Democracy Approaching Crossroads: A South Africa's Crises of the Rule of Law

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Declaration

I, Nontokozo Cwebile Majola, student number 216068841, hereby declare that this thesis titled 'DEMOCRACY APPROACHING CROSSROADS: A SOUTH AFRICA'S CRISES OF THE RULE OF LAW' submitted for the Master of Philosophy degree is my own work and that it has never been previously submitted for assessment or completion of any postgraduate qualification to any other University.

Dedication

This thesis is dedicated to my younger sister Senzelwe ; you are truly the best thing my parents ever got me. If not for your support and love through the difficulties of completing this project I would have given up and for that, this one is for you mntaka Ma.

Abstract

The concept “rule of law” is essential to global legal and political discourse, often referenced in various sectors of society, including politics, media, and government structures. However, what seems prevalent is that different groups often interpret the concept inconsistently. It is no exaggeration to state that there are myriad ways in which the rule of law is interpreted and understood. Hence, the divergent interpretations among ordinary people, politicians, and contribute to both theoretical and practical crises surrounding the concept.

Against this backdrop, this thesis aims firstly to demonstrate the pervasive theoretical disagreements regarding the concept of the rule of law. Secondly, it seeks to highlight the emerging crisis of the rule of law in South Africa. In other words, it will present evidence suggesting that South Africa is currently facing a crisis in the rule of law. This will be achieved through a conceptual analysis of what the concept of ‘Rule of Law’ entails.

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Introduction

The 'rule of law' is significant ideal in contemporary law and politics. In fact, it has been claimed to be the most important political ideal today (Tamanaha, 2004). The rule of law has become a buzzword in recent time. Bellamy, Richard (2007): 54 Writes as Joseph Raz Has Noted, Some Accounts of the Rule of Law, Use Them the Term as a Catch-All Slogan for Every Desirable Policy One Might Wish to Enact (Raz, 1990). It is both crucial and profound that individuals recognize its significance, even as its interpretation remains elusive. While the rule of law constitutes a vital element of the foundations of society, it lacks a definitive or universally accepted definition. The underlying reality serves as a catalyst for the present investigation. As the rule of law has evolved into a mechanism within modern society, numerous individuals employ it in accordance with their personal aspirations and requirements. Therefore, it is incumbent upon philosophers, as citizens of the world and particularly of specific societies, to clarify the concept to ensure that the most importance and salient political discussions we have are meaningful and carry weight. As Isaiah Berlin (1999: 10) eloquently
writes:

> The task of philosophy, often a difficult and painful one, is to extricate and bring to light the hidden categories and models in terms of which human beings think (that is their use of words, Images and other symbols), to reveal what is obscure or contradictory in terms to discern the conflicts between them that prevent the construction of more adequate ways of organising and describing and explaining the experience.

In consideration of this, the present endeavour seeks to implement a philosophical framework through a thorough examination of the rule of law. This undertaking, as posited by Berlin, necessitates confronting the ambiguities and inconsistencies inherent in the conceptualization of the rule of law. At first inspection, ambiguity and inconsistency might appear to be incongruous. Nevertheless, to elucidate this point, the concept of the rule of law must be differentiated from the expression 'a rule of men'. What justifies the necessity for a precise differentiation between the two? The response is straightforward: there exists a considerable degree of vagueness between the Democracy at a Crossroads: South Africa's Crisis of its Rule of Law two concepts. The latter phrase designates legal rules against perpetuities or the stipulation that that taxes must be filed by a certain date. The notion of the rule of law is somewhat elusive, making it hard to state explicitly what it encompasses. However, the rule of law stands as one of the most powerful and often repeated political ideals in contemporary

global discourse, serving as a major source of legitimation for governments in the modern world (Tamanaha, 2004).

The principle of the rule of law constitutes one among a spectrum of ideals that pervade liberal political morality; other significant values include democratic governance, the safeguarding of human rights, the pursuit of social justice, and the promotion of economic liberty. The existence of this plurality of values indicates that there exist diverse methodologies for assessing social and political frameworks, and these methodologies do not necessarily correspond in a coherent manner with one another. A fundamental aspect of the rule of law is that individuals occupying positions of authority must exercise their power within a framework that is constrained by well established public norms, as opposed to acting in an arbitrary, ad hoc, or solely discretionary fashion influenced by their personal preferences or ideological perspectives.

The rule of law has been an important ideal in our political tradition for centuries, and it is impossible to grasp and evaluate modern understandings of it without acknowledging its historical heritage. Writes as Joseph Raz Has Noted, Some Accounts of the Rule of Law, Use Them the Term as a Catch-All Slogan for Every Desirable Policy One Might Wish to Enact (Raz, 1990). Writes as Joseph Raz Has Noted, Some Accounts of the Rule of Law, Use Them the Term as a Catch-All Slogan for Every Desirable Policy One Might Wish to Enact (Raz, 1990). But Locke's argument was that something is considered arbitrary when it is temporary and lacking notice; the ruler simply guesses as he moves along. It is the arbitrariness of unpredictability not knowing what you can rely on that Locke describes as "sudden thoughts, or unrestrained and until that moment unknown wills without having any measures set down which may guide and justify their actions". Though Locke presented his theory of pre-political property rights, the so-called Labour theory in chapter five of the second treatise, it was far from uncontroversial. For Locke, positive law is subject to substantive constraints, He subjected the legislature to a discipline of uncertainty (Waldron, 2016). The substantive constraint was meant to affect the validity of positive law (Locke, 1689:135).

Autocratic governments tend to have simple laws, which they administer peremptorily with little respect for procedural delicacy. Montesquieu argued that legal and procedural complexity is often associated with respect for people's dignity. This respect, he suggested, was associated with a monarchy ruling by law, as opposed to despotism. In monarchies, the administering of

justice was seen as more orderly. Fast forward to the modern debate, and we can still hear echoes of the doctrine propounded in the spirit of the Laws, p.61), 1748: Bk.26, ch.15, ch.14, p. 510 where 'things that depend on principles of civil rights must not be ruled by principles of political rights." 'Civil rights' Montesquieu's term for what we now call private law she called 'the palladium of property'. A failure of the rule of law is likely to lead to the impoverishment of an economy Montesquieu: Bk. V.

Writing in the second half of the 19th century, in his *Introduction to the Study of the Law of the Constitution,* Albert Venn Dicey (1982) bemoaned what he saw as a decline in respect for the rule of law in England. The rule of law had once been a proud tradition that distinguished governance in England both from the executive domination of *Droit administrative* in France and from the fatuous and abstract certainties of paper constitutions in countries like Belgium For Dicey, the key to the rule of law was legal certainty: 'No man is above the law and every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals' (Dicey, 1982:174). F.A. Hayek's work on the rule of law proceeded in two phases: (1) from his wartime book The road to Serfdom (1994) through to The Constitution of Liberty (Hayek, 1960); and (2) a somewhat different account presented in his trilogy Law, Legislation, and Liberty, which is more congenial to the spirit of common law and critical of the role of legislation. Governance during wartime necessarily required the total mobilisation and management of all the society's manpower and resources.

Hayek warned in 1944 against the retention of anything like this mode of administration in peacetime. These regulations would function in an impersonal manner to safeguard individuals from each other, not being directed towards any specific individual or circumstance, and not relying on any anticipations for their efficacy. By the year 1970, Hayek had commenced a revaluation of his stance. Although his attention persisted on the ramifications of the rule of law concerning liberty, he began to interrogate whether the texts of unambiguous, broadly applicable legislated rules would furnish an adequate framework for the preservation of freedom. He favoured something more akin to the law model based on predictability, with principles and solutions emerging from a series of judicial decisions in an almost evolutionary manner. The conventional wisdom of the legal positivists held that laws could be impeccably drafted and even-headedly administrated yet still be hideously unjust; However, Lon Fuller (1958) believed, as a matter of political psychology, that there would be a reluctance to use the

forms of law general and public norms to embody and inscribe injustice. However, Lon Fuller (1958) believed, as a matter of political psychology, that there would be a reluctance to use the forms of law general and public norms to embody and inscribe injustice.

Slavery in the United States and apartheid in South Africa were often cited as examples.
The purpose of the rule of law is to lift the law above politics. The idea is that the law should stand above every powerful person and agency in the land, a sentiment shared by many theorists. The rule of law itself, as a concept, has formal, procedural, and substantive requirements. Failure to meet any of these criteria will not simply result in an ineffective system of legal rules, but one that cannot properly be called a legal system.

Though many jurists follow Raz (1997) in viewing the rule of law as a purely procedural ideal, others argue for a more substantive dimension. Some believe there is a special affinity between the rule of law and the vindication and support of private property. Ronald (2004):131 states that "a critical aspect of the commitment to the rule of law is the definition and protection of property rights"; he further explains that the degree to which a society is bound by law is tied to processes that ensure property rights are secure under legal rules, which are applied predictably and are not subject to the whims of particular individuals**.** This commitment to such processes is the essence of the rule of law (Cass, 2004:131).

Under the apartheid government, its officers, and agents were accountable under the law. The laws were clear, publicised, and stable, and were upheld by law enforcement officials and judges. However, what was missing in even colonised and apartheid South Africa was a substantive component of the rule of law. Both colonisation and apartheid fundamentally undermined the rule of law in South Africa from their inception, as both constituted systematic and organised crimes against humanity. The current absence of political and social cohesion is a consequence of these two historical phases, with both colonisation and apartheid exerting lasting impacts. Apartheid persists, perpetuated by the exploitation of economic and political power by prominent players via indirect violence.

As illustrated above, the term rule of law has been conceived and the parameters of its purpose minimally sketched. This thesis will conduct a conceptual analysis of the rule of law, with a particular emphasis on South African society as the primary subject of examination. This will

examine the factors that led to the current crisis of the rule of law in South Africa. It posits that South African democracy is susceptible to failure owing to an intrinsically faulty system. Therefore, the thesis will propose a reconceptualization of political principles and legal culture in South Africa.

The first chapter offers a historical overview of the notion of the rule of law, tracing its origins back to the founders of philosophy. It is not an exaggeration to say that the classical Greek societies had a form of the rule of law. This idea is also captured in the works of the modern legal experts like Brain Tamanaha (2004). It is in this works, that Tamanaha (2004) eloquently states that Aristotle's writings on the rule of law are still influential even today. In many accounts of the rule of law, its origin is identified in classical Greek thought, often quoting passages from Plato and Aristotle. However, the idea of the rule of law did not remain confined to Greek society alone. It was passed on to the Romans, who contributed significantly to the development of the rule of law, both through positive contributions and the darker aspects of their history.

In medieval times the contest between the kings and popes over supremacy, Germanic customer law and the Magma Carta marked efforts by the nobility to use the law to impose restrictions on sovereignty. It was in the eighteenth century that Albert Venn Dicey introduced *the study of the law of the Constitution* to describe the rule of law as a key feature of the political institutions of England. In his description, Dicey argued that there is a need for the separation of the elements that underlie the rule of law, building upon his emphasis on the jurisdiction of ordinary courts (2017) (Cosgrove).

On the other hand, O'Donnell (2001) notes that even though there are many characterisations of the rule of law, each contains false components. The contrasting definitions of the rule of law in the views of different scholars highlight the complexity of the concept. But the conceptualisation of the rule of law is not the concern of the first chapter. The first chapter is concerned solely with tracing the historical account and development of the notion of the rule of law through time.

The second chapter, as indicated above, focuses on the conceptualisation of the notion of the rule of law. I consider it necessary to reflect clearly on the conceptual issues in and around the

notion of the rule of law. In doing so, I will review a wide range of literature on the notion of the rule of law. My primary aim, however, will be to eliminate the confusions that exist in relation to the concept of the rule of law. In this chapter, I will outline the philosophical and conceptual grounding of the rule of law as articulated by its supporters. My goal is to identify the weaknesses in their own accounts of the notion of the rule of law, while simultaneously pointing the readers to the more suitable conceptualisation.

The third chapter seeks to understand the nature of the rule of law and its criticisms. In this chapter I seek to separate the "chaff" that may hinder our understanding of the rule of law. I am of view that eliminating the unnecessary obstacles is an important aspect in advancing the concept of the rule of law. Hence, in this chapter, I will address two key questions: Firstly, what the rule of law is not. It is important to clarify what is not part of the rule of law, even though it may appear to be so. Secondly, I explore the question: What is the rule of law? Answering this question is central to the current project, as it will ultimately give us a clearer understanding of what the rule of law can minimally be defined as and how it is constituted. The last part of this chapter will address the need for a version of the rule of law that is sensitive to African values. The fundamental assumption behind this idea is that the rule of law should not be entirely detached from the context in which it operates.

The fourth chapter takes a different, yet equally important trajectory by tackling the practical questions of the rule of law. It will explore the integral components of the rule of law, which are necessary for its practical application. Without these components, the rule of law would remain an abstract idea, disconnected from the lives of the people it is meant to govern. If the rule of law's primary purpose is to regulate the conduct of the people or the subjects, then it be supported by institutions and structures to enforce those laws. One such key component is the judiciary which plays a vital role in upholding the rule of law.

In the fifth and final chapter, I will address two important assumptions as to clarify key issues; firstly, I will discuss the assumption that the rule of law and democracy are synonymous. I argue that this conflation should not be taken lightly, as it has of the potential to create confusion. Secondly, I will attempt to illustrate how the rule of law should specifically be conceived in the context of South Africa.

Chapter One

A Historical to Present day account of the Rule of Law

1. Introduction

The rule of law, in its basic form, is the principle that no one is above the law. While the idea of the rule of law is not new, the concept has always been a vulnerable aspect of western political philosophy. Establishing a shared conception of justice is particularly undeniably difficult, especially in societies with a history of injustice (2008) (San Giovanni).The rule of law has become a central theme in public political dialogue. Given its significance, it is essential that a clear and accessible understanding of this ideal be available. The crises around the rule of law are at the heart of many of Africa's current developmental predicaments (Fombad, 2018). Political instability, economic decline, poverty, unemployment, and pervasive corruption are among the repercussions of the current rule of law challenges confronting Africa.

This chapter is structured as follows; firstly, it offers provide a historical and developmental overview of the notion of the rule of law. It is important to note that while the current project loosely attributes the term 'rule of law' to Aristotle and a few other thinkers from the medieval period, the actualisation and coining of the term later than the early discussions of the law. Secondly, the chapter will offer a brief overview of how the notion of the rule of law was originally conceived. Finally, it will turn its attention to demonstrate the crises surrounding the rule of law in South African society.

1.1 Historical Origins of the Rule of Law

Aristotle's work on the rule of law is still influential. Many accounts of the rule of law today identify its origins in classical Greek thought, quoting passages from Plato and Aristotle (Tamanaha, 2012). While the rule of law as a continuous tradition evolved more than a thousand years after the peak of Athens, Greek ideas concerning the rule of law remain vital as exemplary models, offering inspiration, and authority for later periods (Tamanaha, 2004). Aristotle posed the question of whether it was better to be ruled by the best man or best laws. At this time Athens took great pride in democracy, meaning government by the people. By the era of Plato and Aristotle however, Athens had already declined from its peak and lost the war against Sparta. The faith both student and teacher had once expressed in the rule of law reflected their

belief in its stabilising and restraining effect. According to Plato the government must be bound by the law: : where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off (2012); But If the Law Is the Master of Government and the Government Is Its Slave, Then the Situation Is Full of Promise and Men Enjoy All Blessings That Gods Shower on a State (Barker).

For Aristotle "true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws" (Philips, 1951). He determined that, while just, the laws ought to be paramount. Both Plato and Aristotle regarded law as a fundamental component of governance and the societal structure of the state. Their concepts align closely with contemporary notions of democracy, the promotion of the rule of law, and the freedom of all individuals, irrespective of socioeconomic standing.

Further, Roman contribution to the rule of law tradition can be viewed as both positive and negative. The negative aspects however, played a more prominent role in shaping history. Julius Cicero, on March 15 in 44 BC during the dying stages of the Roman Republic, as it was giving way to autocratic rule, wrote, "it is the law that rules, not the individual who happens to be the magistrate" (Chayes, 1975: 1281). For Cicero, the law required a distinction to be drawn between the just and unjust, where the harmful parts of the law were to be disqualified as "law". He was not an advocate of popular democracy; instead, Cicero preferred a mixed constitution with power divided amongst all classes. This division of power was not equal but depended on how high each class ranked academically (Caplow, 2017).

The negative Roman contributions to the rule of law are seen in the Lex Regia and the Corpus Iuris Civilis. To substantiate this point, some historical background is necessary. The Roman Republic, governed by an aristocratic assembly, existed from the fifth century BC until it fell under the rule of emperors, beginning with Augustus, who resigned from 27 BC until 14 AD. In subsequent years, the Roman Empire expanded its dominion over the whole Mediterranean and a significant portion of Europe. The reality was not one of entirely autonomous legal absolutism by emperors. The emperor was unequivocally above the law in both theory and practice. Contemporary legal systems encounter a comparable conflict, as leaders of state function as both the origin of law and as subjects of the laws they promulgate.

The positive Roman contributions to the rule of law in continental countries are significant, even though ancient and medieval law is considered more of the "prehistory", of current law. Knowledge of Roman law is often a prerequisite to a basic understanding of the legal norms in force. Roman law plays an important role in the critical evaluation of present or proposed legislation. Modern arguments rely on a deeper appreciation of Roman legal structures. Due to the common fundamental principles of western legal thought, the terminology of Roman law continues to provide a universal legal language. In the modern world, decisions made by classical jurists remain a touchstone for testing various issues affecting the general theory of law today (Wieacker, 1981).

During medieval period, three traditions contributed to the development of the rule of law: (1) the contest between kings and popes for supremacy, (2) Germanic customary law, and (3) the Magma Carta, which epitomised the effort by nobles to use the law to impose restraints on sovereigns. Firstly, notions of theocratic kingship first asserted by Constantine, made conflict between popes and kings inevitable. The emperor's laws and decrees and commands were manifestations of divinity made known through the emperor. The laws were not solely the result of the emperor's decree, but also embodied divine will, which conferred upon them a sacred legitimacy. Consequently, society was regulated by laws synonymous with Christian justice; the monarch, as a Christian sovereign, was bound by these laws, just like all others. The emperor took a formal oath affirming his submission to both superior (natural, divine, and customary) laws and statutory law. The absolutist monarch model derived from Roman law was consequently challenged and reformed into a monarchy expressly constrained by legal frameworks.

Greek thought, channelled into Western ideas about government and law primarily by the Roman Stoics, postulated a view of the universe, man, and law that retains its vitality today. Cicero (1928), xiii) famously declared, "true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands and averts from wrongdoing by its prohibitions". We cannot be freed from its obligations by the senate or people, and we need not look outside ourselves for an expounder or interpreter of it. There will not be different laws in Rome and Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times. One who will

be master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.

Secondly, the Germanic customary law proposition is that the king is under the law and is to be widely identified as an independent source of the rule of law in the Medieval period, providing a counterpoise to Roman notions of absolutist monarchs (Tamanaha, 2004). “Germanic views of the supremacy of law were with Romanist views that law is the will of the sovereign through the understanding that the monarch has absorbed the law into his will” According to Medievalist Frits Kern (2002): 23.

Kern offered this summary: in the Germanic State, law was customary law, “the law of one’s fathers,” the pre-existing, objective, legal situation, which was a complex of innumerable subjective rights. All well-founded private rights were protected from arbitrary change, as parts of the same objective legal structure that granted the monarch his authority (Tamanaha, 2004).

The purpose of the State, according to Germanic political ideas was to fix and maintain, to preserve the existing order, the good old law. The Germanic community was, in essence, an organisation for the maintenance of law and order. The monarch and state existed within the law, for the law, and as creatures of the law, oriented toward the interest of the community. During most of the medieval period, there was a real tradition of the sovereign being limited by law, albeit not always honoured in practice (Philpott, 1995). Keeping in mind that the king could not be brought before a legal institution to answer for violations, the consequence of these views is that the king was not entirely free to disregard the law. Beyond binding kings, princes, and their officers, as indicated, customary law applied to everyone, including local barons and their aristocratic brethren who presided in manorial courts, confirming, and solidifying the everyday sense that no one was above the law (Tamanaha, 2004).

Lastly, no discourse on the mediaeval beginnings of the rule of law would be comprehensive without referencing the Magna Carta, executed in 1215, a decade prior to Aquinas's birth. The Magna Carta, while significant as a historical event with lasting implications for the rule of law, also exemplified a third mediaeval origin of legal governance: the nobles' endeavour to utilise the law to limit royal authority.

Then and now, the Magna Carta symbolises the fact that the law ought to protect its citizens against the king. Clause 39 is the historic provision: “No free man shall be taken or imprisoned or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land” (Hand, 1907:495).

The Magna Carta's actual influence on the rule of law tradition came after the medieval period. But it did stand for the rule of law during this period. Repeated confirmations of Magna Carta, when demanded by the community and granted by the monarchs, reiterated the idea that the king, like his subjects, was under the law' Vincent, 2012:27 Equally important, it added a concrete institutionalised component within the positive law system, an ordinary court and jury of peers to the earlier mentioned abstract declarations about natural law and customary law.

1.2 The Analysis of the Rule of Law

The notion, 'rule of law' itself is attributable to the British jurist Albert Venn Dicey, whose 1885 introduction to the study of the law of the constitution describes it as a 'feature' of the political institutions of England. Dicey explained the rule of law in two ways: first, that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law; and second, that every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals (Sarat, 2010). In this sense, the law is contrasted with every system of government where authority figures exercise wide, arbitrary, or discretionary powers of constraint. Dicey (2007) Further Argued That the Exercise of Discretionary Powers by Government Officials to Impose Constraints on Individuals Is Inconsistent with the Rule of Law. Discretion and Law, for Dicey, Are Antithetical.

The second aspect of the rule of law, according to Dicey is that everyone ought to be treated equally before the statutes of ordinary law. Public officials and those in power should receive no different treatment from that of ordinary persons Dicey also asserted that the rule of law is the "product of the multitude and totality of judicial decisions determining the rights of private persons in particular cases brought before the courts" (2013):168. He believed that this feature characterised the English constitution. For example, he argued that England had a freer press than in any other country because constraints on the press arose from ordinary libel cases heard by judges and juries, rather than from direct governmental control. Owing to its entrenched, disbursed nature, renewed every day in decisions made in ordinary courts,
Dicey (2004) considered this common law tradition, taken in its entirety, to be a more secure basis of liberty.

O'Donnell (2004) notes that even though there are many characterisations of the rule of law, there is a false component attached to each. Instead, there are individuals in various capacities

“interpreting rules according to some pre-established criteria to meet the conditions of being considered law” According to O’Donnell (2004):34, there is no such thing as rule of law or rule by laws, not men. Half a century after Dicey, A. Hayek presented a more sophisticated case on the same concept. Hayek identified the rule of law as a cornerstone of democracy. Like Dicey, Hayek (2000):74) saw a connection between “the growth of a measure of arbitrary administrative coercion and the progressive destruction of the cherished foundation of British liberty, the rule of law”.

Hayek offered a concise and highly influential definition of the rule of law: all rule of law systems possesses three attributes: “the laws must be general, equal, and certain. Firstly, generality requires that the law be set out in advance in abstract terms not aimed at any particular individual’’ (Gritzalis, 2002:539). The law then applies, without exception, to everyone whose conduct falls within the prescribed conditions of application. “When I say that the province of the law is always general, I mean that the law considers all subjects collectively and all actions in the abstract; it does not consider any individual man or any specific action” (Kelson, 1943:474). Hayek (1967):455) added that the separation of powers between legislature and judiciary is virtually mandated by the attribute of generality. Secondly, equality requires that the laws apply to everyone without making arbitrary distinctions among people. When distinctions do exist (as in male but not female conscription for armed services), Hayek insisted that to be legitimate, they must be approved by a majority of people inside as well as outside the group targeted for differential treatment. Thirdly, certainty requires that those who are subject to the law be able to predict what legal rules will be found to govern their conduct and how those rules will be interpreted and applied. Predictability is a necessary aspect of foreknowledge that enables freedom of action.

“These aspects of the rule of law preserve liberty as follows: When we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free” According to Hayek (1976):457.Even though the rule of law is not defined as part of democracy, it is certainly seen as a factor that advances democracy across much of the literature. Finn (2004):14 argues that “the rule of law complements principles of democratic accountability by prohibiting the exercise of arbitrary power”.

1.3 The Struggle for the rule of Law in South Africa

The scourge of apartheid was characterised not only by its egregious discrimination but also by its pervasive lawlessness. The lawlessness in South Africa was overtly evident as its leaders sustained their authority by the utilisation of murder squads and torturers. The rule of law was absent in South Africa; apartheid, as sometimes said, was governed by legislation. Consequently, South Africa sought membership in the Western tradition of the rule of law, predominantly based on British ideas.

The struggle against South Africa's lawlessness was waged, in part, in in the country's courts, where anti-apartheid lawyers could invoke South Africa's national liberties to sometimes undercut its actual injustices. Apartheid was not defeated in the courts but in the world of politics, mass mobilisation, military force, and international sanctions, though the events in the courts remain a part of South Africa's history (Ellman, 2015).

Moreover, the heritage of law proved to be a path to an agreement in the negotiations. South Africa's old parliament formally voted itself out of existence and the new order into being (although the terms of its departure had been negotiated by the African National Congress and the other contesting parties outside Parliament's walls). The Interim Constitution, which was adopted in 1993, contained "constitutional principles" by which the new constitutional court would judge the validity of the final constitution to be written after the first democratic elections (Sarkin, 1999).). The overthrow of apartheid, then, was not only the abolition of many deep, discriminatory injustices but also the establishment of the rule of law in the new, post apartheid country (2001) (Wilson). Final constitution says as much: its first section declares that among the founding values of the nation is the supremacy of the constitution and the rule of law.

The battle to establish the rule of law is still very much in progress. South Africa's democracy is now more than twenty years old but is still far from perfect. Every country faces problems and perhaps most countries' politicians seem unequal to the tasks before them. South Africa, moreover, faces the immense task of righting the economic inequalities between blacks and whites left over from its past.

The constitutional court takes on a special mandate as an apex and final arbiter in all matters, ensuring the promotion of values and principles of the dispensation. In Democratic Alliance v President of the Republic of South Africa and Others (263/11) (2011) ZASCA 241 (1 December 2011), in a judgment by judge Mohammed Novsa, the SCA pointed out that South Africa is

now a democratic state founded on, amongst other values, the supremacy of the constitution and rule of law (Govinden, 2014). The founding principles behind the constitution mark of democratic character of South Africa and serve to protect and preserve the rule of law (2000) (Rosenfeld).

The most basic principle of the rule of law is that "no man is above the law and no man is below it" (1913) (Roosevelt). The principle follows from the idea that truth, and therefore the law is based upon fundamental principles which can be discovered, but which cannot be created through act of will (Kant, 2012). The most important application of the rule of law is the principle that government authority is legitimately expressed only following written and publicly disclosed laws. The principle safeguards against arbitrary governance, whether by a totalitarian leader or by mob rule (Goodhart, 1958). If the rule of law unravels, everything South Africa's transition into democracy stood for stands to fall apart.

The reality is that both colonisation and apartheid set the rule of law in South Africa in crisis at its very formation, as both parts of history served as systematic and organised crimes against humanity (2001) (Wilson).The lack of social cohesion evident today is the aftermath of these two historical periods, with apartheid's legacy surviving and now being carried through the abuse of economic and political power, by powerful stakeholders through indirect violence.

1.4 Rule of Law and Democracy in South Africa

Legal institutions play a vital role in liberal democracies, particularly, the judiciary. The argument is that 'democracy and the rule of law are institutionally embodied in the legislature and judiciary respectively' (Barros, 2003:188). The relationship between democracy and the rule of law is anchored in constitutional institutions, but the battle often lies within political ideologies. A major political stakeholder this thesis will examine is the African National Congress's conception of democracy and the institutional framework of the rule of law. The African National Congress (ANC)views democracy in a specific light, with policies and missions aimed at rectifying past injustices. Its vision of democracy is centred on liberation, focusing on the goals of democracy, the role of the state in a democratic dispensation, and the pursuit of power.

The primary emphasis is on tackling material inequality and restructuring society around fundamental issues. The individual is diminished to a constituent of a collective, with the paramount objective being universal democracy. Nonetheless, the reality indicates that the

ANC's interpretation of democracy is tailored to fulfil the interests of a particular demographic, especially the politically and economically privileged black elite. The African National Congress is not isolated; it functions as an integral component of South Africa's democratic framework, which has three institutions of government: the executive, legislative, and judiciary.

The problem is clear; the need for absolute and total control can be attributed to the African National Congress's pressing views on democracy. It is important to note that the overstepping between the executive and legislative bodies of government is partly an inherited problem of the Westminster system imposed on colonised South Africa. The reason this part of history keeps coming up is that even today, the doctrine of separation of powers does not explicitly state the action but only implies it. There is no changing the past, but the solution lies in transforming all three organs of the state. Labuschagne (2004) argues that the fusion of executive and legislative chambers undermines the separation of powers doctrine in South Africa. However, the dominance of the executive over the legislative is somewhat mitigated by the stronger judicial authority and substantial judicial review granted to the judiciary which acts as an "institutionalised watchdog." This enables the judicial institution to prevent encroachments on the principle of the separation of powers as embedded in the constitution (Labuschagne, 2004:100).

Budlender (2005):715-6) contends that transformation is a key theme in the constitution, implying that even the judiciary must be transformed. The judiciary's transformation is viewed through three lenses, which also involve the population or 'citizens' come in. The first transformation will be demographic and will accurately reflect the population of South Africa. The second transformation involves embracing a new legal order that aligns with the principles of the new democratic dispensation. The third transformation entails a judiciary that is more responsive to the goals of the democratically elected government. The demographic transformation of the judiciary is particularly important as judges must reflect the broader society they are presiding over. Public confidence is essential if the courts are to fulfil their constitutional functions.

The transformation of judicial attitudes is crucial for facilitating the creation of the society as envisioned by the constitution of 1996 (Wesson & Du Plessis, 2008:200). The transformation of the three branches of government, the interpretation of the law, and the conduct of the African National Congress are highly politicised aspects of South Africa's democracy. This is not only

due to the nature of South Africa's transformation project as encapsulated in the constitution but also due to the overstepping of legislative and executive powers, which has left the judiciary as the black sheep and the outcast branch of government in the public eye.

1.5 Conclusion

The rule of law is one of the most powerful and political ideals found in contemporary global discourse. It serves as a major source of legitimation for governments in the modern world (Tamanaha, 2004). Competing and contesting interpretations of the rule of law undoubtedly exist. A significant political entity, the African National Congress, adheres to one understanding of the rule of law, whilst the South African courts maintain a differing interpretation. Today there are signs of crises in its application reflecting political instability and challenges to social cohesion. The rule of law as a field of inquiry has in this chapter been traced back to the origin of philosophy to the Greek philosophers Plato and Aristotle.

Chapter Two

Conceptualising the rule of law

2. Introduction

In spite its prominence and frequent usage in contemporary legal and political discourse, there is no certainty in answering the question, “What is the rule of law?” The uncertainty surrounding this question stems from the lack of consensus with respect to the status of affairs that the rule of law denotes. One reason contributing to this dissensus over the definition of the rule of law is that every scholar who has commented on the rule of law in modern times has offered a different definition and developed another theory of the term.

As Olufemi Taiwo (1999): 154 points out, “it's very difficult to talk about the rule of law”. There are as many conceptions of the rule of law as there are defenders of it. At first glance, it may seem that many e scholars are consistently stipulating definitions of the concept of the rule of law. Nonetheless, their perceptions frequently differ, while some align in certain respects. In philosophical enquiries, when clarity regarding a particular concept is required, researchers often reference concepts previously examined by their predecessors, aiming to elucidate the profound insights contained within those concepts. This entails re-examining the writings and analyses of individuals who have previously dealt with the concept of the rule of law.

The recent discussions on the theory of communitarianism in African philosophy, for instance, cannot be discussed without consulting Bernard Matolino (2014), 2018, & 2019. Trying to understand the notion of communism in modern African philosophy means that you will have to read Matolino for your literature review. Now the question is, why is this scholar important in Afro-communitarianism in modern African philosophy? Matolino’s contributions are important as they question the very foundations of afro-communitarianism as a theory and practice. He argues that the idea that the community takes primacy over the individual is a

wrong conception of things. Matolino's' criticism of traditional communitarianism is that it exaggerates the role that the community plays over the individual. According to Matolino (2019), this idea stems from his proposed limited communitarianism which he introduces in his 2014 work *Personhood in African philosophy.* He argues that there is no inherent clash between the individual and the community. All in all, the relationship between the individual's constitutive features of a person as an individual and the reality of the society of the self, need not clash, at least for the purpose of working out what constitutive features of personhood. Hence there is a need to conceive the individual and community as contemporaneous.

In the example given above, there is a pattern that philosophers often follow. In any analysis, philosophers go back to the already existing concept and try to see if there are any insights that can be drawn from or advanced by those ideas. However, in discussions regarding the rule of law, this is not the prevailing trend. This is why Taiwo appears to have correctly determined that it is exceedingly challenging to encapsulate the essence of the rule of law. Another contributing element to the difficulties in defining the rule of law is the problem of stipulative definitions that are not confined to a singular interpretation of the notion. Due to the myriad definitions and t theories on the subject matter, it is difficult for one to arrive at a clear understanding of what the rule of law is.

Given the difficulties expressed above, the current chapter will focus on the challenges of articulating the notion of the rule of law. The focal point of this chapter is evaluating some crucial issues related to the rule of law. One of the most pertinent issues concerning the term "rule of law" is that of its character what set of features should the rule of law contain or exclude constitutively. This will be done as follows; firstly, this chapter will present the nature of the rule of law, as articulated by scholars like, Joseph Raz (1979), Jeremy Waldron (2002), Lon L. Fuller (1964), and John Finnis (1980), just to mention the few. These authors conceived the idea of the rule of law differently. The differing interpretations of the rule of law should not be viewed as a hindrance but as an opportunity for conceptual examination of the rule of law. A project focused on the conceptual examination of the rule of law offers substantial potential for comprehending the essence of the term.

2.1 Modern conceptions of the rule of law

In contemporary times, several theorists have attempted to understand the nature of the rule of law. In each attempt put forth, there is at least a slightly distinct definition of what the rule of law should look like. This section seeks to capture the idea that has been expressed above, that of the divergences and convergences in the definitions of the rule of law. Put differently, this section will explore the idea that contemporary positions on the rule of law demonstrate the variance that exists in the discourse.

In examining the few theorists, it will be apparent that the rule of law and each theorist's understanding of it differs from one to the next. This difference creates diverse definitions and, in some cases, contradictions regarding how the rule of law is defined. This has serious consequences, hindering efforts to answer the question of what the rule of law is. It would be worthwhile to start by exploring the theoretical foundations that inform the discussion of the rule of law, particularly as they have emanated from the Lon L. Fuller (1964) in his analysis of the nature of law.

In the 1950s and 1960s, Lon L. Fuller is a professor engaged with the nature of law, becoming a canonical figure for anyone interested in legal theories. In his book *The Morality of the Law*, Fuller (1964) sought to demonstrate that there are "necessary substantive moral constraints on the content of the law". Fuller understood the function of the law as the fundamental guidance for human conduct. He states, "the purpose I have attributed to this institution of law is modest and sober one, that of subjecting human conduct to the guidance and control of general rules" (Fuller, 1964: 146). In this Monograph, Fuller Argues That There Are At least Eight Conditions That Must Be Fulfilled to a Greater Degree, in Order for the Law to Achieve Its Fundamental Function. To Clarify This Point, He Uses the Parable of Rex, a Ruler Whose Good Intention to Make the Law Is Thwarted in Each of the Eight Different Ways. On This, Fuller (1964): 39 writes,

> Rex's bungling career as a legislature and the judge history that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; They are in this enterprise, if you will, eight distinct routes to disaster. The first and the most obvious lies in the failure to achieve the rule at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) A failure to publicise, Or at least to make available to the affected party the rules he is expected to observe; (3) The abuse of retroactive Legislation, which not only cannot itself guided action, but undercuts the integrity of the rules prospective in effect, since it puts them under the threat of retrospective change; (4) A failure to make rules understandable, (5) The enactment of the contradictory rules or (6) Rules that conduct beyond the powers of the affected party; (7) introducing such a frequent change in the rules that subject cannot orient his action by them, and, finally, (8) The failure of congruence between the rules as announced and their actual administration.

There is a plethora of insights that can be drawn from the above analogy. But these insights are not easily visible when one reads the analogy without considering the underlying idea and assumptions behind it. The assumption carried by the analogy is how an individual's conducts can be regulated while at the same time illustrating what the rule of law looks like. These are the two already accessible insights that can be drawn from the analogy given above. On the other hand, the stipulated routes to failure seem to suggest that in order for the legal system to succeed, it should avoid the eight failures outlined. To successfully, guide the behaviour of the individual/individuals within the given system, that system must first and foremost uphold rules. Secondly, the set of rules must be made available to the public. Thirdly, the rules should be prospective rather than retrospective, as prospective rules are better regulators of individuals' behaviour. Fourthly, the rules need to be easily comprehensible to people they are intended to regulate.

A rule must be explicitly defined and free from ambiguity or absurdity for the individuals it aims to govern. Fifthly, the regulations must not be contradictory; they must exhibit systematic coherence. Sixthly, the regulations should solely mandate activities that the subject is capable of executing. A rule must not demand the unattainable, as it would fail to direct behaviour efficiently. For instance, regulations mandating that individuals operate without technological assistance, such as gliders, cannot govern anyone's behaviour.

Seventhly, the rules should be relatively stable and should not change at an unreasonable rate. If citizens cannot keep up with the rules, they will not be able to act accordingly. Finally, eighthly, the published rules and their actual application need to be consistent. Individuals implicated in murder must be held accountable for their conduct if such regulations exist. Should this not occur, the subjects may initially comply with the regulations; nevertheless, over time, they will grow discontented with a legal system that fails to impose repercussions, rendering compliance futile.

The failure to meet any of the above stipulated criteria does not merely result in bad law; it leads to lawlessness. Hence, if any of these criteria are not met, it becomes absurd to expect individuals to be guided by such a law. On this point Fuller (1964: 82) argues that,

> Certainly, there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was

contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point, obedience becomes futile - as futile, in fact, as casting a vote that will never be counted.

In line with the sentiments expressed in the above quotation, Fuller acknowledges that an individual has no moral obligation to obey the a that is flawed or non-existent. As such, a legal system that has fundamental issues whether the law is obscure, contradictory, or impossible to follow leads to lawlessness. Fuller thinks that lawlessness is a condition to be eschewed. Fuller emphasises that the partial failure of the eight criteria is largely preventable, provided the law is understood with clarity and remains accessible. The inability to achieve this leads to a collapse of the rule of law.

Fuller emphasises maintaining the integrity of the legal system, by avoiding bribery, prejudice and indifference within the legal administration. He posits that retroactive legislation may be necessary to uphold overall legality, however this is only significant within the framework of future legislative regimes. He further asserts that although it is advantageous to enable individuals to engage in both short-term and long-term planning, this does not imply that a comprehensive classification of the law is likewise beneficial. A balance between legal clarity and the flexibility necessary for societal change and progress is desirable.

It is worth noting that Fuller never used the concept of the rule of law directly in his work, but subsequent scholars who engaged with his theories speculated on how his analysis of law's internal morality laid the foundation for understanding the concept of the rule of law.

The contemporary legal philosopher Joseph Raz, in his *The Authority of Law*, (1979) provides a different account of the rule of law. Raz begins this discussion of the rule of law with an idea that is not far from Fuller's conception of Rule of law. Raz (1979): 214, like Fuller, acknowledges that "the rule of law must be capable of guiding the behaviour of the subject, and that the doctrine of the rule of law derives from basic points". His conception of the rule of law comprises a number of principles that obtain when a system is accurately characterised as being under the rule of law. Unlike Fuller, who makes a seemingly universal claim about what must be true for the law to exist; Raz argues that his principles depend on the particular circumstances of different societies for their effectiveness or meaning. For Raz, the principles he outlines are not exhaustive. They are simply a few of the important things that come to mind when one first

thinks about the rule of law. The list of principles that comes to mind when reflecting on the rule of law is outlined as follows, according to Raz:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of the crime-preventing agencies should not be allowed to pervert the law (Raz, 1979: 214-219).

The effects of Fuller are clearly evident in the first two principles. Raz acknowledged this and commented that "the discussion of many of his (Fuller's) principles is common sense," but the reason for abandoning those clarifications of Fuller is the "conflict between the laws of the system." Raz's first principle integrates Fuller's three objectives: future potential, publicity or promulgation, and legal clarity. Raz's second principle suggests that the law needs to be relatively stable over the long term. Understanding why each of the eight criteria of legality is included makes it clear why Raz chose to include at least some of these principles in his account. These establish the foundation for the legal authority to direct actions. Raz's final six criteria may not initially appear to align with Fuller's principles; yet I contend that several of them might be seen as an endeavour to express a concept akin to Fuller's eighth criterion. In other words, Raz's final six principles reflect the feelings articulated in Fuller's eight criteria of Law.

This means that there must be congruence between the law and its application. For example, one of the reasons Raz proposes that the judiciary must be independent is that if a judge is free from "external pressure", the judge is only subject to the law, and therefore likely to act accordingly. On the idea of conformity, like Fuller, Raz (1979:
229) recognised that:

> makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal ... After all, the rule of law is meant to enable the law to promote social good and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.

From the above, it is clear that Raz believes that the rule of law is a social goal. At the same time, he believes that the rule of law is neither the ultimate goal nor the only social goal worth pursuing. This suggests that there are other social goals that need to be balanced.

In accordance with the concept of conformance, Raz compares the rule of law to a sharp knife. In this analogy, Raz seeks to demonstrate that the rule of law can function as both a beneficial and a malevolent instrument inside society. Despite its potential for abuse, it is undeniable that it serves as a crucial instrument for maintaining and regulating individuals' behaviour within society.

> Of course, conformity to the rule of law also enables the law to serve bad purposes. That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. At most it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law (Raz, 1979: 229).

For Raz, a society that succeeds in having the rule of law is not automatically a morally good society unless it has a system of promulgated, positive and clear rules. Ideally, a society can fail in relation with respect to certain societal and political ideal but still succeed in achieving the rule of law. In this sense, the rule of law is a tool that can be used to direct citizens' actions for morally good, evil, or neutral purposes. Consequently, evaluating the rule of law solely by the objectives it attains does not invariably yield a morally favourable outcome. Raz contends that without the rule of law, legislation cannot be deemed effective, analogous to how the rule of law cannot be considered a good knife unless it is sharp. Consequently, the rule of law is insufficient for exemplary legislation, while it remains essential. It possesses moral significance and is not entirely impartial.

The special status of the rule of law does not mean that adaptation to the rule of law has no moral significance. Apart from being a moral virtue, the rule of law is a moral imperative if the law is to perform useful social functions. It is morally important to make a sharp knife when needed for moral purposes. For the rule of law, this almost always means that it holds high moral value.

Following Raz's *The Authority of Law*, John Finnis's *Natural Law and Natural Rights* (1980) was published. Although Finnis's book was not primarily dedicated to the discussion of the rule

of law, but rather to the advocacy of other philosophical issues, especially the theory of natural law, his work along with Raz's, has significantly influenced the rule of law debate. While Raz and Finnis have different views on the concept of law, there are some similarities in their understanding of the rule of law. However, Finnis disagrees with Raz's sharp knife analogy.

Finnis presents the rule of law as morally good and downplays attempts to frame it as neutral. He characterises the rule of law as "a name commonly given to states where the legal system is in good legal status. It is a particular virtue of the legal system" (Finnis, 1980: 270). According to Finns, the rule of law is applicable when the legal system operates to further justice and the public interest. The objective is to uphold the dignity of self-determination for the subject of power and to safeguard against specific forms of manipulation. Consequently, the rule of law is a prerequisite for justice.

There are certain conditions that all people are interested in preserving and maintaining, such as "life and health, knowledge and harmony with others" which he calls "understandable essential commodities" or "aspects of human prosperity" According to Finnis (1980): 270.These objectives are essentially desirable for all human beings. He argues that the law is an appropriate means of achieving them, particularly to avoid anarchy or the natural state where "the more strong, cunning and ruthless prey on the less, education of children (which calls for resources outside the family) is difficult to accomplish, and economic activity remains stunted by the insecurity of holdings and the unreliability of undertakings" (Finnis, 1980: 273). Physical instability and lack of corporate credibility are oriented towards avoiding such situations, and that,

> [to] articulate that need is to state the reasons for instituting and supporting political authority, notably state government and law, on condition that these institutions carry on their legislative, executive and judicial activities substantially for the common good of the inhabitants of the relevant territory, rather than the interests of a segment of the population unfairly indifferent or hostile to the interests and wellbeing of other segments (Finnis, 1980: 273).

In other words, the spirit and purpose of enforcing the law is to avoid the evils that exist in anarchy and to realise the common interests of all. When the law is thus understood, it achieves its ultimate goal.

Finnis, Alongside Raz and Fuller, Further Suggests That "the Rule of Law Does Not Guarantee

All Aspects of the Public Interest, and Sometimes It Cannot Even Secure the Substance of the Public Interest" (1980):274.This idea deviates from the law and the constitution, echoing Fuller's argument that, for example, retroactive legislation may need to be introduced to maintain overall legality. Similarly, Raz contends that although the rule of law is an important goal, it is not the ultimate or sole goal of society, but one of many goals that should be weighed against others. Finnis presents a highly intricate theory of the rule of law, which is challenging to grasp due to its integration of two fundamental principles. The rule of law refers to a condition in which the law operates effectively, acting as a mechanism for promoting the common good. Conversely, Finnis recognises that the rule of law may be conceptually misrepresented and employed for unjust ends. In essence, Finnis contends that the rule of law serves as both an intrinsic objective and a conduit to achieve other objectives.

This apparent contradiction can be resolved by adjusting Finney's theory slightly and suggests that it is the law that can be used for harmful purposes. Second, the law becomes the rule of law only if applied correctly; if applied incorrectly, it ceases to embody the rule of law. In this sense, the rule of law will continue to be a moral ideal, and the law serves as a neutral means of achieving this purpose. . This comprehension of the connection between law and the rule of law corresponds with Fuller's criteria, which are essential for the effective operation of the law. Although they do not invariably result in the rule of law, Finnis posits that proper application of the law is likely to attain the rule of law.

Jeremy Waldron is the final legal philosopher that will be considered in this chapter. The analysis of Jeremy Waldron's rule of law begins with observing what the modern audience understands by the term. From this, he concludes that "the rule of law is one of the most important political ideals of our time" (Waldron, 2008: 1). He writes: "The rule of law is considered a fragile but decisive ideal, and the government seeks to impose its will through arbitrary and oppressive measures or by bypassing the norms and procedures set out in national law" (Waldron, 2008: 4). Waldron understands the rule of law as the opposite of arbitrariness.

This is an aspect of the rule of law that has been explored previously in the works of Raz and Finnis, who understand the necessary opposition to arbitrary forces and argue that the rule of law is morally good. Waldron concurs with Hayek's assertion that the presence of law correlates

with the existence of freedom. This signifies that individuals will not face arbitrary prosecution or punishment, and they will understand how to engage legally with the government and communicate with one another. Waldron elaborates on this concept, asserting that it is as potent as Raz's theory but advances farther by safeguarding citizens from substantial arbitrariness through the imposition of specific procedural constraints. Nonetheless, he notes that the procedural notions he advocates are more prominently featured in political discourse than in legal theory. He points out that there is a contradiction between what the philosopher of law emphasises and what the general public expects from the rule of law.

It is worthwhile to illustrate the key points expressed, in Waldon's *The Concept and the rule of Law*. Waldron (2008: 4) states, "Understanding the rule of law and the concept of law need to be much more closely related than modern jurisprudence". Comprehending the rule of law underscores established principles and highlights the significance of procedural and contentious elements of legal matters, especially the predictability they facilitate. Waldron asserts that the aforementioned fixed values and procedural features are interconnected.

A significant part of Waldron's article focuses on outlining the necessary conditions for the existence of a legal system. His first criterion is the existence of a court: "An institution that applies to the norms and guidelines of individual cases established on behalf of society as a whole." This includes, among other things the existence of fair procedures. In a sense, this is the rule of law. Raz, however, does not consider the existence of the court itself as a principle but cites the independence of the judiciary and the accessibility of the court as essential conditions. Waldron's claim that applying the law establishes it in the name of society as a whole aligns more closely to Finnis's perspective than Raz's. The second standard Waldron seeks is the existence of civil norms that must be established for society as a whole. This criterion is in line with Finnis's view on how the laws ought to be created and applied.

The third criterion Waldron identifies is the notion of positiveness as a prerequisite. This includes the recognition that the law is artificial and not an external, sacred source. While this notion might seem optimistic, Waldron does not fully adopt such a view. He specifies that he is solely focused on "central" legal issues, hence excluding proceedings typically regarded as reprehensible. Waldron further advocates for the function of lawmakers, the mechanism

through which legislation is established. His inclusion of legislatures within this criterion further substantiates the context-dependent nature of his thesis.

In the fourth standard, Waldron argues that the law must be presented as directed toward the public interest. He states: We recognise as a law not only the orders that happen to be issued by those in power, but also the norms that are aimed at representing society as a whole and addressing issues that affect society (2019):19). This view reflects Finnis's direction towards the public interest, while the idea that the law must present itself in a particular way is reminiscent of the relationship between Raz's notion of authority and the law. Raz argues that whatever the law really is, it must present itself as a legitimate practical authority. Waldron, however, goes further, suggesting that laws must not only meet this requirement but also be perceived by the public as serving their collective interest.

The fifth, and final criterion is the requirement for systematicity. The regulation builds on itself, Waldron explains; it presents itself as a unified corporation of governance. This requirement aligns with Neil McCormick's requirement for coherence or Ronald Dworkin`s principle of regulation as integrity. McCormick indicates that the regulation has to continuously strive to be a coherent system with each regulation handed and each courtroom docket selection made Dworkin, Similarly, indicates that prison adjudication is an exercise in figuring out the selection which will present the regulation in its best possible light (1985):176. First, a selection has to "fit" within the existing prison material.

To do this, Dworkin proposes to assume that each one legal guideline is traceable to a single (correct) individual (that is a hassle for a couple of authors with a couple of intents). Second, the courtroom docket's selection has to meet the "justification" requirement, serving as excellent reflections of political morality. Waldron shares this fundamental idea with McCormick and Dworkin, emphasising that the regulation ought to be understood as a coherent gadget that keeps consistency in the advent of every regulation and every judicial selection.

Unlike Fuller, Waldron is not strict in defining the criteria that needs to be met for the law to stand or be practiced. He states: "I think that we can call something a legal system if it satisfies a recognisable minimum along these five dimensions" Waldron, 2008: 38. In contrast, Fuller

and Finnis argue that if one of their proposed conditions is not met the rule of law cannot be established.

2.2 Conclusion

This chapter has set out to present the nature of the rule of law, as articulated by scholars like Joseph Raz (1979), Lon L. Fuller (1964), John Finnis (1980), and Jeremy Waldron (2002). It has been shown that these authors conceive the rule of law differently, offering both diverging and converging interpretations of its nature. This variation should not be perceived as an issue, but rather as a testament to the appropriate evolution of the canon. This chapter recognises Waldron's interpretation of the rule of law. Waldron underscores his significant contribution to the rule of law by highlighting the necessity for flexibility concerning the conditions required for the establishment of a law. According to Waldron, as previously indicated, stringent prerequisites are unnecessary for the establishment of a law to govern individuals' activities and behaviour.

Chapter Three

The Rule of Law and its criticism

3. Introduction

There are many conceptions, as illustrated above, attached to the rule of law but consensus in the literature is that the 'rule of law' contrasts with the 'rule of men'. Then the question is: how different is the rule of law from the rule of men? Simply put, the opposition lies in the idea of actions being an expression of an agent's will, often reflecting partiality, irrationality, or susceptibility to error. In contrast, the rule of law represents actions guided and determined by a secure system of rules that uphold abiding general standards rather than the immediate desires of individuals (Ingram: 1985)

The rule of law is not simply a substitute for the rule of men; rather, it underscores the concept that the law supersedes individuals. Enacted laws possess authority that is mostly independent of their originators. A fundamental prerequisite of the rule of law is adherence to regulations and their complete implementation. The application of law and the enforcement of obligation rely on an individual's volition and exercise of autonomy. The concept of an independent legal system is essential for the existence of the rule of law. A legal law or collection of regulations cannot be created or abolished to accommodate human wishes or interests. For a rule to persist as a guiding principle, it must be applied consistently and with significance.

The third chapter seeks to address to two questions: (1) What is the rule of law and (2) What is not the rule of law? Firstly, it examines what the rule of law is not, drawing from the main legal theories to what the rule of law is as an institutional guarantee of democracy. Secondly, it explores what the rule of law is. Lastly, it will demonstrate the idea that the rule of law should be sensitive to the context in which it seeks to be applied.

3.1 What is not the Rule of Law is ?

No one can dispute the diversity of legal theories. From the legal conservatism of the Sabine jurists to the sovereign command theory posited by John Austin, theories of law differ in a variety of ways, from their substance to their organisation and style (Postema, 2001). An examination of the substance of a theory is arguably most important as it facilitates a search for

the common thread that groups theories together under headings such as ‘natural law’ or ‘legal positivism’. Naturally, people by their very nature are often tempted to exploit opportunities around the law, without formally breaking the law but through manipulation (North, 2009). The law itself is made up of what is immoral and what is essentially a crime.

The rule of law is one of the key pillars of political morality; the others are democracy, human rights, and economic freedom (2011) (Waldron). The rule of law is not democracy, but rather a moral value that dominates liberal political morality. The rule of law does not determine who governs but defines the relationship between the government and its people. Similarly, the rule of law is not a human right, but without the rule of law, human rights are paper promises (Peerenboom, 2004). Human rights are protected by the rule of law. It is important in political morality and ensures that political power and government operate within the constraints of positive law, i.e., Within the Framework of a Legal and Constitutional System (Fallon) (1997).The rule of law is by no means a moral phenomenon. The value of morality inherent in it is not restricted to merely the content of any law.

A frequent interpretation of the rule of law is set out by contrast to the rule of men. This contrast is presented as different antitheses: ‘the rule of law, not men’; ‘a government of laws, not men’; ‘law is a reason, man is passion’; ‘law is not-discretionary, man is arbitrary will’; ‘law is objective, man is subjective’ (Tamanaha, 2004: 122). The inspiration underlying this idea is that to live under the rule of law is to not be subject to the vagaries of other individuals. “The rule of law, not men” is, in some way, “the antithesis of the arbitrary use of the power” (Hamara, 2013: 16). The rule of law is distinct from the rule of individuals, whose regulations fluctuate with each leader. It contradicts the governance of humanity. The rule of law embodies the lack of arbitrary authority, the supremacy of legal statutes, equality under the law, and the protection of individual freedoms. Justice within the framework of the rule of law entails ensuring equitable treatment for all individuals, maintaining parity between the affluent and the impoverished in social, economic, and political contexts. Its main impact is in what is known as ‘distributive justice’ or ‘administration of justice’, which includes justice according to law, natural justice, legal justice, civil justice, and criminal justice.

The rule of law is a not a faithful description of any state of affairs but rather a complex ideal that is even more difficult to realise. The rule of law is ineffective if laws are unenforceable or are not enforced. The rule of law cannot establish itself but must be actively maintained by the state. It is not an absolute notion; although essential for a genuine democratic society, its

boundaries resemble those of positive law. The efficacy of the rule of law is contingent upon the ethical principles of the populace and the moral integrity of the enacted statutes it enforces.
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3.2 What is the Rule of Law ?

The rule of law is more than an institutional guarantee of democracy; it goes beyond the principles of equality, constitutional supremacy, and legality. Very little thought has been given to defining what the rule of law is, or why we should accept it as a political ideal. A coherent ideal of lawfulness must include principles that, in some cases, our national government currently violates. Justice and legality are fundamental components of the rule of law, providing crucial safeguards against capricious governance. Although formalities related to legal procedures and the law provide specific protections, they are not conclusive in isolation.

The literature on the rule of law is marked by multiple, contesting definitions found in political science, legal studies, and other social sciences. Different meanings of the notion have been provided by Fuller, Finnis, Raz, and Dworkin, among other scholars. The lack of conceptual clarity of the rule of law has not, however, stopped empirical analysis of its causes and consequences. Despite the lack of clarity regarding a singular, universally accepted definition, the rule of law remains a crucial subject in political and legal research both as a dependent variable (Barros, 2003; Joireman, 2001, 2004; Hansson & Olsson, 2006; Hayo & Voigt, 2005; Hoff & Stiglitz, 2004; Lovett, 2016; Møller & Skaaning, 2014; Sandholtz & Taagepera, 2005), and as an independent variable (Carothers, 1998, 2006; Barros, 1997; Haggard, et al. 2008).

The rule of law is a somewhat elusive concept widely regarded as one of the most powerful political ideals in contemporary global discourse. To address its ambiguity, discussions of alternative conceptions should include an examination of its most frequently mentioned attributes in the literature as well the relationships between those them. Some scholars propose a hierarchical structure behind the concept (e.g., Møller & Skaaning, 2014), whereas others (e.g., Lauth & Sehring, 2009) emphasise trade-offs between its attributes, drawing on ideas such as “radial categories” or family resemblances (Collier & Mahon,1993).

A well-known interpretation of the rule of law is the notion that law is the means by which the state conducts its affairs (1989) (Waldron).In this sense, the meaning of the rule of law is equivalent to a state in which all state agencies' actions are conducted through laws (Reynolds, 1989). As a consequence, the rule of law means that all of the government's actions must be authorised by the law (Raz, 1979). This meaning of the rule of law has received two kinds of criticism. On the one hand, Joseph Raz asserts that the rule of law, understood in those terms, has no real meaning since it collapses into the notion of the rule of government: "If the government is, by definition, the government authorised by the law, the rule of law seems to amount to an empty tautology" (Raz, 1979: 212–213). On the other hand, Brian Tamanaha claims that this conception of the rule of law "carries a scant connotation of legal limitations on government, which is the sine qua non of the rule of law tradition". A more apt label for that version of the concept of the rule of law, therefore, seems to be "rule by law". Hence, rule by law is just "a partial meaning of the German Rechtsstaat (law state), but no Western legal theorist identifies the rule of law entirely in terms of "rule by law" (Tamanaha, 2004: 92).

To expand our understanding of the difference between rule of law and rule by law, it is important to introduce the distinction between rule by law and formal legality (e.g., Tamanaha, 2004, 2007; Møller & Skaaning, 2012, 2014). Rule by law means that the exercise of power is carried out through laws, whereas formal legality means that those laws satisfy the principles of generality, prospectively, clarity, certainty, and equality in their application. It is worth noting that such definitions of rule by law and formal legality imply that the former is thinner and included in the latter, since "formal legality also entails that rulers exercise power via positive law [i.e., rule by law] but then adds certain requirements concerning the characteristic of these rules" (Møller & Skaaning, 2014: 17).

In terms of conceptual analysis, there are two consequences of these definitions. Firstly, the rule of law is not confined to the presence of rule by law but also requires the presence of formal legality. Secondly, rule by law is included in formal legality, which entails a hierarchical structure for the concept of rule of law. In other words, "rules of law and rule by law occupy a single continuum and do not present mutually exclusive options" (Holmes, 2003: 49). Therefore, "the rule by the law is arguably a minimalist definition par excellence within the literature" (Møller & Skaaning, 2012: 139).

The rule of law and formal legality, the latter embracing the former, appear to embody the concept of the rule of law. While rejecting narrower definitions of the rule of law, other scholars assert that its scope extends beyond merely those two traits.

According to Dworkin, the "rule book" conception of the rule of law is incorrect. Law consists of more than just rules. It also consists of immanent moral and political principles embodied within or standing behind the rules and the cases. Law represents the customs and morals of the community (Dworkin, 1977, 1985, 1986). Law constitutes not just a coherent and integrated scheme of rules but also moral principles that reflect the life and vision of the community. There has also been much criticism of thicker theories of the rule of law. One well-known criticism claims that in a "deeply pluralistic society Dworkin's conception has questionable value since in such societies there are competing sets of moral principles" (Tamanaha, 2004:
80–81).

The rule of law serves as a major source of legitimation for governments in the modern world (Tamanah, 2004). As a starting point and less complex than Rawls' definition of the rule of law, is the definition by Brain, Tamanah, Z. (2004). The rule of law means government officials, and citizens are bound by and abide by the law. A society in which government officials and citizens are bound by and abide by the law is a society that lives under the rule of law. This concept underscores the idea of a government and citizenry both bound by the same laws. To understand this more clearly, this paper will begin with a definition offered by Lon Fuller and John Rawls, which may seem minimal but has many strands. This definition requires that there be a system of laws in place that binds the government by a set of principles that are known to its executive, legislature, and judiciary.

Fuller, Lon (1969): 33-41) holds a more formal conception and presents his ideas in an allegory of an imaginary monarch. Fuller explains that King Rex failed to create and maintain a system of legal rules by ignoring the eight elements required to create such a system, thus ensuring his end as a king. The eight characteristics of the rule of law identified by Fuller (1969:39-46-91) are generality, public promulgation, prospectively, clarity, non-contradiction, permeability, stability, and congruence between official actions and declared rules. Failure in any of these criteria will not simply result in an ineffective system of legal rules but rather one that cannot properly be called a legal system. Fuller (1969) is describing a system of legal rules that applies to all people. He is more concerned with what he labels as 'morality of law' refering to his

notion that a system that coerces public behaviour utilising rules creates a situation that is morally preferable to one where such a system does not exist.

John Rawls possesses a more flexible interpretation of the rule of law. For Rawls, the law is more substantive and constitutes an integral aspect of his conception of justice as fairness. This is articulated when he states: “The notion of formal justice, characterised by the consistent and unbiased enforcement of public regulations, transforms into the rule of law when implemented within a legal framework.” Now the rule of law is closely tied with liberty. We can see this by considering the notion of a legal system and its intimate connection with precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons to regulate their conduct and provide the framework for social cooperation” (Rawls, 1995:206-207).

A minimalist definition of the rule of law does not refer to rights, democracy, equality, or justice. It consists of the enforcement of laws that have been publicly promulgated and passed in a preestablished manner. This is prospective, generally stable, clear and hierarchical in nature, applied to particular cases by courts independent of political rulers and open to all. The courts’ decisions adhere to procedural requirements and establish guilt through the ordinary trial process (Maravall, 2003).

Conversely, “thick” conceptions of the rule of law tend to link the concept to freedom or egalitarianism and can be prescriptive in nature. In some cases, thick definitions of the rule of law have gone so far as to represent a “comprehensive political morality” (Trebilcock & Daniels, 2008). For example, O’Donnell defines the rule of law to include democratic principles: “1) it upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability. All this entails that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts (2004) (O’Donnell).Some authors caution that there are risks in associating the rule of law with concepts like justice or other highly subjective terms and note that by “treating any particular conception of justice as universal and self-evident, one may be doing violence to democracy” (Trebilcock & Daniels, 2008).

Trebilcock and Daniels (2008) sort definitions into categories described as thick or thin. Much like those described as minimalist, "thin" or formalistic definitions of the rule of law are limited to those few basic features common to most, though not all, legal systems that exist because "rational people need a predictable system to guide their behaviour and organise their lives in a way that minimises unproductive conflict with other agents" (Trebilcock 7 Daniels, 2002). Thin definitions, therefore, have no bearing on whether the laws imposed are just, or on how the laws themselves are created.

On the other hand, "thick" conceptions of the rule of law tend to link the concept to freedom or egalitarianism and can be prescriptive in nature. In some cases, thick definitions of the rule of law have gone so far as to represent a "comprehensive political morality" (Trebilcock & Daniels, 2008). For example, O'Donnell defines the rule of law to include democratic principles, including that, "1) it upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts (O'Donnell, 2004).

As is widely accepted, there are many different ways to define democracy, and similar to the rule of law, definitions can range from thick to thin. Narrow definitions may say nothing about the rule of law (e.g., electoral democracy), while wider definitions often include the rule of law as one of democracy's main components. Foweraker and Krsnaric (2000) note that over time, liberal democracy has come to include "the main institutional and legal means for achieving and defending the principles of liberty and equality". Sen (1999) proclaims that democracy

"requires the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment" (Sen, 1999:4).

Even if the rule of law is not defined as part of democracy, it is certainly seen as a factor that advances democracy across much of the literature. Finn (2004) argues that the rule of law complements principles of democratic accountability by prohibiting the exercise of arbitrary power (2004). The rule of law may also contribute to democratisation by enhancing the governance capacity of newly democratic regimes. Furthermore, the rule of law can contribute

to democratic stability and maintenance by shaping civic society, by reinforcing citizens' commitment to democracy. At the most basic level, this occurs by persuading citizens that the rule of law and democratic regimes promote effective governance and materially improve the quality of their lives (Finn, 2004).

3.3 African's View on the rule of Law

For Africa, the rule of law and related concepts offer hope and caution in an environment replete with extreme complexity and historical trauma. Few concepts have been as captivating as the rule of law (Mutua, 2016). The concept stretches deep into antiquity and the Magna Carta. Its genius lies in the subordination of rulers to the law and due process. The modern democracy which is not possible without the rule of law is anchored in liberalism, the Enlightenment project, and attempts at the universalisation of its morality (Mutua, 2016). The rule of law is fraught with complexity and contention. Similar to political democracy and human rights, it has experienced a tumultuous past, encountering significant criticisms on its normative inadequacy, cultural insensitivity, complicity with Anglo-Saxon imperialism, and historical context.

The rule of law is often seen as a panacea for ensuring a successful, fair, and modern democracy which enables sustainable development. It may be argued that the crises around the rule of law are at the heart of many of Africa's present developmental predicaments. Political instability, economic decline, poverty, unemployment, and endemic corruption are due to the disregard for the rule of law by African heads of state. In the 1990s, the concept of the rule of law experienced a revival in Africa's democratic initiative, but it is currently experiencing a gradual decline. The rule of law has emerged as a fundamental element in all democratic African nations, constituting a vital aspect of contemporary African constitutional democracy. Over the past decade, this devotion has progressively diminished. Currently, there is increasing scepticism regarding the ability of post-1990 constitutions to avert a rise of authoritarianism across the continent.

Admiration for the rule of law entails compliance with international standards of the rule of law as laid down in international as well as regional and sub-regional instruments. First published in 2007, the Ibrahim Index of African governance has been providing an annual assessment of governance quality in African states. This index is based on 90 indicators grouped into 14 subcategories, four categories, and one overall measurement of governance.

The four main categories guiding the assessment are safety and the rule of law; participation and human rights; sustainable economic opportunity; and human development.

An analysis of the Ibrahim Index from 2006 to 2015 reveals a notable trend. While the continental average score in overall governance during this period improved by one point, the category of safety and rule of law was the only on be that registered a negative trend, falling by 2.8 score points (Froehlich, Ringas & Wilson, 2022). This decline was driven by negative results across all the four constituent sub-categories of safety and rule of law. The 2015 Index shows that almost two-thirds of African citizens live in a country where safety and the rule of law have weakened over the past decade.

The Ibrahim Index of African governance is just one among several monitoring mechanisms. The application and execution of the rule of law may vary from country to country, but the decline is clear. First, although the 1990s appeared to have ushered in a new commitment to respect for the rule of law, this seemed to peak in the early 2000s and has since steadily declined. Second, despite the impression of a degree of rule of law revival on the continent, surveys consistently show that many countries have made no progress at all since the 1990s. One could argue that at least 20 of Africa's 54 states are unable to provide even the barest minimum standards of the rule of law for their citizens. Lastly, all the different surveys and indicators reveal that even countries such as Mauritius, Botswana, Namibia, South Africa, Cape Verde, and, more recently, Ghana, Seychelles, and Senegal, which are doing well, have been declining in their compliance with the basic standards of the rule of law.

There have been alarming declines in cases like South Africa and Ghana, suggesting that the crisis of the rule of law in Africa is not only profound but affects all countries on the continent. In these countries, the issues likely stem from the careless use of law or the abuse of power that is of a temporary nature and not systemic, although if left unchecked, such abuse runs the risk of becoming protracted: The former ‘careless use’ may be described as constitutional capture and the other (abuse of powers) as constitutional mischief (Fombad, 2018).

Africa comprises youthful nations while being an ancient continent. No other continent has endured as much trauma as Africa in the past 500 years. The shift from colonial governance to a sustainable post-colonial state proved more arduous than anticipated. The establishment and maintenance of state institutions, particularly in the judicial sector, were compromised by insufficient internal cohesiveness, ethnic conflicts, cultural discord, and outsider interference.

Every arm of the state executive, legislature, and judiciary experienced contraction, dysfunction, or collapse. An overbearing executive was often the culprit. The men in power usually corralled the legislature and turned it into a rubber stamp. The Africanisation and indigenisation of the judiciary failed to transform the justice sector from its colonially rooted racist, anti-people, and oppressive instrumentalism (Mutua, 2016).

The rule of law is a fundamental component of effective governance. It has developed to embody the fundamental principles of human rights. Over time, the comprehension of the notion, encompassing its normative extent, breadth, and substance, has evolved to be increasingly sophisticated. Shortly after Africa's independence, groups of Western scholars and policymakers were convinced that the continent's nascent republics would be "civilised" through the implementation of the rule of law.

Western thought viewed pre-colonial Africa as pre-law and thus argued that emergent states needed formal Western legal regimes to enter modernity. No credit was given to pre-existing African legal systems, which were often referred to as “customary law,” “traditional,” “savage,” or “uncivilised”. Such views were common in the colonial Church which often was practically fused to the colonial state. A pithy example is that of Shropshire, a British missionary in what is present-day Zimbabwe. Shropshire’s worldview was part of the fuel for the colonial project. It is a philosophy that grounded the civilising mission, the justification for Empire, and the attendant Christian conquest over “barbaric” peoples (Mutua, 2016:160-161). Rudyard Kipling, the English poet, captured it well in the *White Man’s Burden*: “Take up the White Man’s burden, send forth the best ye breed Go bind your sons to exile, to serve your captives need; To wait in heavy harness, on fluttered folk and wild Your new-caught, sullen peoples, half-devil, and half-child” (Roa, 2010).

The reformation of the African state is contingent upon the establishment of the rule of law. The principles of openness and accountability, fundamental to the rule of law, are pivotal in the endeavours of civil society, the political opposition, the media, and the court to address and alter entrenched issues. The legitimacy crisis concerning the rule of law has not diminished its prominence.

The current state. The writing, or revision of new constitutions, places the rule of law at the centre, using it to promote equity and protect the citizen and her resources from plunder (Mutua,

2006). It is the norm used to justify why power must be deconcentrated moved away from the centre and brought closer to the people. The emerging clamour for devolution as a legal and constitutional mechanism to address official impunity and create less opacity and accountability in smaller units embeds the rule of law as one of its key weapons (Mutua, 2006).

Law does not exist in a vacuum. Nor can law and rights language alone transform society. The difficult South African experiment with democracy is proof that using rights discourse alone without a deep restructuring of the political economy can exacerbate powerlessness among the most vulnerable populations (Mutua, 2006). However, what remains unarguable is that no society can achieve sustainable development without infusing a culture of justice grounded in the core norms of the rule of law. However, these core norms must grapple with Africa's unique history and be adapted to its historical circumstances to achieve cultural legitimacy.

3.4 South Africa and the Rule of Law

The South African legal system itself is a product of negotiation, and this is still evident in the consequences of the transition from apartheid to democratic South Africa (Klug, 2000). The shift led to the establishment of three principal state function stakeholders: the judiciary, the executive, and the legislative. The present political landscape is characterised by a contest for authority and dominance, with significant economic and political entities undermining the fundamental principles of democracy. It is essential to recognise that South Africa's historical legacy of division has jeopardised the rule of law, and addressing this problem, along with its ramifications, is crucial, particularly concerning the judiciary's function as the constitution's 'watchdog.'

Over the past decades, the constitutional 'watchdog' has been pulled in different directions by both the public and major stakeholders. High profile cases such as AFRI Forum v Julius Malema, the Masethla judgment, and former president Jacob Zuma's case have made headlines. The divergent applications and interpretations of the rule of law in these cases point to the conclusion that South Africa has major conflicting interpretations of the rule of law.

In Democratic Alliance v President of the Republic of South Africa and Others (263/11) (2011) ZASCA 241 (1 December 2011), in a judgment by judge Mohammed Novsa, the SCA pointed out that South Africa is now a democratic state founded, amongst other values, on the supremacy of the constitution and rule of law (Govinden, 2014). It was in 1994 that South

Africa embraced democracy. The constitutional court then took on a special mandate as the apex and final arbiter in all matters, tasked with ensuring the promotion of the values and principles of the new dispensation.

The reality is that both colonisation and apartheid set the rule of law in South Africa in crisis from its very formation, as both periods of history were systematic and organised crimes against humanity. The lack of social cohesion evident today is the aftermath of these two chapters in South Africa's history. Apartheid continues to survive, now carried through the abuse of economic and political power by powerful stakeholders through indirect violence.

The rule of law as a foundational constitutional value involves the exercise of public power, but the exact and precise limits of this power are not clear or well defined leading to an ongoing uncertainty. South Africa's democracy remains a terrain of contestation about the very terms of democracy, with colonial history continuing to influence contemporary politics. What has become evident is best captured by Lust and Ndegwa in their description of the effects of the changing governance environment on the African continent (Lust & Ndegwa, 2012): There is the rise of new institutions, and changes in the significance of the older ones, and the demands that citizens make in liberated spaces, which reveal gaps and tensions in state performance.

The second is a rapid mutation of public spaces within which contestation occurs; especially with regards to the role of the state, its autonomy, and the function that existing institutions serve in this transformed environment. The third factor is the rise in uncertainty as reforms reveal the efficacy of new claims and coalitions but also expose the insufficiency of state institutions. This uncertainty highlights the limits of change, suggesting impermanence to rules and uncertainty in presumed outcomes.

Legal institutions play a vital role in liberal democracies, with the judiciary playing a particularly important role. The argument is that "democracy and the rule of law are institutionally embodied in the legislature and judiciary respectively" (Ungar, 2002:243-3). The relationship between democracy, constitutional institutions, and the rule of law is often complicated by political ideologies. Political ideologies and the interests of politicians are the reason for conflict with the constitutional court. A rising trend is the judicialization of politics, where the judiciary fights to have the final say even in matters outside its typical remit. The threat does not lie with the judiciary stretching its arm of power as guardian of the constitution but Tamanaha (2004:110) cautions that when the judiciary is disproportionately comprised of a

certain group or is politicised, it can pose threats to the rule of law and by association, to democracy itself.

The role of the judiciary within the South African government is a complex one and to view it simply as a remnant of a once repressive state, now transitioned into democracy would be an oversimplification. The rule of law is not just a necessary component for a modern liberal state but also an important prerequisite for a stable, effective, and sustainable democracy. The success of legal norms depends on the reception of the particular state. The South African constitution vests significant power in the courts. The courts have the power and responsibility to declare any law or conduct inconsistent with the constitution invalid to the extent of its inconsistency (1893) (Thayer). The courts themselves are independent and subject only to the constitution and the rule of law.

3.5 Conclusion

As with all concepts, the rule of law has a history and one of the features of that history is how the concept has been re-interpreted over time (Mason, 1995; Shapiro, 1994; Shklar, 1987). The expression denotes a concept, or some could argue, an ideology regarding the conduct of governments. It has been employed as a synonym for constitutional governance and, at times, although these concepts are not necessarily contemporaneous, to denote democratic governance. The rule of law preceded democratic regimes; but, in contemporary contexts, it is frequently employed as a synonym for democratic governance or at least associated with it. The absence of consensus over the definition of the rule of law has not impeded attempts to quantify it.

Chapter Four

The Integral Components of the Rule of Law

4.Introduction

The rule of law embodies the rallying cry for the fair and democratic exercise of public power, buttressed by law. One of South Africa's leading academic lawyers, Tony Mathews, re-defined Dicey's definition (1975) by laying down preconditions for what would qualify as "law" and insist on the equal guarantee of all basic rights and freedoms. The rule of law embodies two basic metaphors: the tool and the causeway. Under the tool metaphor, the rule of law is applied more as an instrument of power while in the causeway metaphor the law emphasises a form of relationship between state and society where "ground rules" are established. Not only for electoral politics but for the daily transactions and commercial necessities of individuals.

Even if all others are unable to give practical expression to the rule of law, human rights and the constitutional aspirations of the people, any democracy requires a truly independent judiciary. A judiciary must be made up of a strictly independent body of judges and magistrates, who are loyal to their oath of office or solemn affirmation to administer justice to the aggrieved in terms of their oath of office affirmation. The legal philosophy that South Africa is founded on the obligation to uphold the foundational values of the 1996 constitution. Judicial independence is crucial to the existence of the rule of law. A competent and independent judiciary can assist with asserting accountability within government through a party's use of certain legal processes, including judicial review (Ginsburg, 2003: 5). Nonetheless, access to an effective judicial system is not a remedy for all the issues a country may face. Judicial review is a responsive process that necessitates that interested (typically private) parties are aware of their rights or possess the means to be informed of them, as well as the financial resources and perseverance to pursue a judicial review application to its conclusion, which usually ends at a court of appeal.

This chapter focuses on the practical questions surrounding the rule of law, analysing South Africa's separation of powers and the powers conferred to South Africa's judges, in the judicial decision-making process. It particularly examines cases that have set major precedents in the law, such as the Julius Malema hate speech case, the Masethla judgment, and the Jacob Zuma

trial. The struggle for power in South Africa presently is between government organs and the rule of law.

4.1. The judiciary as a crucial component of the rule of law:

4.1.1. The Role of Judicial Independence

There is no doubt that competing and contending interpretations of the rule of law exist. The democratic qualities of the courts as representatives of democracy, lie in their ability act as such (Bellamy, 2013). The independence of the judiciary is of paramount importance, in order to fulfil its role in relation to the other powers of state and the democratic population. The judiciary is South Africa's third branch of government; the third arm of state. There simply can be no state or government without the judiciary in a genuine constitutional democracy. To breathe life into the African dream that is inspired by the desire to break free from centuries of economic oppression, and to recapture the lost glory of Africa, the judiciary in Africa must be more alive to the enormous responsibilities it bears on its shoulders to contribute to the renaissance of Africa (Mogoeng, 2013:3).

Judicial independence refers to the principle that the judiciary, as a governmental branch, interprets and applies the law autonomously from the other institutions of government. It must remain free from undue influence by strong individuals or organisations. Individuals seeking to usurp power through illegitimate methods would be dissuaded from pursuing their illicit schemes by the potential repercussions imposed by an independent judiciary in their nation. Effective governance arises from adherence to traditional, statutory, and constitutional governing principles. The entrenchment of a human rights culture, adherence to the rule of law, and prioritisation of the legitimate aspirations of the citizenry encompassing law, transparency, accountability, responsiveness, the establishment of an independent and effective anticorruption apparatus, safeguarding press freedom, and fostering an investor-friendly environment constitute essential components of good governance.

The role of the judiciary within its constitutional mandate spells out the practical expression of the rule of law, so that democracy stands a chance to survive. It is the role of the judiciary to uphold the law and the legal system (Cane, 2009). This means the judiciary shows commitment to the rule of law and to justice according to law. Justice according to law unfortunately does not always coincide with the ordinary or popular concept of justice. This gap has been exploited

by ruling elites to publicly discredit the courts in society, causing loss of faith in the institution of the courts generally.

In the context of Africa's democratisation, the judiciary is essential in maintaining the rule of law and reinforcing democratic governance. The constitutions of African governments explicitly delineate that the judicial function is only the purview of the judiciary, however some lack clarity about the exclusivity of judicial powers. The controversy persists regarding the extent of the judiciary's role in constitutionalism, regardless of whether a constitution designates the judicial function as exclusive to the judiciary.

The United Nations observed a few years ago that there was a direct link between the capacity of the judiciary to promote the rule of law and facilitate good governance on the one hand, and the willingness of multinational companies to embark upon massive and sustainable economic development on the other. The government of South Africa's judiciary has set policies, strategic priorities and an implementation matrix, to ensure that South Africa has the fundamentals necessary for the realisation of the South African and African dream.

Each judiciary owes its relevance, significance and support not just to the constitution of the country, its laws and impressive institutions South Africa is no different but also to the strategic priorities it sets for itself. This includes the development of a plan to realise its deliverable objectives with firm timeframes, where practicable, and a credible funding model that would not compromise its independence in projects that require financial resources (Mogoeng, 2013, 8).

4.1.2. Judicial Review

While judicial review is not a new concept on the continent, its character, foundation, and have transformed in certain African countries. Historically, most African countries have been associated with either the common law (English influence) or civil law (which includes French influence) legal regimes. One hallmark of Southern African constitutions is the power of judicial review given to the courts. This refers to the authority to examine executive or legislative actions for their compliance with the constitution. This is a crucial instrument for constitutionalism. The authority of judicial review has emerged as a significant asset in the South African legal system. Since the establishment of our constitutional democracy in 1994,

the use of judicial review to contest administrative actions has enabled our esteemed top court to demonstrate its transformative expertise. The constitutional acknowledgement of judicial review presumably indicates a progressive administration that prioritises accountability.

South Africa is a unique case, because for a significant part of its history, it has been subjected to the laws of its colonisers and apartheid laws, generally adhering to the model of parliamentary sovereignty. However, post-apartheid South Africa seems to be focused on constitutional democratisation by recognising, at least in theory, the doctrine of separation of powers, constitutional supremacy, and the need for checks and balances. Judicial review is now used to enforce these principles, and with constitutionalism comes the empowerment of our country's judiciaries (Klug, 2009:703).

The democratic nature of the courts is to function as embodiments of democracy, encompassing both a good and a negative aspect. A disadvantage is that not all legislation reflects the collective will of the populace; instead, it emerges from representatives' deliberations aimed at advancing their own agendas and personal interests under the pretence of democracy. The positive aspect is that judges are able to act as 'watch dogs', of the democratic project. Their chief democratic quality rests on their ability to engage in conscientious and impartial deliberation on the public good (Kyritsis, 2006:748-50).

Courts act as a supplement to the democratic process in several ways, such as protecting the population's individual rights. They are embedded in and dependent on the democratic process in which the exemplars of constitutional reasoning are the actual people themselves and their democratic representatives (2002) (Richardson).

The position of the judiciary and its relationship with the other powers of state in a modern democracy has shifted over the past decades. The role of the judiciary is evolving as the executive and legislative powers have grown more interdependent (Ferejogn, 1998). The growth of executive power in particular has led to more challenges to the judiciary's actions in court, which has in turn led some to question the scope of the judiciary's role as a check on the executive. However, it is widely accepted that South Africa's modern democracy is founded on the separation of powers.

One of the main characteristics of constitutional transformation in South Africa is what Etienne Mureinik called the shift towards a culture of justification, in which ‘every exercise of power is expected to be justified’ (Mureinik, 1994:31-32). He argues that within such a culture, constitutional rights are standards of justification, standards against which to measure the justification of the decisions challenged under them.

The courts reconcile their constitutional authority with the recognition that the current administration aims to regulate the allocation of power and resources in South Africa. This initiative seeks to rectify and initiate the reversal of the profound imbalances and injustices inflicted by previous administrations. The judiciary is frequently compelled to resist acquiescence to the executive's objectives and plans, lest the 'executive-mindedness' of their history resurfaces to their detriment. The judiciary of South Africa confronts a challenging trajectory, particularly in the socio-economic domain, where the multifaceted nature of decisions renders the judicial process unfamiliar to many.

4.1.3. Lawfare and State capture case

“Lawfare” has multiple meanings, but in academic discourse, it usually denotes the use or abuse of law by the state to achieve strategic political or military ends. Using the term in this sense, John Comaroff characterises lawfare as “the effort to conquer and control indigenous peoples by the coercive use of legal means” (Comaroff, 2001:305). In the context of South Africa’s legal and political system, lawfare has had everything to do with the judicialization of politics.

Throughout the tenure of Jacob Zuma, the superior courts were inundated with numerous judicial review cases pertaining to politically sensitive issues, many of which were launched by opposition parties to the African National Congress. The courts frequently determined that the South African government had acted improperly and unconstitutionally. Significant examples encompass the government's inability to apprehend President al-Bashir of Sudan during his visit to South Africa, despite an arrest warrant issued by the International Criminal Court. Furthermore, the government's inability to secure parliamentary approval prior to announcing South Africa's withdrawal from the Rome Statute, several errors in negotiating a nuclear power agreement with Russia, and the Minister for Social Development's and the Social Security Agency's disregard for a Constitutional Court order are notable instances.

Works by Pretorius (2006) best capture the African National Congress's conception of democracy and the rule of law as reflected by its own documents; importantly the African National Congress's conception of democracy includes substantive elements that go beyond merely formal or procedural aspects. Hence, the main measure of the progress made on the national question is the extent to which African people especially blacks in general are liberated. This point must not be lost as a result of the excessive discourse in the media about 'minority fears' (ANC, 2005 quoted in Pretorius, 2006:750-1).

Pretorius argues that: the ANC's conception of democracy defines the majority as "the black and more particularly the African majority" (2006:751). This implies a distinctly contradictory conception. This is contradictory as the theory acknowledges the fundamental equality of rights among all individuals while concurrently favouring the majority, especially in matters like resource distribution and economic policy. The ANC justifies the privileging, especially evident in affirmative action and black economic empowerment initiatives, by citing the historical legacies of colonialism and apartheid.

There is without a noticeable trend in public opinion regarding democracy and the rule of law in South Africa. The reality of South Africa's democracy is that "public works, certain trends that exist, are largely polarised along racial lines" Gibson, 2009:136. Former President Zuma's brand of popularism centred on opportunities for black and previously disadvantaged South Africans, despite the controversies surrounding his leadership (Adhikari, 2005). His supporters were and still are mostly from economically disadvantaged and uneducated backgrounds. The rise of lawfare in South Africa or the judicialization of politics, is threatening not only the judiciary but our democracy as well.

From around 2011 until the end of 2017, an estimated R1.2 trillion in public funds and opportunities were extracted from South Africa by two patronage networks. A surge in litigation was triggered by the sudden dropping of 783 counts of corruption and related offences against Jacob Zuma, then a member of a provincial cabinet, by the National Prosecuting Authority (NPA) early in 2009 (Corder, 2017:113). This conveniently timed decision allowed him to become President of the country in May of that year. For close to a decade the
Democratic Alliance (DA), the main opposition party, doggedly pursued its challenge against the lawfulness and rationality of the decision to drop the charges. Two interlocutory applications

and two appeals later, the full bench of the Pretoria High Court ruled in April 2016 that the decision was indeed irrational. Leave to appeal was then refused, as was a petition to the SCA.

The main judgment held that an unsuspended order of committal was justified due to certain exceptional features of this matter, particularly Mr. Zuma's scurrilous and unfounded attacks on the judiciary. Such behaviour must not remain unpunished. Safeguarding courts from defamatory public remarks, it was underscored, pertains not to shielding the emotions and reputations of judges, but rather to maintaining their capacity and authority to execute their constitutional responsibilities. Moreover, the primary ruling determined that contempt is not just defined by non-compliance with a court order, but also includes the form of the contempt, its magnitude, and the contextual factors involved. Consequently, the court was compelled to acknowledge the distinctive and egregious aspects of the case.

It held that if these aspects were to be ignored, the court would be adjudicating the matter with one eye closed, and declining to decide it without fear, as it is constitutionally mandated to do (Reich, 1963).

A more complete explanation of the situation is that resorting to the courts in political matters has been fuelled by the failure by regular political activity in the legislature and executive to inhibit and prevent, the development of widespread nepotism, corruption and the looting of the state by a "patronage faction" within the African National Congress. This has culminated in what has come to be identified as a systematic process of state capture. It is no coincidence that in October 2017, the Pan South African Language Board announced "state capture" as the most prominent phrase of the year, having appeared in print no fewer than 20 311 times.

The emergence of a mafia state characterised Jacob Zuma's presidency. This trend was probably assisted by the concentration of authority vested in the President, who serves as both head of state and head of government according to the Constitution. The former President's intimate ties to the infamous Gupta family are well-documented; nonetheless, the comprehensive scope of his patronage network and governmental corruption mostly remains speculative.

It has often been pointed out that the courts would far prefer to avoid hearing cases that tend to draw them into the political sphere. However, the design and interpretation of the Constitution give the courts little choice but to rule on the matters brought before them, no matter how

politically fraught the subject matter. Courts are obliged to declare inconsistencies with the Constitution when and where they find them. In recent years, law fare has repeatedly placed the courts in conflict with the executive and legislature, often with troubling outcomes. Members of the African National Congress both within and outside the government have repeatedly accused the judiciary of 'overreach', alleging violations of the separation of powers by encroaching on the preserve of the political branches.

The courts, and sometimes individual judges, have been subjected to intemperate criticism and have been accused of bias against the government. Court orders have been flouted too, seemingly in a more egregious fashion than in the past. This has made the judiciary the main casualty of broader political battles. It is also convenient for those bent on state capture: for if the judiciary itself cannot be captured, the next best thing is to weaken the institution by undermining its authority, its independence and ultimately its legitimacy (Corder & Hoexter, 2017).

This barrage of lawfare has been especially damaging because it has thrust the judiciary thrust the judiciary into a relationship of constant tension with the political branches. If, as suggested, the most recent surge of lawfare was necessitated by the failure of the executive and legislature to fulfil their responsibilities, then sustained dedication to these roles is probably the only way to a lasting solution. As long as political efforts remain insufficient, excessive recourse to the courts is likely to continue and the resulting tensions will remain. The courts may then face a difficult choice: to exceed the bounds of their proper authority or to make a strategic withdrawal, to preserve its capacity for future battles. Sadly, whichever route is taken is likely to lead to an appreciable loss of public confidence, the ultimate currency of judicial legitimacy (2005) (Bratton).

4.1.4. The Limits of Law and the Julius Malema Hate Speech case

The hate-speech case involved AFRI Forum, TAU-SA, and Mr. Julius Malema. The President of the African National Congress Youth League, Julius Malema, was found to guilty of hate speech after he, on several occasions, sang verses from a South African liberation song. The words of the song translated to "shoot the Boers/farmers they are rapists/robbers." He was thereafter prohibited from singing the song, at either public or private functions.

In summary, Judge Lamont found that publication of the words at a political rally must be treated as a publication to the nation, regardless of the intention of the person who utters them.

The singing of the song by Malema constituted hate speech. The words, whether sung in the original language or not, were interpreted as “shoot the Boer farmer, they rape us, they are scared the cowards, they rob these dogs.” These words were published about, and concerning a recognisable, if not precisely identifiable grouping in society. The words undermined their dignity, were discriminatory and harmful. No justification existed to allow the words to be sung (AFRI Forum v Malema, 2011:60-2).

The law, as an autopoietic/self-referential system requires the drawing of boundaries; such a drawing of legal boundaries is clearly illustrated in the judgement. The analogy with the AfriForum case is clear. Although I did not witness an explicit repudiation of the judgment's values, the parties appeared to recognise that their issues were too intricate for a binary classification of legal or criminal. One perspective is that the law failed to recognise this issue as a non-legal matter, and it took several years for this reality to become evident. Nonetheless, it appears that the parties were acutely aware that a purely legal settlement of the case would relegate certain historical elements to the annals of law, resulting in an officially endorsed amnesia. The parties increasingly recognised the distinct enquiries they posed while contextualising the song's recent past, resulting in markedly varied interpretations in their recollections.

Now I will look at Paul Cilliers's approach to complexity. His view is that law tries to avoid complexity by defining clear lines between what is legal and what is not, for example, in terms of time, history, and narrative (Cilliers, 2005). The appeal to efficiency is a typical pragmatic counterargument to the criticism of the law's reduction of complexity. Is being more aware of time, identity, justice, and ethics not simply going to slow down a judicial system that is already trying to keep up with demand? Are delays in cases not incompatible with justice and the rule of law?

Positively linking the "cult of speed" with efficiency, according to Cilliers, is detrimental. Slowness, he claims, enables us deal with complexity more effectively. It is a bold attitude that acknowledges the significance of the past and memory in moving forward. It is an example of ethical temporal neutrality, which emphasises not only current outcomes but also the knowledge that the past and future contain. Because "it is actually an unreflective fastness that returns you to the same location," (Cilliers, 2006:106) speed is not a virtue for growth. In order to plan

initiatives, society requires a predictable future. Because we can never completely know what the future contains, the greatest way to influence it is to plan ahead.

Justice demands that the law assesses problems cautiously and provides modest answers that can be evaluated at any time, especially when they are as delicate, nuanced, and significant like the AfriForum case. As can be seen, the law's reluctance to deal ethically with time has farreaching consequences, but these consequences are not inherently fixed within the law, and that there are concrete steps we can take to improve it.

4.1.5. Masethla Judgement and Procedural Fairness as a component of Legality

Justice is ultimately about fairness. Administrative action that adversely affects the rights of the public as a group or class must be procedurally fair, according to the Constitution. But how much justice is produced by applying the idea of procedural fairness to the public in the judicial processes and public administration practices?

The most familiar conception of procedural fairness stems from the Rule of Law (2003) (Allan). It requires clear rules accompanied by procedural safeguards designed to ensure the rules are respected in real-life cases. There are two conceptions of procedural fairness. The first places a high premium on the creation and application. In this view, public authorities should avoid "balancing tests" or pay close attention to individual circumstances (Sunstein, 2006). Instead, they should attempt to guide citizens through clear, specific, abstract rules in advance of actual applications (Fuller, 1964). The second conception emphasises the value of individualised treatment, being highly attentive to the facts of the particular circumstances. Public authorities should stay close to the details of controversy before them and avoid rigid rules altogether. The problem with rigid rules is that they are likely to overreach.

The element of legality was the point of departure for both the minority and majority judgments, and both judgments agreed that the President could only exercise power conferred upon him by the law (2007) (Bingham). A point of agreement was the interpretation of section 209 (2), which states that the power to dismiss is incidental to the power to appoint. Both judgments were aligned on the formal interpretations of the Rule of Law, that procedural fairness serves a requirement of the Rule of Law. However, when considering more substantive constraints imposed by the Rule of Law, Moseneke D.C.J. and Ngcobo J parted ways. Moseneke D.C.J.'s interpretation of the rule law combined the formal and substantive elements, placing most emphasis on the nature of the power exercised. In contrast, Ngcobo J. held that procedural

fairness is a fundamental requirement of Legality and thus the rule of law in respect of the exercise of public power. Ngcobo's J's interpretation allowed for an interpretation of the rule of law in harmony with other foundational values of accountability, openness, and responsiveness.

Given the Constitutional Court's rejection of the idea of overruling or explaining Masethla, the application of procedural fairness as a component of legality has been limited to circumstances where the failure to apply procedural fairness results in a violation of the law. In such cases, the criteria would be based on context-specific circumstances. To be unreasonable is to be illogical. Hoexter (2004) asserts that it is inconceivable for the logic of a decision to be enhanced without impartially considering both perspectives. This provides ample opportunity for development. The concept of procedural fairness must be established as a prerequisite for reason and legality.

The very presence of the provisions for procedural fairness to the public in the PAJA, is its potential to have a positive effect on the rate and quality of meaningful participation in administrative decision-making which, in turn, has the potential to enhance transparent and accountable public administration (Brynard, 2011). There is a high demand for high levels of fairness where the rights of the public as a group or class are affected. In the interest of justice through fairness. One would hope that forthcoming judicial decisions on the practical implementation of procedural fairness to the public would have more values placed on it in terms of the refinement of legal principles than the uncovering of dysfunctional implementation of administrative action.

4.1.6. 'Negative moments' within the legal system

After 1994, South Africa developed several policies that reflected the wishes of the democratic government to ensure that the needs of South Africans were meet. Only 10 percent of people have read the Constitution or had it read to them. For transformative constitutionalism to be meaningful it must consider this context and acknowledge that the success of the constitutional project requires the creation of a societal culture shaped by law and a legal culture shaped by society (Hodgson, 2015).

The rule of law, as a fundamental principle upheld by most contemporary democracies, serves as practical evidence of its significance in the construction of democracy. Constitutions encompass the foundational and often paramount laws of the state, and the rule of law necessitates adherence to these principles above all other statutes. Constitutions safeguard fundamental concepts and values by imposing stringent requirements for amendments. The judiciary safeguards the rule of law by applying legal principles to specific cases. Consequently, the rule of law, which demands a fair legal system, implies an autonomous and effectively operating judiciary.

South Africa has been caught in the vortex of change that has been sweeping through the global economy in recent times. The perilous decline in many commodity prices (prompted in part by weaker demand in China) and a growing risk aversion among international investors have been gnawing away at South Africa's economic growth prospects, leaving government and business decision makers grappling for solutions.

The question left to the South African judiciary, is whether legal certainty means absolute certainty. The answer is: legal certainty does not equate to absolute certainty in legal outcomes (Coelho, 2017). Maxeiner suggests that absolute "legal certainty is neither possible nor desirable" (Maxeiner, 2006:541). In fact, if this were the case, according to Coelho, then there would be little or no need for legal practitioners, because the outcome of all disputes would be entirely predictable (2007). Coelho reduces the legal certainty concept to notions of judicial predictability of all legal decisions. He uses an interesting, albeit important and simplistic, equation to define legal certainty: the higher the predictability of judicial decisions, the higher the legal certainty; the higher the unpredictability, the lower the legal certainty. This is what South Africa needs.

4.2. The rule of law and the state of legitimacy in Africa

South Africa is confronting the possibility of a fundamental change in its political structure, driven by a crisis in legitimacy in which many groups in the society are repudiating the existing legal order and calling for the establishment of a truly autonomous rule of law.

State legitimacy is undermined when the judiciary does not act as a positive force for social change, when it does not function independently and in a manner that promotes ethical and political leadership. A key moment in this discussion was the workshop on "Challenges to the

Rule of Law in Africa" took place in Pretoria, South Africa, on 12–13 April 2016. The workshop was organised as a collaborative activity between the African Union Commission (AUC), the International Institute for Democracy and Electoral Assistance (International IDEA), and its Africa and West Asia Programme. The obligation to uphold the rule of law is an integral part of the overall commitment to governance and democracy by African heads of state and government, as expressed in the AU Constitutive Act during the period of transformation of the Organisation of African Unity (OAU) into the AU.

The South African experience suggests that policing and the problem of public order can play a role in the legitimation or delegitimating of a new constitutional order. This dynamic illustrates the possibility of linkages between the micro-level experiences of the state and macro-level effects of legitimacy and stability. It thus illuminates one of the pathways that may connect the mass of the public with relatively abstract constitutional dynamics (Huq, 2017). In this regard, it illuminates one modality of what might be called popular constitutionalism.

The post-apartheid state's inability to fulfil the constitutional guarantees of public order and effective security is a critical factor in determining state and constitutional legitimacy, even if it does not threaten the future existence of the 1996 Constitution. This theoretical framework illustrates the connection between macro-level constitutional legitimacy dynamics and microlevel interactions among individuals. The micro-to-macro connection suggests that the issue of constitutional endurance ought to be regarded as a facet of quotidian politics.

In linking the Rule of Law to state legitimacy, Professor Mahao argues that the Rule of Law is not static and is often reshaped by social discourse and the changing societal attitudes and values (Raselimo & Mahao, 2015). He notes that it is often a part of the social contract forged between the people and government. He emphasises that at core of the Rule of Law is the principle of legality, within which all public actions unfold in terms of procedures. Professor Mahao states that the immense challenge for Africa is the tension between liberal and social democratic perspectives or influences on the rule of law. While some may emphasise procedural elements, others would focus on the more substantive elements. He further indicates that inequalities and poverty must be addressed, and procedural requirements should not simply constrain actions. He, however, qualifies this by suggesting that even as systems are developed to be more responsive, governments needed to be based on the formal consent of the people.

In terms of the challenges that confront the rule of Law, there must be substantive compliance with procedural requirements of the rule of law pressures on the judiciary and the media.

4.3. The Primacy of the South African constitution and rule of Law

The disproportionate use of power within the international geopolitical framework and the integration of specific economic interests into legal proceedings erode constitutionalism and a wider adherence to the Rule of Law. A constitution containing Rule of Law provisions is anticipated to operate autonomously. Additionally, it is anticipated to function as a catalyst for societal transformation. State systems are anticipated to perform amid these conflicting forces, from which they also obtain legitimacy. The state remains essential for growth and serves as a crucial mediator of conflicting interests.

Under South African domestic law, an acknowledgement of the importance of public confidence in the judiciary is evident in the legal tests for judicial independence and recusal. The Constitutional Court of South Africa, drawing on Canadian jurisprudence, has emphasised that the appearance or perception of independence plays an important role in evaluating whether courts are truly independent (L'Heureux-Dub, 1998).

The task here is to interpret the rule law in a way that allows us to measure the significance of shortfalls and to weigh competing elements of the rule of law. This involves considering how to structure our practices to achieve acceptable approximations of a complex and conflicted world that may not always offer the best solutions. An African inclusive approach is necessary. One that works for the advancement of South Africa's democracy without limiting its framework to formality and procedure (1999) (Diamond).

4.4. Conclusion

The Constitutional Court has challenged South Africa's political branches repeatedly and boldly. Just how firmly the Constitutional Court stands in the estimation of the South African people may be debated; there is undoubtedly survey research data suggesting that its authority may not always enjoy unwavering support (Ellman, 2015). In the early years of the new nation, however, the judiciary's position in the eyes of South Africa's leaders seems to have been quite strong. The courts enjoyed a considerable degree of respect, and that position gave the courts some potential to speak effectively to power, despite the ANC's immense political power.

Chapter Five
Democracy and the Rule of Law
5. Introduction

Adam Przeworski (1991) explains that the nature of a country's transition determines its democratic success or failure. In South Africa the law played a pivotal role in the apartheid era. Racial discrimination and political repression were not practiced outside the law in an arbitrary and unregulated manner. On the contrary, racial injustice was perpetrated by legal rules, and political repression was administered according to carefully defined legal procedures (Abel, 1995, p. xiii). More than twenty years after the promulgation of the constitution of the Republic of South Africa, the constitution now enshrines an objective value system.

Given South Africa's history, the constitution demands a moral reading of the principle of separation of powers designed to prevent arbitrary or tyrannical rule and protect the governed. In consolidating democracy, procedural norms have received higher priority than substantive policy objectives. As Diamond (1994): 51 notes, "overriding commitment to democratic proceduralism is a critical political-cultural condition for democracy." Adherence to the rule of law is one of the most important of these procedural norms.

It is unequivocal that the majority of South Africans endorse the principle that government should be limited by law and that judicial institutions must operate independently. South Africa has achieved the consolidation of its democracy with very minimal trauma during the transition phase, unlike many other developing nations. Nonetheless, consolidating democracy and fostering a democratic culture have emerged as some of the most formidable challenges in South Africa's democratic trajectory.

This chapter addresses two crucial assumptions; firstly, it seeks to address the conception of acquainting rule of law and democracy. Put differently, it is the idea of treating the rule of law and democracy as though they are synonymous. I argue that the issue of their synonymity should not be taken lightly, as this conflation can ultimately create confusion. Secondly, I attempt to illustrate how precisely the rule of law in South Africa should be conceived.

5.1. What is South Africa's rule of law?

The rule of law is an institutional accomplishment distinct from democracy, and it serves values other than, as well as that of ensuring democratic contestability. It is an old notion, known and to some extent instantiated in many polities that were not democratic, indeed were

antidemocratic. In its most basic form, the rule of law is, the restriction of arbitrary exercise of power, subordinating it to well-defined and established laws. The rule of law and democracy are looked-for attributes of any political system. Scholars who wrote on democracy and its transitions from authoritarian rule usually argue that the goal of such a transition is establishing democracy with the rule of law. The principles underpinning the rule of law go back to Ancient Greece between 500 and 300 BCE, where it participated in the city's political community's self-definition. Fast-tracking back to South Africa's apartheid years, we cannot make the mistake of saying the rule of law did not exist during this era. It was established on racial discrimination and segregation institutionalised by a dominant ideology, characterised by Dr. H.F. Verwoerd, one of its architects, as 'comprising a whole diversity of phenomena.' It encompasses the political domain; it is essential for the social domain; it pertains to ecclesiastical affairs; it is pertinent to all aspects of existence. In the economic realm, it is not solely a matter of numerical data. The critical issue is whether to uphold the colour bar.

It was entrenched in the law and enforced through the law in ways that lacked even pretence of the separate but equal doctrine influenced law in the United States before the decision in Brown v Board of Education. Apartheid South Africa had no moral laws; the doctrine of parliamentary supremacy prevailed. The system lacked validity in South Africa because parliament was not for the people. It was a parliament of the white minority. Nevertheless, parliamentary laws were binding on all South Africans. The legislation system was not open to being challenged.

South Africa's judiciary was called on to enforce apartheid laws routinely. The distinction was between the law and what it ought to be. Apartheid picked the latter; the morality of law had no place in the system. The role of judges could be labelled as complex. The law was an instrument of a repressive state. This rendered its judges powerless in the face of apartheid. The human rights bar was small and, when challenged, infrequently succeeded. A system is often labelled as 'wicked', but we are not to make the error of labelling it as one without the rule of law. Its rule of law was undemocratic and founded on racial discrimination and segregation. Its laws were separate from morality.

1994 marked a new era for South Africa. A new era founded on democratic and constitutional values. South Africa's Constitution is one but a moral document. The preamble to the conduct inconsistent with its provisions is invalid. The preamble to the Constitution delineates constitutional objectives that encompass the establishment of a society founded on democratic principles, social justice, and fundamental human rights. The South African government bears the responsibility of enacting laws and policies, not only in their current form but also in accordance with ethical considerations. Our society is fundamentally unequal; the remnants of apartheid persist in numerous communities. The rule of law, dignity, equality, and freedom are the foundations upon which the future can be established. They provide ethical dilemmas that can be sufficiently resolved only through a moral interpretation of the Constitution.

So, the question remains after analyses of two parts of South African history, what is the rule of law. The rule of law is, simply put, the foundation of a government's legal system, be it democratic or an autocracy. It is what binds the government to its people and people to their government. Furthermore, that is a general understanding offered by its scholars, but to better understand it, one must look at the setting where it resides. Rephrasing the question of what the rule of law is in South Africa presently. The rule of law is a democratic principle of its democracy. The rule of law delineates the manner in which the South African government governs its inhabitants. The rule of law is an essential tenet of democracy, governing the actions of those in authority. History has isolated South Africa from the global community. Today, it occupies a position in the global political arena since it has, via its Constitution, committed to a morally inclusive application of the rule of law across all governmental levels.

South Africa's rule of law is the absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness or even vast unrestricted power on the part of the government. A.V Dicey has three principles attached to this definition of the rule of law in South Africa. Firstly, the supremacy of law: The first meaning of the rule of law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. Equality before Law: The Second meaning of the rule of law is that no man is above the law. The predominance of legal spirit or the third meaning of the rule of law is the general principles of the constitution are the result of juridical decisions determining file rights of private persons in particular cases brought before the court.

"Stripped of all technicalities (the ideal of the rule of law) means that government in all its actions is bound by rules fixed and announced beforehand rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs based on this knowledge". Though promising the perfect society. The rule of law cannot see the future or undo the past but can only work on the present.

The rule of law constitutes the foundation upon which South Africa's democratic traditions are established. South Africa's constitution includes groundbreaking assurances of socioeconomic rights. These rights encompass the entitlement to housing; healthcare, sustenance, water, and social security; education; and environmental safeguarding. Protections for children's rights and a constitutional guarantee of land restitution for individuals whose land was confiscated during colonial control are also in place.

However, most of these rights come with a crucial qualifier: that the state's duty is not to provide all of them today but to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". When the law bounds both the rulers and the ruled alike, theoretically and practically, it is a very different scenario. This is because this bond is of legal significance, as Fuller exemplified in his eighth requirement of the rule of law list. There must be congruence between what a written statute declares and how officials enforce those statutes. No one knows what the future holds or what it will look like.

People's aspirations of democracy cannot ask for the impossible; impossibility is a factual impossibility. For the first time since the mid-90, more adults South Africans feel that democracy is going in the wrong direction. Politics are rooted in the resolutions and elections of the dominant party seeking to impose their ideologies on the people. The structures and collectives of the movement must decide the direction our country should take collectively. There is nothing wrong with the aspirations of multi-party democracy, whether or not one shares the same sentiments. No one knows what the future will bring, but it is easy to trace two possible scenarios. A bleak version, political leadership grows gradually more determined to challenge the courts' power, or the ideal dimension of law rises to the surface into the degree of law's intolerance for injustice. The task of the constitutional court than is to give rise to a more principled and democratic political culture in South Africa.

5.2. There is no legal vacuum

It is apparent that a tension exists between the real requisite of law, as discussed here, and the doctrine of the rule of law. The law, specifically positive law, functions as a pervasive set of legal principles through which all human activity can be assessed, regulated, and rectified. This perspective is distinctly state-centric, as it posits that state institutions are defined as lawmaking entities by the normative provisions of the constitution. The legislature primarily, and to a lesser degree the executive through subordinate legislation and administrative rulemaking, along with the courts via judicial interpretation, fully encompass the functions of law-making and legal modification. Furthermore, it is asserted that not only can no law be enacted or amended, but that no law is, in reality, enacted or amended. Interpreters of the law elucidate the meanings of normative formulations, although their function is confined to revealing what is intrinsic to the text; it does not supplant the formulations themselves.

The claim of the omnipresence of law logically stems from the doctrine of the rule of law. The law forfeits its claim to any capability to rule in favour of forces beyond the control of law. This is not to say that the rule of law can act in a vacuum, because there is no magic solution.

Instead, the rules of law and democracy are inseparable elements of good governance. Scholars, politicians, and U.N. declarations regularly join the concepts of democracy and the rule of law. Democracy and the rule of law are theoretically independent, and the relation between them may be neither necessary nor simple. Reduced to its core, democracy is concerned with selecting the holders of political power, while the rule of law is concerned with the method by which political power is exercised. Thus, a non-democratic regime may operate with a strict rule of law, and a political system governed by electoral majorities may flout the fundamental rule of law principles. There is no denying that, as a matter of hard fact, a lack of democracy goes hand in hand with a lack of proper implementation of the rule of law, while strong democracies tend to adhere to a strict rule of law.

5.3. Rationalising Policy and Practice

The rule of law advances rationality by reconciling legal requirements with one another and by requiring that laws be publicly promulgated. Also, the rule of law advances the rationalisation of policy in the most direct of ways.

Ronald Dworkins, in his seminal *Law's Empire Essays* explains the rationalisation of policy. In *Law's Empire*, Dworkin posed the following questions: "Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this "strict" liability on manufacturers of automobiles but not on manufacturers of washing machines? Do the people of Alabama disagree about the morality of racial discrimination? Why should their legislature not forbid racial discrimination on buses but permit it in restaurants? Do the British divide on the morality of abortions? Why should Parliament not make abortions criminal for pregnant women who were born in even years but not for those born in odd ones?"

Dworkin posited that all laws must align with a singular "scheme of justice" and a unified set of moral principles. The law is perceived to operate under a singular scheme of justice applicable to the entire legal framework, regardless of the disparate subject matters of the laws; all legal mandates must ultimately align with a unified moral framework. Dworkin's concept may be innovative, although I believe the accurate response is both more straightforward and more comprehensive. It pertains to the connection between law and logic, rather than solely the connection between law and morality.

Testing for rationality involves ensuring a balance between the adverse and beneficial consequences of an action while encouraging the government to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. It is often explained using the metaphorical claim that a sledgehammer should not be used to crack a nut. The proportionality ingredient is what distinguishes review for reasonableness from rationality review simpliciter. As Corder notes, "Rationality plus at Least Proportionality Equals Reasonableness" (2004):439. These concepts, despite overlapping and both flowing from the animating constitutional principle of accountability, thus cannot mean the same thing.

The principle of separation of powers is a well-explored subject in scholarly literature and judicial pronouncements in South Africa and beyond. It is provided for in the Constitution of the Republic of South Africa of 1996 that there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness (RSA, 1996; O'Regan, 2005:120; Mojapelo, 2013:39). It has been shown, in modern day positive constitutionalism, that there is a need for another cluster of institutions whose remit is to hold the political branches accountable. At the

centre of this tension between the traditional branches of government and oversight institutions lies a more substantial question about the place occupied by these institutions in the organisation of the state. Put differently, can it be said that South Africa has a constitutional scheme that includes a "fourth branch" of government?

The South African model of separation of powers is indisputably still developing. It is safe to say that while it is still firmly based on the classical conceptions of the separation of the main functions and branches of government, it is distinctive. The constitution has empowered the oversight institutions, reflecting the country's intention to outgrow the trappings of liberal constitutionalism. The rule of law has disrupted the conventional understanding of separation of powers. A careful examination of the key decisions of the superior courts lends credence to this observation. There are firm participants in the checks and balance scheme. Unlike in the past, when their powers were limited to making "recommendations", today their powers are binding. The justification for the strong powers of these institutions is the principle of accountability.

Although accountability is not yet firmly established, like to other traditional functions, it possesses characteristics that define it as an independent function of the state. In South Africa, and probably throughout Africa, accountability holds greater significance than in other regions of the world. The nation possesses an unchallenged history of state power abuse.

To achieve this goal, we have adopted accountability, the rule of law and the supremacy of the constitution as values of our constitutional democracy. While the classical model of separation of powers intended to contain the abuse of power, it has not proven successful. As such, it is justifiable that a new function and a new branch is now emerging in post-liberal constitutionalism to fill the void. As Ackerman (2012) observes, "a separate 'integrity branch' should be a top priority for drafters of modern constitutions." The strength and quality of South Africa's constitutional democracy will depend to a large extent on how the rule of law serves South African people.

A perfect society would be one where democracy is without politics. For South Africa, this perfect society is impossible, because of our history. The rule of law is fundamental in advancing our democracy. Strengthening the rule of law has to be approached not only by focusing on the application of norms and procedures, but one must also emphasise its

fundamental role in protecting rights and advancing inclusiveness, in this way framing the protection of rights within the broader discourse on democratic development. The rule of law remains closely linked with the ideals of democracy. South Africa's democracy cannot exist without the rule of law, especially the rule that dictates who should occupy public office given the results of elections. However, supporting the rule of law only during an election season is not enough. Democratic stability depends on a self-enforcing equilibrium.

Democratic stability relies on the self-sustaining balance of the rule of law, which is frequently intrinsically precarious. The sustainability of the rule of law is contingent upon the populace: should they choose leaders who contravene the rule of law, its integrity will swiftly deteriorate. In vulnerable, conflict-affected cultures, the rule of law is especially tenuous.

Legislation and regulations for maintaining order do not have an immediate effect on behaviour or security, and thus on democracy. Implementing sound rule of law principles in conflict affected societies creates distinct challenges, because, in addition to promoting the rule of law in judicial and legislative institutions, the security sector, including the military, police, and prisons must also have a firm foundation in the rule of law.

5.4. The notion of the Rule of Law and democracy

Historically and today, social movements have often been at the forefront of envisioning the content of democracy. Unlike the rule of law, there is a consensus on what democracy is. The idea is that our democracy is a form of government based on some degree of popular sovereignty and collective decision making that remains largely uncontested. Another prominent theme that arises in discussions of democracy is the idea around collective living and/or decision making. Attempting to reconceptualise the concept of democracy would be to challenge the norms. Challenging the model of procedural, representative democracy in which the role of citizens is limited to participation in elections, democratic theory, particularly since the latter part of the twentieth century, has seen a renewed push for popular participation in civil and political life. Since the 2000s, this debate has increasingly been expanded beyond its Euro-centric history towards the specific experiences of South Africa.

The rule of law is a compelling political ideal for liberal democracy, so the democratic aspiration is to be compatible with all its formal and substantive versions. Indeed, scoring high on the rule of law index is a valid indicator of the quality of a democracy. In principle, provided

that the system comports with the procedural requirements envisaged by formal legality, implements sophisticated and rigorous accountability processes, and has a system of separation of powers and checks and balances which allow for an independent judiciary, democracy and the rule of law are "mutually constitutive" (Habermas, 1995). Democratic law is binding not as an "utterance of the sovereign" but as the product of the public sphere, periodically discerned, enacted, and promulgated by the people's representatives after adequate consultation with the civil society. Conversely, expedited adoption of legislation or limited consultation with stakeholders may put the rule of law under pressure.

Democracy's dimensions of public contestation and inclusivity allow a fair chance for the civil society to contribute to law-making and demonstrate its consent. This realistic approach replaces unanimity, which is unattainable, with a qualified and dynamic version of majority rule. To prevent its arbitrary rule, the undiluted will of the people is checked both by reference to individual rights and by shifting from a vote-based to a consent-based legitimation of decisions. The commitment of (liberal) democracy to individual liberty makes its potential to attain the thickest versions of the rule of law realistic.

Nevertheless, ostensible limitations to the general will of the people, caused, for example, by the rigorous protection of the rights of minorities, might be perceived as a democratic deficit. This is often attributed to non-representative and, to an extent, less obviously accountable institutions, such as ombudspersons or the courts that, nevertheless, provide essential institutional checks and balances at the core of a thick rule of law (Adamidis, 2021). Legal protection of individual rights necessitates the endowment of the court with the authority of judicial review. This tendency may result in the judicialization of political matters, as unelected and democratically unaccountable judges seemingly undermine public sovereignty to safeguard rights. Consequently, the populist pledges for a restoration of authentic democracy, envisioning genuine 'people sovereignty', seem appealing.

To conclude, the relationship of democracy and with the rule of law depends on two variables: the purpose that the rule of law is envisaged to serve, and the version applied. Democracy often prioritises its liberal aspect which qualifies popular sovereignty by reference to individual rights and, thus, aspires to attain a thick, substantive rule of law. Populism, on the other hand, gives precedence to an absolute popular sovereignty and opts to instrumentalise a thin, formal version of the rule of law to serve that end. Democratic formal and substantive versions of the rule of

law are incompatible with populism, as they appear to be incompatible with any ideology embracing a view of unlimited sovereignty. Although the populist instrumentalization of law has been discussed in pejorative terms, it can still be, I believe, a rule of law success story in formal terms, while systematically violating the underlying values of the rule of law.

5.5. Conclusion

The rule of law envisages that everyone is subject to the discipline and sanctity of the law. No one shall set himself above the law no matter what position they occupy in society. Actions of all and sundry must conform to the law. The rule of law is the antithesis of the existence of wide, arbitrary powers in the hands of the executive or the legislature. Society must observe the rule of law if it is to be orderly. Rulers have an even more outstanding obligation to observe the rule of law at all times to reinforce the rule of law and eliminate the possibility of the emergence of the rule of men. The rule of law is predictable. The rule of men is unpredictable.

The process of judicial review guarantees that all individuals executing public duties comply with the rule of law. The judiciary's function within its constitutional framework is delineated in the majority of Southern African constitutions. The conventional function of the court is to resolve conflicts between individuals and between individuals and the state. The judiciary's function is to maintain the law and the legal framework. This signifies that the judiciary must demonstrate dedication to the rule of law and to justice in accordance with legal principles. Legal justice does not invariably align with the conventional or widely accepted notion of justice. The ruling elites have exploited this vacuum to openly undermine the judiciary, intending to diminish popular confidence in the legal system. While courts endeavour to reconcile the disparity by shifting from technical justice to substantive justice, they remain steadfast in their adherence to the principle of justice as dictated by law.

The constitutions of Southern African states recognise the principle of separation of powers. In his 1748 book *The Spirit of the Laws*, Montesquieu aptly wrote: "Political liberty is to be found only when there is no abuse of power. However, constant experience shows us that every man invested with power is liable to abuse it and carry his authority as far as it will go. To prevent this abuse, it is necessary from the nature of things that one power should be a check on another. There would be an end to everything if the same person or body, whether of the nobles or the

people, were to exercise all three powers." The principle of separation of powers is designed to prevent arbitrary or tyrannical rule and to protect the governed.

Executive decisions and legislative enactments which fall outside the framework of the rule of law must be declared invalid in order to compel the executive and the legislature to observe the rule of law. This will ensure that individuals enjoy the rights and liberties guaranteed by the Constitution. Thus, an independent judiciary is critical to the rule of law. The Constitution of South Africa is firmly founded on the rule of law, binding everyone in the country, including the ruling elite. The rule of law is a cornerstone of well-functioning democracies in Southern Africa and elsewhere. As a bulwark of society, it is regarded as a reliable long-term safeguard against abuse of state power.

General Conclusion

The rule of law maintains enormous appeal amongst academics and reformers. No stranger to being redefined, 1994 promised a reinvented South Africa. It was without a doubt that South Africa could have been labelled Africa's 'golden state', because of its promises of a better quality of democracy and life. This better quality of democracy and life lies in our constitution and the supremacy it grants to the notion of the rule of law. The notion serves as a powerful social construct, and how major stakeholders have chosen to understand it, has led to significant consequences for South Africans. Today politics is competing with the law, for the position to define the 'notion' as a means to spread their views and influence society and people.

This thesis set out to paint what it hopes is a clear picture of the storm South Africa is headed towards. It has portrayed a picture that South Africa is facing a crisis in its rule of law, a buzzword of recent times in the political sciences. This thesis has not repeated what has been discussed and debated in the political sciences, but instead, the current project has applied a philosophical and analytical stance on the concept of the rule of law. South Africa as a whole is the focal point of analysis for this project. The dissertation has built up to its view on how it feels the crisis has emerged and its thought on South Africa's future of democracy.

Ideas about the rule of law have been central to political and legal thought since at least the 4th century, from when Aristotle distinguished the 'rule of law' from 'that of the individual'. In South Africa, competing and contending interpretations of the rule of law definitely exist. Political leaders seem to be conceptualising this divide by offering alternative constructions of the notion to suit their own interests. There are clear indications of a crisis, which today is causing political instability and social disintegration.

The rule of law is a notoriously difficult concept to define. In this dissertation, I did not want to underplay that reality because neither in politics nor in philosophy is there one clear definition of exactly what the rule of law is. Raz, Joseph (1979), Lon L. Fuller (1964), and John Finnis (1980), Jeremy Waldron (2002) have offered definitions that come very close to what the rule of law entails. It is worth mentioning again that this not a problem but allows for flexibility in the rule of law. Its basic form remains intact: the rule of law is the principle that no person is

above the law. In the reality of our case study, 'In South Africa,' we are subject to clearly defined laws and legal principles, but at the mercy of powerful political stakeholders.
In the context of South Africa, the ambit of constitutional law is generally between two branches. First, there is the separation of powers and secondly, there is a body of law that grants persons within that jurisdiction of South Africa certain rights. As explained above, constitutions generally establish arms of the state and assign powers and duties to those arms of the state. South Africa's constitution prescribes state powers and duties in numerous ways and these ways in the end affect our democracy.

Theorists since Aristotle have focused on constructing a coherent explanation of the rule of law that endures analytical examination. The concept of the rule of law is inherently complex for South Africa's democracy, having been established amidst a crisis. Despite significant enthusiasm for the rule of law, we must exercise caution in adopting American-style legal systems that are incompatible with South Africa's setting. We cannot disregard the existing literature and projects in South Africa. A consensus is required concerning the precise significance and components we prioritise regarding the rule of law. This is not intended to provoke unwanted enquiries, but to clarify what South Africa's rule of law cannot include.

The criticisms of the rule of law at present are many, given that the needs of society include many dimensions. The solution, better explained in Chapter Three, is not to simply stitch together the theories of the rule of law and democratic principles, but to distinguish clearly what the rule of law is and what it is not. As explained above, the rule of law is not the rule of men but the institutional guarantee of democracy.

The rule of law can be viewed in terms of certain core historical meanings, and yet it can also be conceived of beyond its contingent features and contexts. The rule of law has prevented the complete will of the government from completely absorbing available social normativity. It is hopefully clear at this point that much of the reigning understanding of South Africa's reality is based largely on guessing how the inevitable failure of democracy will unfold, rather than on reality. The outcomes discussed from constitutional decisions are not likely to change unless society's elites change their approach to governance. Business left unfinished in the compromises of 1994 has left South Africa's democracy in a worse position. The qualify of democracy and a better standard of life for ordinary citizens is now nothing but an empty promise. South Africa will remain, despite all the talk of newness, like F. Scott Fitzgerald's

America in the last line of *The Great Gatsby* a perpetual prisoner of its past.
Almost all earlier research on the rule of law is from an angle that is foreign; now there is a rule of law that is South African. Support for the rule of law in South Africa may not be particularly widespread Due to past legal failures. If democracy is to survive, we are to give the constitution the ability to stand firm and rebuke anything that challenges its authority. It feels almost too natural to blame all our troubles of socioeconomic inequality on the ruling party, but the temptation suggests a cry for a more traditional post-colonial form of African rule of nearly untrammelled executive discretion in a state dominated by one party. The future may be dire for the rule of law in South Africa if accountability does not enter leadership discussions. However, considering the history and present of the continent, no remedy to solve the challenges facing South Africa's democracy will fall from the sky or be so jaw dropping that, at the first shot, everything is fixed. Properly implementing existing policies and actions will make South Africa better for future generations.

South Africa needs to push harder to protect its rule of law. Solving the country's fundamental challenges of inequality, poverty, unemployment, and human capital formation will be a step in the right direction. In order to make the necessary inroads, action is needed. South Africa is in a better position regarding the quality of political leadership, efficient and technocratic management of the public sector, good, transparent governance, and respect for the rule of law. Given the many needs and beliefs of society, the rule of law may come in many flavours and include many dimensions. Citizens may prefer that the theory of justice on which the rule of law is based is tailored to a specific policy context and changes across different policies.

Recommendation

There is no new experience left under the sun for Africa and its states. Democracy remains constrained from delivering on its development potential for two reasons: the failure of governments to serve their people, and the quality of democracy the people are willing to accept. Proposed future research should not focus on democracy and how fragile it is becoming after so many years of independence in South Africa. We now comprehend the issue and the competing perspectives on governance and law. African countries must now establish policies that foster good governance and delineate a definitive strategy to attain their economic and social objectives.

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