or aimed towards sabotaging the laws of the land. This has the effect of putting pressure on the officials to be effective and efficient in whatever they are doing. The second effect is that it compels the relevant authorities (in many instances) to take action on the cases that are reported.

³⁸⁸ President Zuma rejected the calls on the basis that government had pre-existing mechanisms in place to detect any instance of unjust enrichment. See 'Zuma rejects Vavi's call for lifestyle audits', Business Day of 24 of February 2010, available at <http://www.businessday.co.za/articles/Content.aspx?id=94571> (accessed on 4 June 2010)

³⁸⁹ 'Soccer City Scam', Sunday Times of 25 April 2010.

³⁹⁰ Act 53 of 2003. It is described as an Act 'to establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith.' The Preamble further explains the Act as designed to

'promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services'.

³⁹¹ This was followed up in the Sunday Times of 23 May 2010 with a report that stated that the gentleman in question had now sued the holding company of the National Stadium of South Africa, for breach and failure to pay him his dues as a 20 percent stakeholder in the company.

However, there have been certain worrying events and signs in the recent past which have indicated certain cracks that may be leading to an encroachment of the rule of law in the country. For example, even though there is press freedom, the exercise of such (like other guaranteed rights) is importantly curtailed by the limitation clause contained in section 36 of the Constitution. Such limitation must be ‘reasonable and justifiable ... based on human dignity, equality and freedom, taking into account all relevant factors ...’ Some of the factors to be taken into account in the application of section 36 are listed in this section.³⁹²

The ANC, in its 2007 52nd National Conference, adopted the recommendation of its Policy conference that there should be an investigation of the establishment of a Media Appeals Tribunal (MAT).³⁹³ This was stated to be with a view of curbing instances of questionable, irresponsible and sensationalist journalism. The conference opined ‘that the creation of the MAT would strengthen, complement and support the current self-regulatory institutions (like the Press Ombudsman/Press Council) in the public interest’.³⁹⁴ The call for discussions on this was recently revived by the ANC in an advance discussion document prepared for its National General Council (NGC) in September 2010.³⁹⁵ This discussion document comprehensively dealt with the issue of media freedom, media diversity and ownership, and reiterated the call for such an appeals tribunal for the media.³⁹⁶

While the reasons for the tribunal might be necessary to curb irresponsible journalism as stated by the ANC, it is important to note that it could also have the counterproductive effect of muzzling the media, intimidating journalists and thus

³⁹² Sub-section (1) of Section 36 of 1996 Constitution lists the factors as including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose;
- (e) and less restrictive means to achieve the purpose.

³⁹³ ‘ANC 52nd National Conference: Resolutions’ available on the ANC website, available at <http://www.anc.org.za/show.php?include=docs/res/2007/resolutions.html&ID=2536> (accessed on 8 October 2010).

³⁹⁴ *Ibid.*

³⁹⁵ NGC 2010 Discussion Document - Media Diversity and Ownership, available on the ANC website at [http://www.anc.org.za/events.php?t=National General Council - 2010](http://www.anc.org.za/events.php?t=National%20General%20Council%20-%202010) (accessed on 8 October 2010).

³⁹⁶ *Ibid.*, see particularly points 69-109. The document also extended to a call for a Media Charter (115-122) to ensure transformation in employment and ownership, particularly in the print media.

preventing reportage and monitoring of the actions of the authority.³⁹⁷ Also, the Protection of Information Bill recently presented by the Department of Justice to Parliament for adoption, seeks to broaden the classification of protected information. The bill provides that any Head of an Organ of State would be empowered to classify any document or information as protected in the national interest. This bill, together with the ruling party's MAT, raises the suspicion in the minds of people that the government is on a deliberate drive to silence the investigative capabilities of the media. These steps have had the media, opposition parties and civil society up in arms.³⁹⁸

In as much as there is press freedom, there is also the responsibility that comes with exercising such freedom. This can be evidenced in section 36 of the Constitution, referred to above. The press has a duty to uphold responsible journalism and not to engage in sensationalism or incitement of any kind. This was recently brought to the fore again in a Sunday Times publication.³⁹⁹ In an article that was a response to a previous column by Fred Khumalo of the Sunday Times, Professor Z Motala, a long standing professor of the University of Western Cape, raised issue with the tone of Mr Khumalo's previous publication. Professor Motala alleged that the tone of the article amounted to offensive and racist references about Indians, and offensive generalisations about Chinese in the country. He noted the need for responsible journalism and for media houses and the press ombudsman to be proactive in dealing with incidents that contravene the Constitution or the code of conduct of journalism. He said that '[w]hen a journalist does not exercise his/her craft in a way that respects core constitutional values of anti-racism and violates the dignity of other groups in the society, it is expected that media houses and the press ombudsman would deal with such incidents with alacrity'.⁴⁰⁰

³⁹⁷ See, generally, 'Power without Responsibility – the Media Appeals Tribunal', by Thabani Khumalo posted on AllAfrica.com, available at <http://allafrica.com/stories/201008030432.html> (accessed on 5 August 2010). This write-up enumerates the pros and cons of a media appeals tribunal, especially in the light of press freedom and press responsibility.

³⁹⁸ See various articles in the Mail and Guardian on the issue, available at <http://www.mg.co.za/tag/protection-of-information-bill> (accessed on 5 of August 2010).

³⁹⁹ 'Dignity should be protected', by Professor Motala, *Sunday Times Review* 1 of 7 of November 2010.

⁴⁰⁰ *Ibid.*

5.6.2 Further challenges to the rule of law

There are also other events that have constituted challenges to the rule of law in the country, and that have put the entronement of rule of law under great strain. These affect the rule of law and its perception as law in the country. These events (sometimes bordering on scandals) are important in order to determine the state of the rule of law in the country, and efforts being made to either build on it or to destroy it. A brief exploration of some of these will be carried out below. Firstly, the different issues that have arisen in the recent past concerning Mr Jacob Zuma, the President of the Republic, will be examined.

1) There have been a number of issues and allegations involving Mr Zuma prior to his election as the President of the Republic. Part of these are his role in the ‘1999 arms deal’ and his ‘friendship’ with Shabir Shaik, and the allegation of rape that was levelled against him by an acquaintance. His role in the 1999 arms deal⁴⁰¹ was investigated, and as a result in 2003, the former special unit on organised crime, the ‘Scorpions’ (an elite anti-crime unit, reporting to the National Prosecuting Authority) recommended that Mr Zuma and Shabir Shaik (a close associate, and personal financial advisor of Mr Zuma) be charged for fraud and corruption for their role in the arms deal.⁴⁰² This was whilst Mr Zuma was the Deputy President of the republic. Eventually, the National Director of Public Prosecutions decided not to proceed against Mr Zuma, but to prosecute Shabir Shaik.⁴⁰³ He was convicted of fraud in 2005 after he was found to have defrauded the state and to be guilty of various financial crimes. This was upheld on appeal.

The Supreme Court of Appeal (SCA),⁴⁰⁴ in dismissing the appeal, upheld the ‘finding’ of the lower court (High Court),⁴⁰⁵ *inter alia* held that there was a ‘generally corrupt’ relationship between Mr Shaik and Mr Zuma.⁴⁰⁶ This led to the

⁴⁰¹ The ‘arms deal’ involved the procurement by the South African government of arms and military weapons from a French arms company, to bolster its defence capability. The deal was valued at approximately R30 billion at the time of the transaction.

⁴⁰² Dodek (2009) 3 *J.P.P.L* 121 at 128.

⁴⁰³ At a press conference in 2003, the head of the NPA, Bulelani Ngcuka announced that Mr Zuma was not to be charged despite the existence of a *prima facie* case against him.

⁴⁰⁴ *Shaik & Others v S* 2007 (2) All SA 9 (SCA).

⁴⁰⁵ *S v Shaik & Others* 2005 (3) All SA 211 (D).

⁴⁰⁶ The learned judge who heard the case in the high court, Judge Hillary Squires, has refuted the claim that he used the words ‘generally corrupt’ in his judgement. In a letter to ‘The Weekender’, a Business Day publication over the weekend of the 11th of November 2006, the honourable judge

corruption investigation against Jacob Zuma, which ultimately led to his being charged in December 2007 on different counts of fraud, racketeering and money laundering by the National Prosecuting Authority (NPA).⁴⁰⁷

Based on the unfolding events, the then president Mbeki on the 14th of June 2005 relieved Mr Zuma of his position as Deputy President on the basis of the decision of the High Court in the Shabir Shaik case.⁴⁰⁸ The decision of the High Court had been to the effect that there was a mutually beneficial symbiosis between Mr Zuma and Mr Shaik.⁴⁰⁹ This followed the undisputed evidence before the court that a series of payments were made to Mr Zuma by Shaik, with the only possible return being the influence of Mr. Zuma's political office. As stated above, the then president Mbeki, on the grounds of upholding the rule of law, and respecting a decision of the court, relieved Zuma of his post as Deputy President of the republic.⁴¹⁰

The NPA in June 2005, after the court judgement in the Shaik case, reinstated the charges against Mr Zuma. The process of such reinstatement was challenged by the Mr Zuma, and after a number of interlocutory applications and processes,⁴¹¹ the SCA in February 2009 decided that Mr Zuma should be tried on the charges laid

indicated that he never used the phrase attributed to him and that it was used by the prosecution in the case. See 'Squires never used *generally corrupt* phrase', available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1163318760847B263 (accessed on 27 May 2010). This finding of the court was based on the fact that Shaik admitted in the course of the trial to have made several payments to Mr Zuma, totalling over R1m, and had negotiated a bribe of over R1.5m from the French company, in exchange for Mr Zuma providing future protection to the French Company from investigation.

⁴⁰⁷ 'Zuma Charged with Corruption, Fraud', available at Mail & Guardian Online at <http://www.mg.co.za/article/2007-12-28-zuma-charged-with-corruption-fraud> (accessed on 27 May 2010). The NPA is created by section 179 of the Constitution, and the NPA Act 32 of 1998. These laws provide for it to be headed by a National Director of Public Prosecution (NDPP).

⁴⁰⁸ 'Statement of President Thabo Mbeki at the Joint Sitting of Parliament on the Release of Hon Jacob Zuma from his responsibilities as Deputy President', 14 June 2005, available as Institute for Security Studies (ISS) Resource Centre publication on http://www.ipocafrika.org/index.php?option=com_content&view=article&id=70&Itemid=67 (accessed on 27 May 2010).

⁴⁰⁹ 'Shaik, Zuma relationship 'corrupt'', 1 June 2005, Mail & GuardianOnline, available at <http://www.mg.co.za/article/2005-06-01-shaik-zuma-relationship-corrupt> (accessed on 27 May 2010).

⁴¹⁰ He remained deputy president of the ANC, however, and later became the president of the ANC when Thabo Mbeki lost out to him in the ANC elections in Polokwane in 2007.

⁴¹¹ Part of the interlocutory processes was a judgment by Judge Chris Nicholson of the Natal High Court on the 12th of September 2008, reported in (2009) 1 All SA 54 (N). The judgment was to the effect that the prosecution of Mr Zuma had been politically motivated. The ANC capitalised on this judgment and recalled the then President Thabo Mbeki as President of the Republic. Thus, Mbeki also became a casualty of the events relating to Mr Zuma.

by the NPA against him.⁴¹² By this time, Mr Zuma was running on the ANC ticket for the presidency of South Africa. The NPA thereafter faced the dilemma of deciding whether to proceed with the corruption case against him whilst it was becoming clearer by the day that he would be the next president of the Republic. Apart from this, there was pressure from various sectors of the population on the organisation to drop the charges.⁴¹³

On the 6th of April 2009 (just a few days before the presidential elections), the NPA decided to ‘drop’ the charges against Mr Zuma. According to the then acting head of the NPA, Mokededi Mpshe, new revelations to the NPA showed that the timing of the prosecution of Mr Zuma had been planned by the former head of ‘Scorpions’, Mr Leonard McCarthy and former National Director of Public Prosecutions, Mr Bulelani Ngcuka, to prevent Mr Zuma from being elected the president of the ANC.⁴¹⁴ To them, this was necessary, as being president of the ANC, more or less meant becoming the president of the Republic whenever the tenure of the incumbent was up.

The dropping of the charges by the NPA paved the way for Mr Zuma to become the third democratically elected president of post apartheid Republic of South Africa.⁴¹⁵ It however raised a lot of issues about the independence of the NPA and other government institutions. The NPA was heavily criticised by the opposition parties, civil society and members of the public as it appeared that it had become a tool in the hands of those with power and influence, with which they served and achieved whatever purposes they had.

Not long after the commencement of the corruption trial, in 2006 Mr Zuma faced another trial in which he was charged with the rape of a 31-year old woman.⁴¹⁶

⁴¹² *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277.

⁴¹³ The ANC had called for the prosecution to be dropped in the public interest, insinuating that if Mr Zuma was tried (let alone found guilty), there would be unrest in the country. The ANC Youth League on its own filled the air waves with a lot of fiery rhetoric that the organisation was prepared to ‘take up arms and kill for Zuma.’ All of these put pressure on the NPA and heated up the public sphere just before the 2009 presidential elections.

⁴¹⁴ Statement delivered by Mpshe, ‘Statement of the National Director of Public Prosecutions on the matter *S v Zuma and Others*’, available at <http://www.mg.co.za/uploads/2009/04/06/statement.pdf> (accessed on 29 May 2010).

⁴¹⁵ Although the existence of the criminal charges against him would not have necessarily barred him from the presidency as the Constitution only bars, *inter alia*, someone who has been convicted of an offence and sentenced to more than a year imprisonment.

⁴¹⁶ *S v Zuma* 2006 SA (WLD) 2.

The High Court in this case held that the State had not proved its case beyond reasonable doubt, and as a result found Mr Zuma not guilty and discharged him.⁴¹⁷ This case further put a strain on Mr Zuma's reputation. It created factions within the ANC and other parties (as many of those who had supported him ardently had been disappointed by the further allegation of rape).

The effect of the Zuma trials on the rule of law and the political system of the country was profound. It created rifts and different levels of distrust amongst the arms of the political party, law enforcement agencies and even within the judiciary.⁴¹⁸ It formed part of the bitter succession battle that was then ongoing between Mr Mbeki and Mr Zuma. This scenario was aptly captured by the Mail & Guardian analysis of April 2006, which stated, amongst other things, that

‘the political damage is incalculable, with the ruling ANC now an openly divided and faltering movement. This has had a domino effect on the South African Communist Party and the Congress of South African Trade Unions, which have floundered and fractured in the face of damaging charges against a man they ardently backed as the country's next president’.⁴¹⁹

Apart from the political damage, there was also damage suffered by the judiciary. The whole Zuma matter put a strain on the judiciary, as it faced the prospect that regardless of the legal validity of any action or decision of the courts, any decision against Mr. Zuma would be considered by the majority of his supporters to be part of the ‘conspiracy’ against him. This played out in calls by the ANC alliance partners and their allies that the judiciary was partisan in the matter.⁴²⁰

⁴¹⁷ *S v Zuma* 2006 SA (WLD) 2 at 140-174, per Van der Merwe J.

⁴¹⁸ A fallout of the Zuma trials was the case of Judge Hlophe, president of the Cape High Court Division. He was accused of trying to influence the Constitutional Court. This would be discussed later in this research.

⁴¹⁹ ‘23 Days that shook our World’, Mail & Guardian of the 28th April 2006, available at www.mg.co.za (accessed on 29 May 2010).

⁴²⁰ See the views expressed by Cosatu, the ANC Youth League and other allies in Matshiqi A (2007) *Undamaged Reputations: Implications for the South African Criminal Justice System of the Allegations against and prosecution of Jacob Zuma*, (a research report written for the Centre for the Study of Violence and Reconciliation) available at http://www.csvr.org.za/index.php?option=com_content&task=view&id=362 (accessed on 2 June 2010) at 7, 11-12, 14.

2) A second example of events that have played out and resulted in undermining the rule of law in the country, in terms of the perception of legitimacy of the judiciary, the legal profession and other law making institutions, is the case concerning the Judge President of the Cape Provincial Division, John Hlophe in 2008. The facts of this case are very much in the public domain and as such a detailed account would not be necessary here, except for a brief summary.

The Hlophe matter involved an allegation by the judges of the Constitutional Court that Judge Hlophe had approached certain of its members in 2008 and attempted to improperly influence them in proceedings pending before the Constitutional Court, in one of the cases involving Mr Zuma (then he was the president of the ANC).⁴²¹ These allegations are very serious, and if found to be true, would have been in violation of sections 165(3) and (4) of the Constitution concerning the independence of the judiciary and non-interference by any person or organ.⁴²² A complaint was subsequently laid by the Constitutional Court judges against Judge Hlophe at the Judicial Services Commission (JSC), which had the mandate to investigate complaints of misconduct against and amongst judges.⁴²³

In response to the complaint against him, and before the JSC could proceed on the matter, Judge Hlophe brought a court case against the Constitutional Court and each of its members in the High Court and the JSC. He alleged that his constitutional rights to dignity, equality and privacy had been violated.⁴²⁴ The High court found in his favour in *Hlophe v Constitutional Court of South Africa and Others*,⁴²⁵ but this was overturned on appeal by the SCA.⁴²⁶ The decision of the SCA paved the way for the JSC to commence its hearing into the alleged

⁴²¹ This was released into the public domain through a public statement issued by the Constitutional Court which contained these allegations on 30 May 2008. The case in question was *Zuma & Another v NDPP & Others* 2008 ZACC 13. It related to the constitutionality of various searches that the NPA had conducted on the offices Zuma's defence team, and on the admissibility of the materials seized.

⁴²² Sections 165(3) and (4) provide:

(3) 'No person or organ of state may interfere with the functioning of the courts.

(4) 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'.

⁴²³ Provided for in section 178 of the 1996 Constitution; also provided for in Part IV of the Judicial Services Commission Act 9 of 1994.

⁴²⁴ This was based on the fact that the Constitutional Court held a press conference making the allegations against Judge Hlophe, even before it had lodged its complaint with the JSC.

⁴²⁵ 2008 ZAGPHC 289.

⁴²⁶ *Langa v Hlophe* 2009 ZASCA 36.

conduct. The JSC eventually decided not to hold a formal inquiry, with cross-examination into the complaints concerning Judge Hlophe. It thereafter dismissed the complaint laid by the Constitutional Court against Judge Hlophe, saying that it was not convinced that Judge Hlophe had tried to improperly influence the Constitutional Court.⁴²⁷ This decision was challenged in the Western Cape High Court by the Premier of the Western Cape, Helen Zille, and in April 2010, the judges of the Cape High Court ruled, overturned the JSC decision, declaring it ‘unconstitutional and invalid’.⁴²⁸

The ruling of the high court leaves the JSC with two options, either to re-try the matter, or to appeal the ruling of the high court. The JSC, on the 30th April 2010, decided to appeal the ruling of the high court.⁴²⁹

5.6.3 Assessing the resultant fall-out

The actions of the NPA in the various cases concerning Mr Zuma have come under a lot of criticism from the opposition parties, the public, civil society, members of the academic profession and even private sector.⁴³⁰ It brings to question the independence and impartiality of the NPA, and its officers, especially in relation to the authorities’ stance regarding the decision to charge or not charge Mr Zuma,⁴³¹ the timing of the eventual decision to charge him, and the final decision to withdraw all charges against him in 2009. It is felt that the decision to withdraw

⁴²⁷ ‘Mixed reaction to JSC decision to drop Hlophe charges’, SAC NEWS, 28 August 2009, available at <http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnextoid=4ae210086a163210VgnVCM10000077d4ea9bRCRD&vgnnextfmt=default> (accessed on 6 June 2010).

⁴²⁸ *Premier Western Cape Province v The JSC & Others* Case No: 25467/2009 (not yet reported). In the case, the judges held that the JSC was improperly constituted when it decided to dismiss the charges against Judge Hlophe, because the Constitution provided that in such cases before the JSC, the premier of the city was entitled to be part of the JSC hearing the matter, and also that the votes for the decision to dismiss the charges were only 6 out of 13, and thus not a majority as provided by the law.

⁴²⁹ ‘JSC to appeal Hlophe Ruling’, available at <http://www.newstoday.co.za/index.php/news/sanews/4254-jsc-to-appeal-hlophe-ruling.html> (accessed on 6 June 2010).

⁴³⁰ Helen Zille, Leader of the Democratic Alliance said in April 2009, that the dropping of the charges was irrational and unlawful. See ‘Zille: Dropping the charges against Zuma is Irrational and Unlawful’ at <http://www.da.org.za/newsroom.htm?action=view-news-item&id=6584> (accessed on 31 May 2010).

⁴³¹ Matshiqi (2007) 18.

charges against Mr. Zuma impacts on the rule of law in South Africa negatively. The perception created by this is that certain members of the society are beyond and above the rule of law and the judicial system, and thus they are exempt from going through the due process of law if they are found wanting.

The criticisms are further to the effect that even if there was a conspiracy or a manipulation of the ‘timing’ of the prosecution of Mr Zuma, this did not negate the fact that there was a *prima facie* case against him which was declared by the Supreme Court of Appeal to be a sufficient basis for prosecution.⁴³² The court held that ‘a prosecution is not wrongful merely because it is brought for an improper purpose, it will however be wrongful if, in addition, reasonable and probably grounds for prosecuting are absent.’⁴³³ This has been echoed by the chair of the Centre for Constitutional Rights in its April 2009 press statement.⁴³⁴

Matshiqi, however, in another view of the NPA decision, held that the NPA yielded to public and political pressure when it charged Mr Zuma in 2005. This was because it already knew that there was not enough evidence to convict him. Thus, according to Matshiqi:

‘The unenviable position of the NPA is reflected in the fact that, ever since the Shaik judgment, it has had little choice but to pursue Zuma in order to retain broad public credibility. If the NPA had acted in a manner consistent with Ngcuka’s original statement, and withdraw from its efforts to prosecute Zuma on the basis that it had insufficient evidence, this would be taken as proof that it had succumbed to political pressure, or that a political deal had been made...’⁴³⁵

This view has now seemingly been ratified by the criticism of impartiality, lies, and other allegations that followed advocate Mpshe’s decision to withdraw the

⁴³² Decision made in the *NDPP v Zuma* 2009 (2) SA 277.

⁴³³ *NDPP v Zuma* 2009 (2) SA 277, par 37 of SCA decision.

⁴³⁴ De Havilland N ‘The Rule of Law and the Independence of the National Prosecuting Authority’, available at <http://www.nmmu.ac.za/documents/law/zumaopinion2.pdf> (accessed on 31 of May 2010). The author, considering the powers of the NPA granted to it by the Constitution and the enabling act; the circumstances of the scenario painted by Advocate Mpshe (acting Director of the NPA); and the decision of the SCA in its verdict of 2008; inferred that Advocate Mpshe had erred in his decision to drop the charges and that the independence of the NPA was under great threat from the influences of the executive.

⁴³⁵ Matshiqi (2007) 18.

charges against Mr Zuma in 2009. It is submitted that even if the NPA did not have sufficient evidence to prosecute Mr Zuma in the first place, and even if it had yielded to ‘pressure’ to prosecute in 2005, the only way the uncertainties and negative perception could have been avoided would have been for the case to be decided by a competent court of law, which was denied by the withdrawing of the charges.

When one compares South Africa to her peers on the continent, the feeling is, however, that the investigation and prosecution of a senior leader of the ruling ANC, and a deputy president of the country (even if the charges were eventually withdrawn) is indicative of the health and strength of the democratic institutions in the country. The same scenario would be very far-fetched in Nigeria or other African countries, if it happens at all. This solid nature and good foundation of the democratic institutions in the country was reaffirmed in the final report of the APRM process that took place in South Africa in 2005 (discussed later in this thesis).

The Hlophe matter is another test of the strength of the judiciary and the legal profession as it involved judges of the highest court of the land laying a complaint against a fellow judge. It has called into question the integrity of a single judge, one of South Africa’s highest ranking judicial officers, a judge president, as well as the propriety of the actions of the Constitutional Court judges in publicising the complaint.⁴³⁶ It is felt that these proceedings risk damaging the legitimacy of the judiciary as an institution, damage the judiciary can ill afford at a time when it has gone through a spate of external attack that it suffered during the Zuma corruption cases.⁴³⁷ The case of Judge Hlophe and the Constitutional Court judges have been described as internal ‘self-inflicted’ wounds that could, together with the external attacks on the judiciary, undermine the progress made in building a post-apartheid judiciary that is both independent and impartial.⁴³⁸

⁴³⁶ Dodek (2009) 3 *J.P.P.L* 121 at 130.

⁴³⁷ *Ibid.* The judiciary was under a lot of attack from pro-Zuma loyalists who felt that it was being used as a tool by those who were conspiring against Zuma. Particularly, the ANC Youth League and the Young Communist League, COSATU, all attacked the integrity of the judiciary after the Shaik judgement which implicated Mr Zuma.

⁴³⁸ Dodek (2009) 3 *J.P.P.L* 121 at 131.

Whilst these concerns are probably true and germane, it is also very important that if there exists any evidence of misconduct, misbehaviour and failure of integrity within the judiciary (or any other institution in society), such must not be shielded and buried in the name of ‘not wanting to damage the integrity and legitimacy of the institution’. The way and manner in which the JSC will go about the compliant a second time around will be indicative of the seriousness of the country, especially those in positions of authority, to foster and work to enthrone the rule of law and the independence of the judiciary, which are constitutional principles. The fact that the JSC consists of a number of political appointees and that the President has the final say on the ratification of nominations to the commission may not bode well for the commission. It may also further the impression and allegations of interference with the independence of the judiciary being created by the actions of the ANC-led government.

Whilst the ANC has indicated that the ‘transformation of the judiciary’ forms part of its post-apartheid mission goals for a while now, more proactive steps need to be taken to see this being actualised. Following its Polokwane conference at the end of 2007, part of the resolutions of the ANC National Executive Conference was that though progress had been made in this regard, more still needed to be done in transforming the judiciary.⁴³⁹ Even though it is necessary and in accordance with the Constitution for the judiciary to be transformed from the racial and pro-government posture it took during apartheid to an independent judiciary, the way and manner the transformation agenda is effected would impact on the independence and legitimacy of this very important branch of government. If the implementation of the transformation agenda creates the perception that government is interfering in the independence of the judiciary, public confidence in the judiciary would be adversely affected, and this would impact on the enthronement of the rule of law in the country.⁴⁴⁰

Another contributor to the enthronement of the rule of law in the country is international law. The respect and observance of international law principles

⁴³⁹ ANC 52ND National Conference 2007 – Resolutions, available at <http://www.anc.org.za/ancdocs/history/conf/conference52/index.html> (accessed on 14 June 2010).

⁴⁴⁰ See possible instances of interference in the actions of the Minister of Justice, Jeff Radebe, as relates to the composition of the JSC in 2009, just before the Hlophe matter was deliberated on by the JSC; the appointment of Advocate Mpshe as a judge, which seems to be a reward for the former’s decision as NDPP to withdraw charges against Jacob Zuma, and others.

(which are basically formed by states and individuals on the global level) plays a great role in the country. The South African Constitution makes international law a very important role player, not only in the legal system, but even in the country as a whole. The role of international law in enthroneing the rule of law in South Africa will be examined in the next section.

5.7 International law in South Africa and its impact on the rule of law

Against the backdrop of the experiences of South Africans during the apartheid era, the impunity of the National Party, the extensive violations of human rights and human dignity, it was imperative that the drafters of the 1996 Constitution focused greatly on entrenching the protection of fundamental human rights in line with international standards.⁴⁴¹ Compliance with international law under the 1996 Constitution takes on a heightened significance for the country. The 1996 Constitution of South Africa makes international law of both direct and indirect application in the country. It specifically provides for the basis for the application of treaties and customary international law in the country. This depicts a greater reliance on international law in the country, as opposed to previous South African constitutions which made very little mention of international law, and its position in the South African legal order, if at all.⁴⁴² The reason for this greater reliance on international law has been said to be the need to fundamentally reconstruct the South African legal system.⁴⁴³

⁴⁴¹ Schaffer RP 'The Inter-relationship between Public International Law and the Law of South Africa: an Overview (1983) 32 *ICLQ* 277. This article provides a useful summary of the main developments leading up to 1983. On the conclusion and incorporation of treaties before this present dispensation under the 1996 Constitution, see Dugard J 'The Treaty-making Process (1968) 85 *SALJ* 1; Dugard J 'International Law and the South African Constitution' (1997) *EJIL* 77-92; Devine DJ 'Some Problems relating to Treaties in the Interim South African Constitution and Some Suggestions for the Definitive Constitution' (1995) 20 *SAYIL* 1; Olivier ME 'The Status of International Law in South African Municipal Law: Section 231 of the 1993 Constitution' (1993/94) 19 *SAYIL* 1; Botha NJ 'Incorporation of Treaties under the Interim Constitution: A Pattern Emerges' (1995) 20 *SAYIL* 196.

⁴⁴² Dugard (2005) *International Law: A South African Perspective* 55. As indicated in the footnote above, the 1993 Constitution made the first elaborate provision for the place of international law in the South African legal system.

⁴⁴³ Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 127.

Section 231 of the 1996 Constitution provides for the basis for the application of treaties (international agreements) within the South African legal system.⁴⁴⁴ It provides, *inter alia*, that an international agreement would generally only bind the Republic after it has been approved by resolution of parliament, and enacted into law by national legislation.⁴⁴⁵ The only exception to this constitutional provision is in the case of the international agreement being of a ‘technical, administrative or executive nature, or an agreement which does not require either ratification or accession’.⁴⁴⁶ In such cases, the Constitution provides that such agreements would bind the Republic without needing the approval of parliament.⁴⁴⁷ It is, however, required that such be tabled before parliament within a reasonable time.⁴⁴⁸ These types of agreements have been understood to be agreements ‘of a routine nature, flowing from the activities of government departments’.⁴⁴⁹

Section 231(4) further provides that an international agreement would only become law in the country when it is enacted into law by national legislation.⁴⁵⁰ This

⁴⁴⁴ See Dugard (2005) 58-62, Dugard 1997 *EJIL* 77 *et seq*; Michie A ‘The Provisional Application of Treaties in South African Law and Practice’ (2005) 30 *SAYIL* 1; Keightlley R, ‘Public International Law and the Final Constitution’ (1996) 12 *SAJHR* 405; Scholtz W ‘A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996’ (2004) 29 *SAYIL* 202 at 208 *et seq*.

⁴⁴⁵ Section 231(1) provides:

‘The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.’

⁴⁴⁶ Section 231(3) 1996 Constitution.

⁴⁴⁷ Dugard (2005) 60; see also Botha N ‘Treaty Making in South Africa: A Reassessment’ (2000) 25 *SAYIL* 69, in which the author discusses the ways in which these types of agreements come about and how they are applicable. He also notes the potential for manipulation of the system.

⁴⁴⁸ Dugard 1997 *EJIL* 77.

⁴⁴⁹ Olivier M ‘Informal International Agreements under the 1996 Constitution’ (1997) 22 *SAYIL* 63 at 64, in which she notes that this is the view taken by the state international law advisers.

⁴⁵⁰ Section 231(4) of the 1996 Constitution; the Constitution in section 239 defines the term ‘national legislation’ as including not only an act of parliament, but also ‘subordinate legislation made in terms of an Act of Parliament; and legislation that was in force when the Constitution took effect and that is administered by the national government’.

means that for any international agreement, treaty, convention to be law in South Africa, it must first have been passed into law by an act of parliament, or other such legislation (like a schedule to a statute, or means of proclamation or notice in the Government Gazette).⁴⁵¹ The only exception to this rule is contained in the proviso to the section, which deals with the issue of ‘self-executing parts of treaties’, which do not need enactment into law before becoming law in the Republic.

By these provisions, it becomes clear that South Africa adopts the dualist approach to the incorporation of treaties in South African law. Section 231(4) is the only exception to this by making self-executing treaties directly applicable in South African law without the need for parliamentary legislation.⁴⁵² This tends towards a monist approach. This proviso has been criticised by Dugard, who feels that it would cause problems for the South African courts, as there is no clear-cut definition of the meaning of ‘self-executing’ parts of treaties, and thus, it would be left to the courts to decide on it.⁴⁵³ This decision, he feels, would need to be based ‘on its own merits by the courts with due regard to the nature of the treaty, the precision of its language and the existing South African law on the subject in question’.⁴⁵⁴

The one thing to note about the proviso of section 231(4) is that it grants direct application to parts of international treaties which are capable of direction

⁴⁵¹ Dugard (2005) 61; see Keightley (1996) 12 *SAJHR* 405 at 410-412, in which the author raises the concern that has been echoed by many about the impact of waiting for parliamentary action before a treaty can become law in South Africa, even after the country has ratified it.

⁴⁵² Olivier ME ‘Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations’ (2002) 27 *SAYIL* 99; Ngolele EM ‘The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law’ (2006) 31 *SAYIL* 141-172, in which the author explores the origin of the term ‘self-executing’, its definition and its application in South African law, see also Keightley (1996) 12 *SAJHR* 405 at 411, where he suggests that the treaties or agreements referred to in section 231(3) and (4) can be viewed as being the same or similar, since they both would not need parliamentary ratification or to be passed into law by an act of parliament for them to be binding.

⁴⁵³ Dugard (2005) 62; Botha (2000) 25 *SAYIL* 69 at 91; Olivier (2002) 27 *SAYIL* 99.

⁴⁵⁴ Dugard (2005) 62, where he states his definition of *self-executing provision of an agreement* as involving a decision whether the existing law of the Republic is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty or in the converse, whether further legislation is required. Ngolele (2006) 31 *SAYIL*, goes to great length to define what self-executing treaties are in line with their definition in the United States from which the term originates.

application. These parts will be directly applicable in South African law, without the need for incorporating legislation,⁴⁵⁵

Section 232 of the 1996 Constitution makes provision for the direct application of customary international law in the Republic, the only exception being if it is inconsistent with the Constitution or an Act of Parliament.⁴⁵⁶ This entrenches the common law position that makes international law automatically a part of municipal law, making it compulsory for the courts to consider it.⁴⁵⁷ This provision also raises the importance the Constitution gives to customary international law, making it subject only to an Act of Parliament and the Constitution, thus all other sources of law in the South African legal system will come second to customary international law. As Dugard observed, ‘even the doctrine of *stare decisis* would not be evocable as an obstacle to the application of a new rule of *customary* international law’.⁴⁵⁸

Section 233 of the 1996 Constitution reinforces the importance of international law in the South African legal system. It provides that a court, in interpreting any legislation, must prefer an interpretation that conforms with international law, as opposed to one that does not conform to international law. This suggests that international law should play a part not only in the application of treaties and customary international law, but also be used as an interpretative tool. The Constitution therefore establishes a framework for using international law in constitutional interpretation, such that any interpretation to be adopted by the courts must be consistent with international law.

Section 39(1) of the Constitution, in referring to interpretation of any of the rights contained in the Bill of Rights, mandates courts or any other type of forum to consider international law.⁴⁵⁹ Whilst this is a preemptory obligation, it requires the

⁴⁵⁵ Oliver ME ‘South Africa and International Human Rights Agreements: Procedure and Policy (Part 1)’ (2003) 2 *TSAR* 292 at 303.

⁴⁵⁶ It states that ‘[c]ustomary international law *is law* in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’ (own emphasis).

⁴⁵⁷ Dugard (2005) 55; Keightley (1996) 12 *SAJHR* 405 at 406.

⁴⁵⁸ Dugard (2005) 56 (author’s emphasis).

⁴⁵⁹ Section 39 provides:

- ‘(1) When interpreting the Bill of Rights, a court tribunal or forum –
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and

courts to merely ‘consider’ international law. The Constitutional Court has stated in this regard that ‘public international law’ in this context would include non-binding as well as binding law. They may both be used under the section as tools of interpretation’.⁴⁶⁰

The impact of these provisions on the development of the rule of law in South Africa (especially the development of human rights jurisprudence) is apparent. Law-making is influenced by international law, as law making bodies are now compelled to ensure that their rules, statues and regulations are in accordance to international law (whether that binding on the country, or customary international law). The constitutional provisions go a long way in establishing that international law principles and rules are guiding principles for the development of law within the country. Thus, by this the rule of international law is further entrenched.

In instances where laws (whether statutes or other rules) are not in compliance with international law, such statutes or provisions of statutes, if challenged in a court of law, can be struck down.⁴⁶¹ In the cases that have emanated from the courts, especially the Constitutional Court, the court has made use of international law as an interpretative aid in a number of cases, as prescribed by the Constitution. The next section will examine this impact in more detail.

5.7.1 International law in the legal system with specific reference to International Human Rights Law

As indicated in chapter 3, international law is developed by international organisations, international tribunals, bodies and states. After South Africa was accepted back into the international community in the early nineties, the country has ratified a number of international agreements, conventions or treaties,⁴⁶² and is

(c) may consider foreign law.’

⁴⁶⁰ *S v Makwanyane*, *supra* 391 at 413. This statement was made in reference to section 35 of the 1993 interim constitution, which was reproduced as section 39 of the 1996 Constitution.

⁴⁶¹ See n 375 above, where reference is made to the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, *supra*, in which the Court declared section 16A of the Local Government Transition Act 209 of 1993 (LGTA) an unconstitutional delegation of legislative power to the executive.

⁴⁶² For a list of these agreements as at 2007, see annexure to article by Olivier ME & Abioye FT ‘International Environmental Law: Assessing Compliance and Enforcement under South African and International Law’ (2008) 33 *SAYIL* 184-216 at 208-216.

particularly party to major universal human rights instruments.⁴⁶³ The influence of these international agreements on the rule of law in the country is determined by the way and manner the provisions of the Constitution (examined above) are implemented. Since the establishment of the new constitutional order in 1994, courts in South Africa have demonstrated a great willingness to be guided by the decisions of international organisations, and tribunals in matters relating to international law.⁴⁶⁴

Chapter two of the 1996 Constitution (containing the Bill of Rights) makes provision for the guarantee of human rights in the country. The Bill of Rights is modelled on international human rights conventions, as almost all of the provisions have been adopted from these conventions.⁴⁶⁵ As a result of this, it has become commonplace for the Constitutional Court and other courts to invoke human rights norms and decisions by international human rights tribunals and supervisory bodies to interpret the Constitution.⁴⁶⁶

In *Kaunda & Others v President of the RSA & Others*,⁴⁶⁷ the applicants were a group of South Africans who had been arrested in Zimbabwe on charges inclusive of being mercenaries and plotting a coup against the President of Equatorial Guinea. Upon their arrest, they sought for an order of court to compel the government of South Africa to make representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, to avoid their being extradited to Equatorial Guinea (which was alleged to have a poor record of human rights observance). The Constitutional Court, in reaching a decision, carried out a thorough discussion and analysis of the nature and scope of diplomatic protection at international law and the limitations on extraterritorial action.⁴⁶⁸

⁴⁶³ The International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child, and others.

⁴⁶⁴ Dugard (2005) 66.

⁴⁶⁵ Particularly the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); and International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁴⁶⁶ Dugard (2005) 338.

⁴⁶⁷ (2004) 10 BCLR 1009 (CC); also reported in (2005) 4 SA 235.

⁴⁶⁸ *Ibid.*

In *S v Makwanyane* the Constitutional Court had to decide on the constitutionality of the death penalty.⁴⁶⁹ In doing so, the court made extensive use of several international human rights instruments, including the different instruments on human rights, especially the rights to life and human dignity.⁴⁷⁰ In declaring the death penalty unconstitutional, the court held that it was ‘a cruel, inhuman and degrading punishment’.⁴⁷¹

In *S v Williams*⁴⁷² the Constitutional Court found that corporal punishment was unconstitutional in that it violated the prohibition of ‘cruel, inhuman or degrading treatment’ in the Constitution, which also conformed to most international human rights instruments.⁴⁷³

The above cases are just a very small fraction of the cases dealt with by the Constitutional Court over the years. There are many more cases relating to the rights contained in provisions of the Bill of Rights.⁴⁷⁴

In the post-apartheid South Africa, the use and impact of the rule of international law has been evident and is definitely still evident within the legal system. It is playing a part in the evolution and moulding of the legal system, whether as a binding or a non-binding authority. A different view has, however, been expressed by some authors and commentators. In a survey on the use of international law in the decisions of the Constitutional Court, carried out in 2005, it was indicated that the court has made limited use of international law in constitutional interpretation, especially in regard to the Bill of Rights.⁴⁷⁵ Hovell and Williams, who

⁴⁶⁹ *S v Makwanyane* (1995) 3 SA 391 (CC) at 402, per Chaskalson J. This case was decided under the 1993 interim constitution; the international law provisions of which have been regurgitated in the 1996 Constitution to a great extent.

⁴⁷⁰ *S v Makwanyane* (1995) 3 SA 391, paras 66-86. The court’s reaction to the use of these instruments was that they were of value and mandated by the Constitution.

⁴⁷¹ *S v Makwanyane* (1995) 3 SA 391, paras 95, 146.

⁴⁷² (1995) 2 SA 632 (CC); (1995) 7 BCLR 861.

⁴⁷³ (1995) 2 SA 632 at 639; the court referred to article 5 of the UDHR, article 7 of the ICCPR, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and article 5 of the African Charter on Human and Peoples’ Rights.

⁴⁷⁴ *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148; *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) dealt with the constitutionality of extraditing an accused person to a country that imposes the death penalty, whilst it is abolished here in South Africa; *Hoffman v South African Airways* 2001 (1) SA 1, dealing with employment discrimination against an HIV-positive person; *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) which dealt with the right to equality, in which the court declared the tradition based on male primogeniture unconstitutional; *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721, dealing with the right to health care and access to HIV/Aids treatment. These are just some of the cases.

⁴⁷⁵ Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 114.

commissioned the survey, found that out of 228 cases that the court had decided in the period from 1995 to the end of 2004, the court had made detailed consideration of international law in only 32 (14 percent) cases.⁴⁷⁶ The figures pertaining to the Bill of Rights cases present a brighter picture. Out of the 137 of such cases that had come before the court in the same period of time, the court had made detailed consideration in only 30 (22 percent) of the cases. The authors referred to this as a ‘relatively limited use of international law in constitutional interpretation’.⁴⁷⁷

This limited use has been attributed to the fact that on any particular issue (or right), most of the references to international law would occur in the early decisions on the issue (*when the principles are being established*), but as the field of law *and the principles of law* on the issue develop and achieves consistency, the use and resort to international law will become less useful.⁴⁷⁸ Another reason cited by the authors is the *ad hoc* basis on which international law is considered. The consideration is at times cursory and does not extend beyond a depiction of the relevant international law treaty provisions. It is also on a case by case basis and subject to the judge(s) hearing the case.⁴⁷⁹

As stated above, South Africa is a signatory to the Convention on the Rights of the Child, adopted by the UN General Assembly, which came into force in 1990. South Africa ratified the convention in 1995.⁴⁸⁰ Its African equivalent, the African Charter on the Rights and Welfare of the Child, was signed in 1997 and ratified in 2000.⁴⁸¹ The provisions of these international instruments have been domesticated by the Children’s Act.⁴⁸² This act makes reference in its preamble to the constitutional protection provided by section 28 of the Constitution on the rights of the child, and also to other international instruments dealing with the rights of a child. In *Christian Education South Africa v Minister of Education*,⁴⁸³ South Africa’s obligations under the Convention on the Rights of the Child, and other

⁴⁷⁶ Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 115.

⁴⁷⁷ Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 117.

⁴⁷⁸ Hovell (2005) 29 *Melb. U. L. Rev.* 95-130 at 118.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Dugard (2005) 325.

⁴⁸¹ See, in this regard, http://www.african-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf (accessed on 6 June 2010).

⁴⁸² No 38 of 2005.

⁴⁸³ 2000 (4) SA 757 (CC).

international human rights instruments were invoked to uphold the prohibition on corporal punishment in independent schools.⁴⁸⁴

Another international law treaty which South Africa is a party to is the International Covenant on Civil and Political Rights (ICCPR).⁴⁸⁵ The covenant and its optional protocol entered into force for South Africa in March 1999 and November 2000 respectively. In the case of *Prince v South Africa*,⁴⁸⁶ which came on appeal before the UN Human Rights Committee (UNHRC), the applicant challenged the failure of the country's laws to exempt Rastafarians from the ban of using cannabis, as a violation of his right to freedom of religion, and freedom from discrimination on the basis of religion, under articles 18(1), 26 and 27 of the ICCPR.

The case had come before the South African High Court,⁴⁸⁷ the Supreme Court of Appeal,⁴⁸⁸ and two decisions of the Constitutional Court of South Africa,⁴⁸⁹ where it was held that even though the prohibition of the use of cannabis in the Drugs and Drugs Trafficking Act⁴⁹⁰ and the Medicines and Related Substances Control Act⁴⁹¹ affected and limited the applicants' constitutional right to use cannabis for the purposes of his Rastafarian religion, such limitation were reasonable, justifiable and necessary under section 36 of the Constitution,⁴⁹² and was thus upheld. On appeal to the African Commission on Human and Peoples' Rights in *Prince v South Africa*,⁴⁹³ it was found that there had been no violation of the applicants' rights. The matter before the UNHRC was considered and the committee decided upon the facts that the prohibition under the South African legislation was based on objective and reasonable grounds and thus the failure of the state to provide an exemption for Rastafarians did not constitute differential treatment contrary to the ICCPR. The committee thus found no breach of the articles of the covenant.

⁴⁸⁴ 2000 (4) SA 757 (CC), paras 19-20; 23 and 40.

⁴⁸⁵ Available on the website of the Office of the United Nations High Commissioner for Human Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed on 14 April 2010).

⁴⁸⁶ (2007) AHRLR 40 (HRC 2007).

⁴⁸⁷ *Prince v President of the Law Society, Cape of Good Hope and Others* (1998) 8 BCLR 976.

⁴⁸⁸ *Prince v President, Cape Law Society and Others* (2000) 3 SA 845 (SCA).

⁴⁸⁹ *Prince v President, Cape Law Society and Others* (2001) 2 SA 388 (CC); (2002) 2 SA 794 (CC).

⁴⁹⁰ Act 140 of 1992.

⁴⁹¹ Act 108 of 1996.

⁴⁹² (2007) AHRLR, para 2.5, although the minority decision found the prohibition on the use and possession of cannabis in religious practices (which did not pose an acceptable risk to society and the individual) unconstitutional, and considered that government should allow such an exemption.

⁴⁹³ (2004) AHRLR 105 (ACHPR 2004).

On the regional level, South Africa is party to a host of treaties and agreements, central of which is the African Charter on Human and Peoples Rights (the Charter), which was ratified on the 9th July 1996. The African Commission on Human and Peoples Rights (the Commission), whilst acknowledging limitations faced by member states, has imposed further obligations on them to ensure that they, at the very least, satisfy minimum levels of the rights contained in the Charter.⁴⁹⁴

Part of the limitations mentioned above is where the government lacks the capacity to enforce the rights, whether in terms of the resources needed or in terms of the human capital needed.⁴⁹⁵ The case of *Government of South Africa & Others v Grootboom & Others*⁴⁹⁶ is case in point here. The Constitutional Court held in this case that government had a positive obligation to take reasonable steps within its available resources to implement the respondents' socio-economic right to adequate housing, which was guaranteed by section 26 of the 1996 Constitution of South Africa.

A product of the influence of international law and the international community in terms of rule of law in African countries are the effects of globalisation, and the APRM review process, which South Africa is a party to. As already indicated in chapter 3, globalisation is a phenomenon that has swept through the world, at an alarming rate, and has made brought about interconnectedness between and amongst nations. The effects of this on the rule of law in South Africa, together with the effects of the APRM review process, will be examined below.

As explained in chapter 2, the APRM is a peer-review mechanism through which member states in Africa commit to adhere to general principles on democratic and political governance, amongst others.⁴⁹⁷ Through these guidelines and principles, the state of the entronement of law in South Africa has been surveyed in the South African review, which was completed in 2007. The review was carried out in line with the procedures of the APRM, and a report issued. This yielded great dividends for the country both within and outside the continent, partly because the

⁴⁹⁴ ACHPR Res 73 (XXXVI) 04.

⁴⁹⁵ Egede, *ibid.*

⁴⁹⁶ 2001 (1) SA 46; which will be discussed in the next chapter.

⁴⁹⁷ These are set out in the Base Document of September 2003. These principles are more or less an African domestication of newly developed international guidelines.

submission to the review of peers and the publication of the report indicates the willingness of the country to strive for greater heights. The steps required and taken by the government of South Africa in order to comply with the APRM process further strengthens democracy and rule of law in the country, as discussed below.

5.7.3 Impact of the APRM initiative on the rule of law in South Africa

As part of the review process, the South Africa government appointed an APRM Focal Point with the responsibility of sensitising the country and outlining modalities for participation in the APRM process.⁴⁹⁸ In 2005, the APRM National Governing Council (NGC) was inaugurated by the then president, Thabo Mbeki. This council was in charge of the whole process of the self-assessment from the part of the country. Whilst the council had a widely representative membership, these were initially overly dominated by members of the government, and this issue was raised by civil society within the country. Consequently, the NGC was expanded in order to make it more inclusive.

In its assessment by the APRM, South Africa went through a rigorous process. Measures were put in place to get widespread consultation from members of the public on the four thematic areas of the APRM. All stakeholders were encouraged to also carry out their own self-assessment for submission to the APRM. Thus labour, parliament, private and public sector organisations were encouraged to do an internal self-assessment in the process of participating in the APRM process.⁴⁹⁹ Sensitisation and consultation processes were effective and put the participation of the society at just over 5 million people.⁵⁰⁰ The NGC consolidated the CSAR and submitted to the APRM, though the approach used by the governing council was criticised by some of the stakeholders as reflecting that

⁴⁹⁸ APRM Country Review Report on South Africa, 2007, available on the APRM website at <http://www.aprm.org.za/docs/SACountryReviewReport5.pdf> (accessed on 14 June 2010) 39. Honourable Geraldine Fraser-Moleketse was appointed as the APRM Focal point (also known as the APRM country representative) for South Africa.

⁴⁹⁹ APRM Country Review Report, chapter 1.

⁵⁰⁰ See the entire APRM report on the stage by stage processes that had to be followed in order to get a thorough report; see also page 45, where the National Governing Council is reported to have recorded awareness raising tapes in all the eleven languages, recorded CDs and songs to popularise the APRM.

the council wanted to manipulate the process and its outcome,⁵⁰¹ presumably to conceal the depth of the challenges the country was facing.

At the end of the self-assessment, the Country Review Report (CRR) on South Africa was issued by the APRM. It was a product of the consideration of both the Country Self-Assessment Report (CSAR) and the Country Review Mission (CRM). The CRR highlighted areas where the country was making progress and areas that were lacking and that needed more attention and political will to be paid to them. Of the thematic areas of the APRM, the one that relates the most to the issue of the rule of law is the Democracy and Political Governance theme. As stated in the SA APRM country report,

‘the key objective of democracy and political governance is to consolidate a constitutional political order in which democracy, respect for human rights, the rule of law, the separation of powers and an effective, responsive public service are entrenched to ensure sustainable development and a peaceful and stable society.’⁵⁰²

This stresses the role that the Constitution plays in determining the rule of law within a country. This is just one part of it, the other part of it is the way that the Constitution is respected and upheld by the members of the society. The report goes on to buttress the fact that the South African Constitution is not only the most important document in the construction of the state, but also the most crucial instrument in forging a nation.⁵⁰³ Whilst the CRR identified issues under the thematic areas on which the country needed to make improvements, it also commented the progress made by South Africa in its 13 years of democracy in enthroneing the rule of law.⁵⁰⁴

Amongst the issues identified were the increasing phenomena of corruption, the poverty levels, the lasting impact of apartheid on the people and xenophobia. The NPoA was submitted along with the CRR to the CHSG. It signifies the steps that have been identified that will be taken to address the issues that were identified in

⁵⁰¹ APRM Country Review Report 43.

⁵⁰² APRM Country Review Report 69.

⁵⁰³ *Ibid.*

⁵⁰⁴ See, generally, APRM Country Review Report on South Africa, especially the Executive Summary.

the CRR. It is a program of action as the name depicts. An annual progress report is expected to be issued by the country to indicate how much progress is being made in relation to the issues raised, and how the country is coping with implementing the recommendations of the CRR.

South Africa has submitted the first progress report on the NPoA, and was due to submit the second in this year 2010. The progress report has been criticised by civil society as not fulfilling and reflecting the purpose for which it is designed.⁵⁰⁵ The progress report is meant to give an indication of the progress made by government in correcting the concerns raised in the CRR. It would appear that even though South Africa is one of the pioneer countries of the mechanism, the country has not been able (and or willing) to give effect to the purpose of the APRM.

Unfortunately, the first progress report was unable to show any substantial effort that has been put into addressing the problems identified in the CRR a year after. In particular, the problem of xenophobia that was identified in the CRR spiralled out of control in 2008.⁵⁰⁶ Currently, there have been threats and insinuations made by communities that they will again chase foreigners out of their communities after the world cup.⁵⁰⁷ The issue of the proper implementation of the BBE initiative (now under the BBBEE) was another issue identified. The effectiveness of this initiative in correcting the ills of the society is still questionable, as it has merely succeeded in creating a tiny black middle class. As indicated earlier in this chapter, corruption is still a problem, along with issues of poverty and others.

Whilst it is not expected that by the time the first progress report is issued, the identified problems would have been conclusively dealt with, it is at least expected that there will be signs of efforts being made to meet the challenges identified in

⁵⁰⁵ Turianskyi Y 'Off Track? Findings from South Africa's First APRM Implementation Report' *SAIIA Occasional Paper* No 53.

⁵⁰⁶ This resulted in the loss of lives, property and source of livelihood for immigrants. It created a temporary refugee community as foreigners had to be living in makeshift tents after being chased out of their communities.

⁵⁰⁷ This issue has been brought into the public domain by the media. Talk Radio 702 in particular has alerted the public and authorities to these threats. This has been corroborated by members of the public who have called in to confirm such threats. On the 2nd of July 2010, the Police Minister, Nathi Mthethwa, was reported to have issued a strong statement against any xenophobic attacks. See also 'Anti-xenophobia Committee Finalising Post Cup Plans', available at http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=8728:zz&catid=3:Civil%20Security&Itemid=113 (accessed 2 July 2010).

order to ensure growth and development. This is when the APRM process is said to be effective and successful. The effectiveness of the APRM will translate to better and greater respect for the rule of law in the country.

5.8 Conclusion

In examining the existence of the rule of law in South Africa, this chapter provided a brief historical background, especially in relation to the evolution and formation of the country, the role of the Dutch, British, Afrikaners and Africans and other nationalities, in what has now evolved into South Africa. This historical perspective paid particular attention to the role that law played in the evolution process of South Africa (whether good or bad, legitimate or illegitimate).

South Africa as a country has gone through tumultuous times and challenges on its path to liberation for all its citizens. In the seventeenth and eighteenth centuries, the legal practices of the Dutch, notably the institution of slavery, led to the development of a racial order. This racial order manifested as the system of apartheid, which resulted in a lot of damage to the social fabric of the country. It has resulted in the country having one of the most extreme cases of inequalities ever seen in a country. In examining the legitimacy of the laws promulgated under apartheid, it is seen that these lacked, and have not fostered, the growth of the rule of law in the country.

This chapter has sought to lay the foundation for the place of the rule of law in the legal system in post-apartheid South Africa. The rule of law, as used here, implies the rule of 'legitimate' law; law that the people perceive and obey as binding on them; and law that they are participatory in its making and moulding. The pre-1993 constitutions of South Africa were not products of public participation; rather, they were products of the desires of a white minority. These constitutions lacked legitimacy due to the prohibition from participation of the greater majority of the population, thus giving rise to a situation in which the system of governance that emanated from these constitutions was such that allowed and perpetuated discrimination and racism against the majority of the people. The laws that emanated from this system also followed suit in perpetuating apartheid.

The post apartheid period has seen a marked improvement in the state of the rule of law in the country. The 1993 and the current 1996 Constitutions are products of extensive consultations and public participation, which confer a great deal of legitimacy on these documents. They express the hopes, values and aspirations of the majority of the people of the country. There exists a sense of ownership, acceptance of the process and the document by the people. This is translated into the public sphere, where the law continues to order and direct people's lives, and continues to be upheld.

The rule of law in South Africa has shown a level of resilience in withstanding the challenges and pressures which can actually be turned into 'building blocks'. This can be partly attributable to the people of South Africa and the way in which they engage with the law, and also the perception that exists and that is transferred into behavioural patterns, that they (the people) are bound by the tenets of the law. This can also be adduced to the reflection by government (state) that it itself is bound by the law. Thus, on both sides of the divide, the people and the state exhibit a reasonable level of compliance with the law.

However, even though this is the case, there are still challenges that have to be surmounted in order to properly enthrone the rule of law in the country. These challenges can be seen manifesting in the various instances referred to above, that have had the effect of raising anxiety and doubt in the public domain. What these events have shown is that the public needs to keep its vigilance in protecting the entrenchment and entronement of the rule of law. The vigilance of the public puts those in positions of power on their guard, to realise that their very actions are being monitored, gauged and accessed by the people. Vigilance of the public remains a much needed virtue; so also transparency and accountability on the part of public office holders, and the society in general.

Compared to her African peers, the rule of law in post-apartheid South Africa is better established. The law is generally upheld and respected, the Constitution and its institutions are respected also. This can be attributed to the fact that at the dawn of the new South Africa, the memories and scars of apartheid were still so fresh in people's minds that there were definite lines and boundaries that were not to be

crossed by the government or the people under any circumstance.⁵⁰⁸ This is manifested also in the way that international law is incorporated into and adhered to by the South African legal system. As we saw earlier on, international law has had a huge influence on the development of the legal system, and continues to play an important role as such. Compliance with international law further enhances the profile of the country on the international plane and the different institutions that exist to ensure compliance with the law in various areas and aspects of life

⁵⁰⁸ Both the interim and 1996 Constitutions (especially with the Bill of Rights) were very clear as to what was expected by the people and what was expected of the people. Any type of unfair discrimination on whatever ground was contrary to the Constitution, and not allowed. Institutions were set up in Chapter 9 of the 1996 Constitution for the purpose of strengthening constitutional democracy. They were mandated to be subject only to the Constitution and to be impartial, and without prejudice.