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DOES AFRICA NEED ANOTHER KIND OF LAW?

ALTERITY AND THE RULE OF LAW IN SUBSAHARAN AFRICA

by

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**Being a Dissertation presented in Partial Fulfilment of the Requirements for the
Degree of Doctor of Philosophy in Law**

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DECLARATION

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ABSTRACT

Does the Rule of Law in Africa need another kind of law? This theoretical dissertation answers in the affirmative, drawing exclusively from secondary literature.

The dissertation uses critical discourse analysis to challenge the Rule of Law Orthodoxy, a set of ideas and strategies accepted in development practice as formulaic for the Rule of Law. The goal is to demonstrate that an Afrocentric alternative to modern law is not only plausible but would better facilitate the Rule of Law in Africa. Establishing the plausibility of the alternative substantiates the cliché that Africa should look to its indigenous norms for renaissance. This should have implications for policy formulation as it fundamentally challenges the current paradigm for establishing the Rule of Law.

The dissertation conceives of the Rule of Law as a state of functionalism rather than as the 'Rule of Modern Law.' The dissertation argues that the Rule of Law Orthodoxy assumes the essentialism of modern law. The dissertation uses coups and corruption to demonstrate that in the absence of systemic fidelity to modern law in Africa, the Orthodoxy is futile. The dissertation provides an Afrocentric critique of modern law which holds modern law alienating in Africa.

The dissertation then makes the case for looking for an 'Other' of modern law which will attract systemic fidelity in Africa. The dissertation presents African customary law as a historic alternative to, and different form of law from, modern law. The dissertation argues that the legal cultures and rationalities that simultaneously produced and were embedded by African customary law have endured and continue

to undermine the success of modern law in Africa. The dissertation then uses the concept of alternative modernity as a contemporary framework to rationalise Africa's need for an 'Other' of modern law and co-opts anarchism in support of the case.

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The dissertation is ultimately mine and I take responsibility for any errors or omissions herein.

CHAPTER 1 - INTRODUCTION

‘There is ... uncertainty about what the essence of the Rule of Law actually is - whether it primarily resides in certain institutional configurations or in more diffuse normative structures. Rule-of-Law promoters are also short of knowledge about how the Rule of Law develops in societies and how such development can be stimulated beyond simplistic efforts to copy institutional forms’ (Carothers 2003:3).

‘In the area of Rule of Law development, there is a widespread feeling that simply exporting institutions and laws does not strengthen the Rule of Law. We need to understand more about what makes law tick in the complex setting of today. What goes on behind the institutions and formal structures? ... Tackling this question – or the many questions it encompasses – will first and foremost require ... a multidisciplinary and interdisciplinary approach, encompassing law and behavioural sciences ... To that we must devote ourselves with great urgency’ (Muller 2008:52).

1.1 PROBLEM STATEMENT

The research problem stems from the ‘African Exception’ (Engel and Olsen 2005) to the Rule of Law. Sub-Saharan Africa (‘Africa’) lags behind all other regions on Rule of Law indexes including, notably, on the Rule of Law Indicators published annually by the World Bank from 1998 to date. The African Exception has defied what has become known as the ‘Rule of Law Orthodoxy’ – ‘a set of ideas, activities and strategies geared towards bringing about the Rule of Law’ (Golub 2003:7). The Rule of Law Orthodoxy emphasises strengthening the foundations of ‘modern’ (Western-style) law (Tamanaha 2004, Golub 2003 and Carothers 2003). The approach continues to prevail despite a shortage of knowledge, captured by the likes of Muller (2008), Krygier (2007), Zimmerman (2007) and Carothers (2003), on how the Rule of Law develops in societies and how it can be stimulated other than by copying institutional forms.

If building on modern law has so far been abortive in Africa, then perhaps the solution lies in another type of law. The suggestion raises the problem of demonstrating that the Rule of Law can be built on a type of law other than modern law. The problem translates into the following research question.

1.2 RESEARCH QUESTION

The main research question is:

‘Can it be demonstrated on the current state of knowledge that the Rule of Law in Africa needs and can be built on a type of law other than modern law?’

The following subsidiary questions flow from the main research question:

‘Can it be demonstrated that the Rule of Law is not necessarily the Rule of modern law?’

‘Are assumptions of the Orthodoxy (on how the Rule of Law is achieved) falsifiable?’

‘Can it be demonstrated that another type of (‘modern’) law is possible in Africa?’

1.3 RESEARCH AIMS AND OBJECTIVES

The research aims to establish the basis for an alternative discourse of the Rule of Law in Africa by answering the research questions in the affirmative. Meeting that aim requires demonstrating that on the current state of knowledge, it is plausible that the Rule of Law needs another type of law to thrive in Africa and that such other law is possible. The research objectives are as follows:

- To demonstrate that in building the Rule of Law in Africa, there is as much sense in looking for an alternative to modern law as there is in consolidating it;
- To demonstrate that key assumptions underlying the Rule of Law Orthodoxy are flawed and falsifiable;
- To demonstrate that the Rule of Law is not necessarily the Rule of modern Law
- To demonstrate that there can be an alternative to modern law in Africa
- To demonstrate that the Rule of Law in Africa can be built on an alternative to modern law

1.4 RESEARCH BACKGROUND

1.4.1 The Rule of Law Orthodoxy

In the 1990s, the Rule of Law metamorphosed from a constitutional concept into a development paradigm (Ohnesorge 2007, Trubek and Santos 2006). Since development studies emerged as a discipline in the 1950s, it was the first time that law shared centre stage with economics (Trubek and Santos 2006). The Rule of Law defied quantitative measurement but that did not deter development practitioners from devising an institution building template as the hub of the Rule of Law Orthodoxy. The template provided for the enacting of new statutes and reforming of courts, civil service, police and legislatures in the image of laws and institutions in developed Western countries (Ngugi 2005, Tamanaha 2004, Carothers 2003, Golub 2003, Jensen 2003).

After more than a decade of reform (and despite widespread democratisation), the Rule of Law remained poor in much of Africa (USAID 2009, World Bank 2008). A

new conventional wisdom emerged that efforts at reform would continue to disappoint without ‘national ownership,’ a euphemism for African society taking charge and making the Rule of Law happen (Vig 2009, Cravero 2009, Migiro 2009, Dakolias 2001). The convergence on national ownership was acknowledgement that the roots of the Rule of Law lay deeper than had been thought. The earlier premise that the Rule of Law would be secured by transplantation of law had proved simplistic and inadequate (Muller 2008, Trubek and Santos 2006, Carothers 2003). Fidelity to the reforms and to law itself was a fundamental but mysterious part of the matrix to which attention also needed to be paid (Krygier 2005, Tamanaha 2004). Beyond exhortations on the need for national ownership however, no insights have been developed on how this fidelity can be built (Krygier 2007, Zimmerman 2007).

If fidelity to modern law continues to be problematic for the Rule of Law in Africa, the question must be asked whether there is another type of law which might attract the requisite fidelity. This is the question at the core of this research and to which the research makes the case for an affirmative answer. Trubek (1972b) had hinted at such affirmation over a quarter of a century ago but his thesis that modern law was not the only type of law that could guarantee ‘development in the Third World’ has not been pursued. Similarly, Woodman (1989) asserted that there is adherence in Africa to the Rule of a law that is different from modern, state-based law but this view has not been elaborated.

The Orthodoxy conceives of the Rule of Law as unachievable in the contemporary world otherwise than by modern, Western-style law (Trubek and Santos 2006). It is a trite observation that all the countries now adjudged to have the Rule of Law operate

modern law. *Prima facie* therefore, it can therefore hardly be amiss to consolidate modern law in Rule of Law reform projects. But correlation is not causation so that modern law could have been the result of the Rule of Law or both could have resulted from a third element. This possibility has so far been lost on the Orthodoxy.

1.4.2 An Alternative Perspective

The Orthodoxy takes it for granted that modern law is universally rational – it is *law* – so that where there is a problem with the Rule of Law, modern law cannot be the problem. Where the Rule of Law is absent, it is taken that modern law is either absent entirely or not sufficiently present. If modern law is found to be present and there is still no Rule of Law, then it is the ways of the societies lacking the Rule of Law that are abnormal and therefore a changeable problematic.

The alternative argument attempted in this dissertation reverses the logic. If an ambiguous attitude to modern law can be accepted as normalcy in certain societies, then it is modern law that is problematic in those societies. While the Orthodoxy is premised on modern law working successfully in certain places, the contrary view is based on modern law continuing to come up short in others, particularly in Africa. The two perspectives therefore approach the centrality of modern law to the Rule of Law project from opposite poles.

Whether the Rule of Law actually happens, whether it is attributable to machinations of law, and whether it is the best form of social organisation are examinable questions all by themselves. However, for the purposes of circumscribing the subject matter,

those questions are taken as affirmatively answered; in the main, this dissertation does not concern itself with them, as worthy an enquiry as that might otherwise be. The major site of contestation here (having taken for granted that ‘Rule of Law’ does actually occur and is an ideal worthy of pursuit by all peoples) is whether modern law is synonymous with the ‘Law’ in ‘Rule of Law.’¹ If the case can be made that the Rule of Law does not necessarily coincide with the Rule of modern law, then modern law is only *a*, as distinct from *the*, legal form by which the Rule of Law can be established. In that event, not only can an argument be made on the possibility of the Rule of Law by means other than modern law but also that the modern law might actually be an impediment, in certain circumstances, to the Rule of Law.

1.4.3 Caveat

A caveat is necessary. It is not intended that the dissertation will provide the definitive answer to Africa’s problems of law and development. The dissertation does not outline any specific strategy for developing the Rule of Law. No attempt is made to prescribe specific remedies, much less a cure-all one, for the problems of the Rule of Law in Africa or elsewhere. Rather, what is sought is to initiate a baseline perspective to those problems that stands as credible *alternative* to current Orthodoxy. The word ‘alternative’ is emphasised as it is acknowledged from the outset that the Rule of Law Orthodoxy contrives a formidable argument for consolidating the modern legal form in Africa. The thesis does not seek so much to oust that argument

¹ Criticising the ‘Law and Development’ scholarship of the 1960s and 1970s, Trubek (1972b) and Trubek and Galanter (1974) argued that it was wrong to hold the modern legal form synonymous with ‘the law’ everywhere, especially in developing countries. Moreover, they argued, the modern legal form was necessary only for the proper functioning of a bureaucratic state; there was nothing to prove that it was necessary in every society. Trubek (1972b) distilled a ‘core conception of modern law’ by contrasting the processes of social regulation in traditional societies with that of the modern legal system.

as to demonstrate the plausibility of an alternative argument. If that demonstration is successful however, the alternative argument would have implications for policy formulation and practice by challenging the bases of current strategies for the Rule of Law.

1.5 RESEARCH APPROACH

1.5.1 Theoretical Research

Dissertations may be empirical or theoretical (conceptual) (Silverman 2009, Tedre 2006, Jankowicz 2005). The empirical dissertation collates and analyses empirical data while the theoretical dissertation marshals evidence from existing literature to state a case (Silverman 2009, Bhatt 2004, Silbergh 2001). The theoretical dissertation is invariably library-based and results in either a state-of-the-art statement or a novel interpretation of existing writing (Tedre 2006, Jankowicz 2005, Day 1993).

This dissertation is theoretical and entirely library-based. Its principal object is to bring a new interpretation to current literature by arguing the case that the Rule of Law needs another type of law to thrive in Africa.

1.5.2 Historical-Documentary Research

When proposing a new interpretation to existing literature, the theoretical researcher is required to show how and why things are as they have been as well as how and why they might be improved if the position of the research is taken seriously (Tedre 2006, Day 1993). Meeting this requirement informs the adoption in this dissertation of a research approach that has been labelled 'historical-documentary' by Lang and Heiss

(1997). Used alone, the historical method is ‘the writing of an integrated narrative about some aspect of the past based on a critical analysis and synthesis of sources’ (Lang and Heiss 1997:64). The documentary method, on the other hand, is cross-sectional rather than longitudinal and emphasises contemporary sources and issues (Lang and Heiss 1997). The main factor in analyses is the search for common ground or variations, as the case may be. An amalgam of both methods produces the historical-documentary method in which the research proceeds from a historical perspective to analyse contemporary sources and issues.

1.5.3 Subjectivist-Interpretivist-Constructivist Paradigm

Research approaches are also categorised according to their ontological and epistemological paradigms (Blumberg *et al* 2008, Cooper and Schindler 2008, Saunders *et al* 2007). Ontology is the nature of reality while epistemology concerns the manner of knowing (Saunders *et al* 2007, Guba 1990). The ontological spectrum exists between objectivism and subjectivism. Objectivist ontology sees a social reality that is external to social actors while the subjectivist view is that reality is socially constructed (Saunders *et al* 2007, Collis and Hussey 2003). The research tends to a subjectivist ontology in which modern law is viewed as socially constructed rather than something objective and inevitable.

The subjectivist ontology is closely associated with the interpretivist epistemology in which knowledge is viewed as a matter of interpretation rather than as something fixed whose discovery was always inevitable (Saunders *et al* 2007, Guba 1990). Interpretivism allows for empathy towards social actors ways’ of life rather than

judging them according to an *a priori* standard. The research approach in this dissertation leans towards interpretivism in so far as it seeks to view African attitudes towards modern law as normalcy within the context of African actors rather than an aberration according to some ‘objectivist’ global standard.

1.5.4 Qualitative Research

Research questions may be answered by either or both qualitative and quantitative methodologies (Cooper and Schindler 2008, Balian 1988). Quantitative research attempts to precisely measure phenomena (Cooper and Schindler 2008, Saunders *et al* 2007). Qualitative research seeks to ‘describe, decode, translate or otherwise come to terms with the meaning, not the frequency of ... [natural] phenomena’ (Cooper and Schindler 2008:162) in the social world.

Quantitative research is used for theory testing while qualitative research is also called ‘interpretive research’ because it builds theory without testing it statistically (Cooper and Schindler 2008, Saunders *et al* 2007). Qualitative research does not therefore require a statistically testable hypothesis before it can proceed; rather, the conjectural research questions are subjectively answered by the researcher (Balian 1988).²

Consistent with the subjectivist-interpretive approach, this research is carried out as a qualitative study. The research concentrates on the meaning of social phenomena, with a view to bringing fresh interpretation to existing writing. The research neither

² Denzin and Lincoln (2005) stress the value-laden framework of qualitative research in contrast to the value-free nature of quantitative enquiry.

measures the frequency of any phenomena nor engages in the statistical testing of hypotheses.

1.5.5 Jurisprudence

The research takes a ‘macro’ law approach, focusing on the philosophy of law reform in Africa rather than on ‘micro’ law in the sense of specific statutory provisions or judicial decisions.³ The study of law in this manner, as an abstraction and not in ‘black-letter’ terms, has been the basis of centuries of Western jurisprudence.⁴ Jurisprudence used to focus on the influence of law on society, law being regarded as autonomous from other social forms (Cotterrell 1984). This was partly because jurisprudence was dominated by persons trained in legal thought. It was considered ‘that collection of lawyers’ speculations on their craft gathered and stored over the centuries’ (Cotterrell, 1984: v).

But jurisprudence has been evolving on several planes. It has since gone beyond the effects of law on society to include society’s effect on law.⁵ The broader approach

³ Studying law on this level makes it possible to discern overarching commonalities across the region of study despite the diversity of legal systems. As Schur (1968:11) puts it, ‘analysis that cuts across specific legal systems is a prerequisite to any generalisation about the nature of the legal systems and to the development of meaningful theories in this area.’ Orucu (2004:42-43) says that macro-level comparative study moves the focus away from legal systems to legal cultures and traditions. It is in this context that Woodman and Obilade (1995), for instance, explore the possibility of an ‘African legal theory.’

⁴ Ogwurike (1979:6), quoting Jolowicz (1963), defines jurisprudence as a ‘general theoretical discussion about law and its principles, as opposed to the actual rules of law.’ He points out that jurisprudence is no longer confined to the narrow limits imposed by the legal positivism that dominated Anglo-American jurisprudence until the end of the 19th century. Instead, says Ogwurike (citing Stone 1961), jurisprudence has become the ‘lawyer’s extraversion.’ It is ‘the lawyer’s examination of the precepts, ideals, and techniques of law in the light derived from present knowledge in disciplines other than law’ (Ogwurike 1979:6).

⁵ Schur (1968:5-8) analyses the reverse neglect of law by sociologists in the past. Among the factors he identifies for that disappearing trend are ‘a certain intellectual impenetrability about the law,’ the fact of a long-standing body of jurisprudence (rendering the area seemingly unworthy of further work by sociologists), and the difficulties of interaction between sociologists and lawyers.

has necessitated the ‘reformulating and reinterpreting many of the issues canvassed in [its] vast literature’ (Cotterrell 1984: vi).⁶ Contemporary writing confronts the cultural particularity of the past so that jurisprudence is now more readily acknowledged as ‘the product of long Western history ... coloured by a ... culture based on the Hellenistic and Christian view of man and society’ (Chiba 1986:2). While it may be the ‘most advanced science of law ever accomplished by man,’ (Chiba 1986:2), jurisprudence’s universality can no longer be taken for granted and the conceptualisations of the great jurists no longer accepted as ‘transhistorical, timeless truths’ Calhoun (1995:85).⁷

Reflexivity in jurisprudence informs this research revisiting core propositions on the Rule of Law so as to critique their universality in the context of Africa. While undertaking the process, it has been useful (given that the researcher is African) to remain conscious of the potential for parochialism in ‘ethnography from the native’s point of view’ (Godemont 1999:114).⁸ It is neither to be assumed that Africa is so unique that Western jurisprudence is inappropriate nor that core propositions like the necessity of separation of powers are unimpeachable with regard to Africa.

⁶ The ‘Law-and-Society’ school, which emerged from the Legal Realism of the early twentieth century, departs from the internalising perspective of classical legal thought. It views law not as a closed system with its own logic but as the product of external influences like history, culture, economy and politics. Law, by this view, is the dependent variable instead of the independent variable of classical legal thought.

⁷ Tamanaha (2001:xiii) says that the ‘quest for a universal jurisprudence, traditionally indulged in by Western jurisprudence scholars, has embarrassingly imperialist, old-fashioned overtones.’ Cotterrell (1984:vi), in a sign of the times, distances his sociological study of law from anything other than ‘theory and empirical research bearing on law in industrialised societies of Western Europe and North America.’

⁸ Denzin and Lincoln (2005) advise that research in the critical tradition requires self reflexivity on the researcher’s part regarding his or her subjective and normative reference claims.

1.5.6 Plain Commentary

Commentary on Africa often tends to either patronise or overly denigrate. The former tendency arises from what Chabal and Daloz (1999: xviii) call the felt need of Westerners ‘to expiate the colonial crimes of [their] forefathers.’ Menski (2006: 380-390) alludes to the latter tendency when, in making a case for studying African legal traditions in their own right, he highlights the Eurocentrism of scholarship that peremptorily dismisses African legal traditions as inferior. The research approach is to seek the middle ground, the researcher being of the belief that if the continent could express a wish on its representation, it might do so in verse, albeit rendered in West African patois: ‘Make you talk am as I be; no talk better where I no better but no take bad mind talk anything.’⁹

1.6 DEFINITIONS

The key concepts defined in this section are of an essentially contested nature.¹⁰ The following definitions are therefore put forward as ‘working definitions,’ to guide the usages in this dissertation, rather than as universal definitions. Each of the definitions is elaborated upon within the dissertation.

‘Africa’ Sub-Saharan Africa, excluding South Africa whose peculiar history, compared to the more uniform pathways across the rest

⁹ ‘Speak of me as I am; nothing extenuate, Nor set down aught in malice,’ from Shakespeare’s *Othello*, Act V, Scene II.

¹⁰ Gallie (1956) introduced the term, ‘essentially contested concept’ to give a name to that problematic situation where an abstract notion is agreed on but there is endless debate about the meaning, substance or realization of that notion.

of the region, has resulted in contemporary conditions that are different from those of the rest of the region.¹¹

‘Modern Law’ Form of law enshrined in institutions that are most manifest and most developed in the West; a system of formal and general rules that is backed up by the organised force of the modern state, is applied by specialised agencies and is relatively autonomous from other forms of social order.¹²

‘Rule of Law’ State of social functionalism that contains an optimal mix of predictability, cohesion, equity, security, law and order, freedom and other libertarian desirables; said usage evokes much more than the legal purist’s view of the term as the rule over society by a particular type of legal structures and processes: it expresses social outcomes which go beyond law but of which the effectiveness of the prevalent legal form is a fundamental determinant.¹³

¹¹ This delineation of ‘Africa’ is situated in an established academic tradition that is elaborated upon in chapter 3 (section 3.4) of this dissertation. The geographic area is known within that tradition as ‘Black Africa’ (Chabal 2005) and it is argued that ‘using Black Africa as ... unit of analysis is a viable research strategy because of the area’s marked similarities in colonial past, revolutionary change and contemporary dynamics’ (Hanna and Hanna 2009:7).

¹² Again, ‘modern law’ is a term that is incapable of universal definition. However, the working definition here draws on the common ground in definitions provided, inter alia, by Davies (2008), Galligan (2007) and Trubek (1972b). The definitions have particular resonance for this dissertation as Trubek (1972b) queries the assumption that modern law is the only route to development, Davies (2008) holds up modern law as a ‘Western’ conception and Galligan (2007) ponders how modern law achieves its binding effect in some societies and falls short in others.

¹³ It is important to re-emphasise that this is a working definition for the purposes of the dissertation; the basis for choosing it is explained in Chapter 4. The Rule of Law being an ‘essentially contested concept’ (Li 1999, Fallon 1997 and Radin 1989), there is no universally acceptable definition. It would be naïve, as Zolo (2007:5) has said, to ‘seek a semantically univocal and ideologically neutral definition of the Rule of Law.’ Zolo (2007:5) argues that to do so, given the many meanings which have been or may be ascribed to the concept, may result in the dismissal of the concept as ‘imprecise, unascertainable and contaminated by evaluative judgements.’ However, a lot of legal and political theory would be subject, on the same grounds of imprecision, to expunging from scientific communication. Rather, what matters is not ‘semantic definiteness’ but the ‘communicative clarity’ of the concept. By endorsing such a weak epistemology, social theory can then elaborate ‘coherent interpretations rather than explicative definitions of the concerned concepts’ Zolo (2007:5-6). Indeed, Ohnesorge (2007) alludes to a popular assumption in the U.S. that everyone knows what it is so that

[the] ‘West’ North America and Western Europe.¹⁴

1.7 DISSERTATION STRUCTURE

Chapter 1: Introduction. This chapter introduces the dissertation, providing the problem statement, research questions and background to the research. The chapter states the research aims, describes the research approach, defines key concepts and outlines the dissertation structure.

Chapter 2: Literature Review. The chapter chronicles the incidence of the Rule of Law and emergence of the Rule of Law Orthodoxy in development literature. The chapter reviews the theoretical possibilities arising from the literature for challenging the Orthodoxy and concludes with a justification of the research question.

Chapter 3: Research Methodology. The chapter explains the research methodology, including a reflection on the methodological imperatives of a

little time is usually ‘wasted’ on defining it or subjecting it to comprehensive analysis. A lot of the writing on the Rule of Law no longer attempts comprehensive definition. At best, there is a definition in context, for the specific purpose of such writing. Fogelklou (1997) for instance, specifies at the onset that he is looking at the Rule of Law from a ‘legislative development perspective.’ Fogelklou (1997:39) says that the Rule of Law is not a single principle or maxim but a ‘concept which comprises several principles and rules governing the mechanisms of the legal order and giving the content of the legal order a certain quality.’ He identifies the principles as the supremacy of law, separation of powers, protection of life, liberty, safety and property of persons, legal certainty, equality before the law and the effectiveness of Rule of Law principles.

¹⁴ Again, the term ‘West’ is essentially contested with definitions falling between geographic and ideational conceptualisation. Nemo (2006) argues, for instance, that the ‘West’ is a singular cultural entity to which North America and Western Europe belong. He sees ‘Western civilisation’ as the combination of the rule of law, democracy, intellectual liberties, critical rationality, science, and economic freedom founded on private property. Huntington (1993) sees ‘Western civilization’ as possessing two major variants: European and North American. Sorman (2008) takes the ideational route, arguing that to be ‘Western or westernized,’ is ultimately a mindset which does not coincide with any specific nation or religion. Sorman (2008) argues, in opposition to Huntington (1993), that the West cannot be contained inside national borders: ‘there is no map of the West.’ For Sorman (2008), Asian nations like Japan and Taiwan are ‘Western’ while supposedly Western countries often harbour non-Western groups. In that case, he says, it is easier ‘to define the mental borders of the West than its territorial boundaries.’ Gress’ (1998) *From Plato to NATO: the Idea of the West and its Opponents* synthesises the West as both an idea and a geographical description. .

theoretical dissertation. The chapter explains and rationalises the nature of data used, the unit of analysis and the argumentative methodology by which the dissertation proceeds.

Chapter 4: Deconstructing the ‘Law’ in the Rule of Law. The chapter argues that in contemporary usage, the ‘Rule of Law’ alludes to a Rule of Reason rather than the Rule of Modern Law. Tracking the Rule of Law from its modern origins in the Enlightenment, the chapter examines the fundamentals of the idea before adopting a functional conception informed by its interpretation of the term in contemporary usage.

Chapter 5: The Futility of the Orthodoxy in Africa. The chapter uses coups and corruption to demonstrate the futility of the Orthodoxy in the absence of systemic fidelity to modern law in Africa. The chapter then makes the case for looking for an ‘Other’ of modern law which will attract systemic fidelity in Africa.

Chapter 6: An Afrocentric Critique of Modern Law. The chapter provides an Africa-centred critique of modern law which it uses existing critical legal theory to corroborate. The chapter reiterates that an ‘Other’ of modern law is not only possible but would be more legitimate in contemporary Africa.

Chapter 7: African Customary Law as Past Alternative to Modern Law. The chapter presents African customary law as a historic alternative to, and different form of law from, modern law. The chapter argues that the legal cultures and rationalities

that simultaneously produced and were embedded by African customary law have endured and continue to undermine the success of modern law in Africa.

Chapter 8: Towards an Alternative Modernity of Law for Africa. This chapter uses the concept of alternative modernity as a contemporary framework to rationalise Africa's need for an 'Other' of modern law. The chapter co-opts anarchism in support of the case for an alternative to modern law in Africa.

Chapter 9: Conclusion. The chapter summarises and concludes the dissertation, including stating the limits of the study and making suggestions for further research.

CHAPTER 2 - LITERATURE REVIEW

Ngozi: Hi Nnamdi, what are you looking for?

Nnamdi: I lost my keys somewhere in the park.

Ngozi: Did you lose them under one of those street lights?

Nnamdi: No, I do not think so. I checked there several times already.

Ngozi: So why are you still looking under the street lights?

Nnamdi: Because that is where the light is.¹⁵

2.1 INTRODUCTION

The previous chapter introduced the research questions which challenge the centrality of modern law to the building of the Rule of Law in Africa. The questions arise in the context of the Rule of Law having been identified as something that Africa needs to develop. This chapter presents a review of the literature. The review is in the form of a historiography of relevant themes.¹⁶

The first part of this chapter tracks the paradigms of the Rule of Law in development discourse, from constitutionalism through instrumentalism to the Rule Law as a development end of itself. The emergence and nature of the Rule of Law Orthodoxy – a constellation of ideas on how to build the Rule of Law – is examined in this part of the chapter. The centrality of modern law to the Rule of Law is found to be a fundamental assumption of the Orthodoxy. The second part of the chapter presents critical perspectives, from within and outside legal theory, which may be used to challenge the hegemony of modern law in the Rule of Law Orthodoxy.

¹⁵ Paraphrase of story in Whitehouse (2009:162).

¹⁶ In keeping with the historiography approach to the literature review, citations on any particular point in this chapter are arranged with earlier works appearing before later works to show the progression of thinking. In the rest of the dissertation, later publications appear before earlier ones.

Through the chapter, gaps are identified in the literature on Rule of Law with a view to eventually grounding the research questions. The chapter finds that there is a paucity of Africa-specific socio-legal research and that the Rule of Law Orthodoxy is based on Eurocentric knowledge. The chapter finds that the literature does not significantly challenge the assumed centrality of modern law in the Rule of Law. The question therefore remains open whether the Rule of Law in Africa would benefit from an alternative type of law and whether the plausibility of such an alternative can be demonstrated.

2.2 PARADIGM ONE: RULE OF LAW AS CONSTITUTIONALISM

2.2.1 A Concept for Lawyers

One of the first things noticeable in researching the Rule of Law is the relative dearth of literature prior to the 1990s. For most of the preceding century, study of the Rule of Law had mainly been confined to law faculties in the West and in former European colonies. There was a brief promise of wider interest in it during the Cold War and as nations emerged from colonialism in the 1950s and early 1960s. In 1955, the International Commission of Jurists was founded with the aim of the advancement of the Rule of Law and encouragement to people to whom the Rule of Law was denied. Proceedings of its Congresses over the next decade provide elaboration on the Rule of Law that still resonates today. At the second Congress in 1959 in Delhi, the Commission adopted the following definition of the Rule of Law:

‘The principles, institutions and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him enjoy the dignity of man’ (International Commission of Jurists 1965: 177).

Meeting under the aegis of the Commission, the 1961 African Conference of the Rule of Law in Lagos declared the Rule of Law a 'dynamic concept' which was to be employed to safeguard and advance the people's will and the 'political rights of the individual.' The Rule of Law would also be used to establish 'social, economic, educational and cultural conditions under which the individual may achieve his dignity and realise his legitimate aspirations' (International Commission of Jurists 1962: 16)

The Commission's conception of the Rule of Law was premised on a libertarian philosophy and interwoven with human rights. The maiden congress in Athens in 1955 declared that the Rule of Law sprang from the 'rights of the individual developed through history in the age-old struggle of mankind for freedom' including the rights to freedom of speech, press, worship, assembly and association (International Commission of Jurists 1955:9). The State was also declared subject to Law and required to respect and enforce the rights of the individual under the Rule of Law. The Lagos Conference asked for fundamental human rights to be entrenched in all constitutions and not to be restricted, in peacetime, without trial in a court of law.

The role of lawyers and jurists was continuously emphasised with the declarations in Athens and Delhi stating that an independent judiciary and legal profession were essential to the maintenance of the Rule of Law and to the proper administration of justice. Democracy was also closely linked with the Rule of Law by the Commission. The right to free elections had been upheld as a fundamental right at Athens. In Lagos it was declared that adherence to the principle of democratic representation was required to adequately maintain the Rule of Law. The Rule of Law was canvassed as

a universal good, sometimes at the risk of stripping away its democratic and libertarian imperatives. Opening the plenary session at the Lagos Conference, the then Chief Justice of Nigeria, Sir Adetokunbo Ademola disavowed any notion that the Rule of Law was a Western idea or linked to any economic or social system:

‘As soon as you accept that man is governed by Law and not by whims of men, it is the Rule of Law. It may be under different forms from country to country, but it is based on principles; it is not an abstract notion. It exists not only in democratic countries but in every country where the dignity of man is respected and provisions made for his legitimate rights’ (International Commission of Jurists 1961: 86).

Despite the global outlook expressed by the Commission, its efforts through the 1950s and 1960s focused on what it saw as the absence of the Rule of Law in the Soviet Union. This drew criticism from Boulter (1958) and Cicchetti (1958), the former terming the Commission’s work a ‘cold-war enterprise’ involving discrimination among nations in which some were judged superior and others inferior by applying to them the standard of the Rule of Law. The 1957 Chicago Colloquium of the International Association of Legal Science was more subtle in its aims but no less reflective of Cold-War politics. It had been preceded the previous year by a Conference between Eastern and Western lawyers which drew contrasts between the Rule of Law and what the Eastern representatives termed ‘socialist legality.’

The Chicago colloquium followed up with the theme ‘the Rule of Law as Understood in the West’ (International Legal Science Association 1957). The English concept of the Rule of Law, as defined by Dicey, was regarded as proximate to the French ‘*le principe de la legalite*’ or ‘*la suprematie de la regle de droit*’ and to the German ‘*Rechtsstaat*.’ It was agreed that the terms were not ‘strictly convertible’ even if they shared some common ground. The colloquium made a notation, which might be

startling today, that the Rule of Law was not a term of common usage in the US where a lawyer was more likely to speak of ‘government under law,’ ‘due process’ or ‘equality before the law’ (International Association of Legal Science 1957).

Outside the conferences, the Rule of Law did not go much beyond the purview of teachers and students in law and, to a lesser extent, politics. Its importance as such was reflected in its place in the literature going back to the modern roots of the concept. Dicey’s seminal exposition of the Rule of Law in 1885 was but a small part of his *Introduction to the Study of Law of the Constitution*. The Rule of Law was treated through the next century as a topic occurring within constitutional and administrative law curricula. Rare is the book up to the late 1980s that was devoted to the Rule of Law.

When the Rule of Law did merit exclusive treatment, it was usually only as a working paper or journal article. Titular allusions to the Rule of Law could even be deceptive in terms of explicating the concept. Wolff’s (1971) *The Rule of Law* was made up of articles on the theory of law with anarchist undertones, epitomised by Diamond’s comparison of law and custom which concluded that law was neither necessary nor sufficient for social order. Lyon’s (1984) *Ethics and the Rule of Law* discussed the Rule of Law only by implication and did not bother at all with Dicey. Hutchinson’s and Monahan’s *Rule of Law* (1987) was an eclectic collection of articles ranging from Lowi’s examination of the welfare state to Duncan’s critical phenomenology of judging (although it yielded explicatory staples by Shklar on Political Theory and the Rule of Law and by Weinrib on the Intelligibility of the Rule of Law).

2.2.2 African Lawyers' Perspective

Where the Rule of Law was analysed, it was usually only with reference to separation of powers and the independence of the judiciary, including in Africa where the recurrence of coups gave constitutional law professors a lot to ruminate on in those areas. From the late 1960s through the early 1980s, literature from Africa on the Rule of Law was situated in constitutionalism. Date-Bah (1971), Ewelukwa (1974), Obilade (1985) and Ghai, Luckham and Snyder (1987) analysed cases from Ghana, Nigeria, Rhodesia and Uganda touching on legality of regimes brought to power by coups. The analyses yield extra value between the lines.

A surprising regard for and instrumental use of law by authoritarian regimes in Africa may be found on perusal of the cases (and their aftermath). Instead of open disdain for law, many of those regimes strove to bring their actions within the bounds of legalism. Whatever the legal system, the inherent nature of law always confers a wide discretion in the interpretation and application of law. It is within this grey area that legal interpretation and outcomes are often determined. This is where many authoritarian African regimes have worked, within the letter of the law and not outside it, to produce the severe outcomes that they have. It is as Finnis (1980:270) has observed - that the impression that tyranny does not submit itself to law is often wrong; rather, tyranny exploits the wide discretion within law to pursue selfish ends.

From a Rule of Law perspective, the rampant coups of the 1960s and 1970s were not necessarily viewed as a bad thing in Africa, having been popularly received in many countries at the time. They were 'revolutions', meant to restore the Rule of Law rather than destroy it. It did not matter that the regimes installed by the coups were

undemocratic. A strong hand seemed to be needed to hold together fragile nations that tethered on the brink of chaos and disintegration.

The relevant literature of the time from Africa is not unduly critical; rather the focus is on the reality of successful takeovers by usurper regimes. Kelsen's (1934) *grundnorm* featured strongly as legal academics in Africa like Date-Bah (1971), Ocran (1978), Ahwoi (1981), Ofori (1982) and Obilade (1985) sought to rationalise obedience to military regimes. There was even argument that military government was a new and necessary form of government. No less a figure than Azikiwe, the Nigerian statesman and first president, emerged a strong proponent of diarchy, a military-civilian power share, as a legitimate governance structure (Doyle 1998, Onwumechili 1998).

Through the 1980s in Africa as elsewhere, analyses of the Rule of Law remained the preserve of legal scholars who concentrated on the concept for its own sake, as an inherent political good. There was very little effort to use the concept for broader social theorising or to link it to development (Ohnesorge 2007). Ghai's (1986) article on the 'Rule of Law, Legitimacy and Governance' was notable in going beyond constitutionalism to study the lack of connection between legitimacy of regimes in East Africa and good governance.

2.2.3 Conceptions of the Rule of Law

In the 1990s, the Rule of Law emerged from the inner recesses of law textbooks into the dialogue of international development. The tumultuous events of the late 1980s in

Eastern Europe had seen off Soviet-style communism as a global competitor to capitalism. In the triumphal air that followed the fall of the Berlin Wall the 'Rule of Law' was seized upon, initially as little more than a rhetorical tool, to rationalise the triumph of Western capitalism. Absence of the Rule of Law and a yearning for it in the European communist bloc was presented as the crucial reason for the collapse of the Iron Curtain (Carpenter 1990, Brown 1994, Suraska 1998). Use of the Rule of Law in that manner, for self-congratulation and deprecation of the Other, goes back to the modern roots of the concept. Dicey's (1885) formulation of the Rule of Law was written in exultation of the English constitutional system as compared with the French *Droit Administratif*. Despite its parochial motivations however and the criticism (from the likes of Jennings 1943, Wade 1945, Hayek 1960 and Ohnesorge 2007) that has trailed it since on that score, Dicey's formulation remains paradigmatic.

Dicey (1885) did not define the Rule of Law but saw it as comprising three 'kindred conceptions.' The first was that no person could be legally punished except for a distinct breach of law established in the ordinary manner before the ordinary courts of the realm. Secondly, no one was above the law; every person was subject to the law and to the courts. Thirdly, the principles of the Constitution were the results of judicial decisions determining the rights of private persons in cases brought before the courts. While the first two elements have endured as fundamentals of the Rule of Law, the third element was clearly a defence of England's unwritten constitution and has been warily received (Waldron 1989, Orts 2001).

If Dicey and particularly his first two conceptions were used as the template, it is not clear that much more than propaganda would account for the Rule of Law being

declared non-existent in communist Eastern Europe. The Rule of Law *au* Dicey merely required, after all, that all persons (without exception) be only subject to punishment under the law through trial by the courts. It is a moot point whether such a system did not exist in Eastern Europe and if there was deviation, whether this was really to a greater degree than any Western country. However, the Rule of Law that was adjudged to be lacking under Soviet rule was bigger than Dicey's kindred conceptions. In the popular usage by which it was applied to criticise Soviet communism, the Rule of Law conjured up something wider than the purport of constitutional lawyers. As is evident from Hayek (1944) and Butler (1990), it evoked a 'free society,' where the ability of expression in word and deed exceeded that available under the Soviets and known forms of authoritarianism.

The Diceyan version of the Rule of Law had been exposed as compatible with an authoritarian system, the antithesis of a free society, by the likes of Fuller (1964) and Raz (1977). The Rule of Law by this conception prescribes 'adverbial' conditions; it tells people not what to do but how to do whatever they choose to do (Oakeshott 1984, Macedo 1999). Writers who hold this view effectively confine the Rule of Law to narrow legalisms, similar to Dicey's, and are termed 'formalists.'

Having experienced how legalism can be used to perpetuate oppression, African writers have long eschewed a formalistic conception of the Rule of Law. Reflecting the roots and continuing complexion of their legal education, those writers from Commonwealth Africa invariably begin the Rule of Law with Dicey. That, however, is usually as good as it gets for the famed British jurist. Repeatedly, the formalism associated with a 'Diceyan school' (in which Montesquieu is included) is decried by

the likes of Ojwang and Kuria (1977), Rukwaro (1994) and Ocran (1994). Preference is expressed not for a legalistic formula but for a more philosophic one that proceeds in terms of legitimacy, ethics and value systems.

Those who seek more from the Rule of Law than formalism's due process and equality under the law are regarded as 'substantivists' (MacCormick 1989, Craig 1997). Substantivists want something closer to popular usage of the Rule of Law. Mere formalism, they say, would mean that the Rule of Law existed in every modern state (Tamanaha 2004). Formalists, on the other hand, argue that infusing ideological or substantive objectives would render the Rule of Law incapable of universal appeal (Raz 1977, Oakeshott 1984, Summers 1988 and 2000). Formalism is regarded as the 'thin' version of the Rule of Law while substantive versions are 'thick' and 'broad' (Hutchinson and Monahan 1987, Craig 1997, Urbina 2002, Jensen 2003, Ohnesorge 2007).

Substantive writers' compromise with formalists is that formalism is the minimum conception of the Rule of Law which, while not sufficient by itself, must lie at the heart of any substantive conception (Mathews 1986, Allan 1993, Urbina 2002, Kramer 2007). The tendency was exemplified by Hayek who clearly subscribed to a formal version of the Rule of Law but tacked a thick liberal morality onto it. Hayek (1944:80) offered a concise statement of the Rule of Law in formalist terms:

'Stripped of all its technicalities, this 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 on the basis of this knowledge.'

Hayek (1944) argued that that formalism was *sine qua non* for the market system. It was only under the predictability provided by formalism that the capitalism could succeed. Hayek deeply distrusted central planning and argued that the more of it there was, the closer totalitarianism came. He saw the centrally-planned Soviet communist regimes as lacking the Rule of Law. Writing at the dawn of the cold War, Hayek was not shy to imply that market-oriented genres of economic management in Western Europe and America were repositories of the Rule of Law by comparison. The German sociologist and legal philosopher, Marx Weber, had famously made such a claim of Western legal systems at the turn of the century.

2.2.4 Weber and Formally Rational Law

Weber did not use the words ‘Rule of Law’ but he described a system of formally rational law that shares the same characteristics as the formalists’ definition of the Rule of Law (Trubek 1972a, Kronman 1983). Weber (1954 and 1978) categorised world legal systems into three. In the first type, obedience depended on the charisma or personality of the ruler. In the second, authority was derived from tradition while the third, a characteristic of modern states, was a system of authority based on legal rationality. The three types existed in a hierarchical order of development – states progressed from charismatic authority to traditional authority and finally to rational authority.

Weber (1954 and 1978) divided rational authority into substantive rationality and formal rationality, the latter being the higher form. In systems founded on formal rationality, problems were solved by the application of calculable, technical criteria.

On the other hand, where substantive rationality was applied, decision making was subject to emotive considerations.

Weber (1954 and 1978) found a formally rational system of law as not only being needed for capitalism but also as uniquely existing in the capitalist modern states of Western Europe. Weber (1954 and 1978) concluded that all other legal systems were stages in the evolution towards a formal rational system of the sort possessed by Western Europe.

As with Dicey (1885) and Hayek (1944), it is not difficult to detect a certain triumphalism in Weber's (1954 and 1978) ruminations on Western legal systems. Furthermore, as appealing and authoritative as they have since been, Weber's insights were empirically limited. Weber himself admitted puzzlement at the 'English exception.' Industrialisation had first come to England which, in Weber's estimation, possessed little of a formally rational legal system. The English flaw in Weber's theory seems to have been magnified by today's East Asia, particularly China, whose rise to global economic power challenges the requirement for a formal, rational legal system of the Western variety.

2.2.5 The Washington Consensus

In the 1990s however, the sudden collapse of communism in Europe made it seem an unassailable conclusion that not only was successful economic development synonymous with capitalism but there could be no such development without Western-style legal systems and laws. A seductive line of reasoning that mixed

elements of Dicey, Weber and Hayek produced the conventional wisdom that if successful capitalism – economic development - did not exist, it meant there was an absence of the Diceyan Rule of Law which in turn was incapable of existence outside Western-style systems of administration of justice.

The conclusion was arrived at in stages, evident from the literature. The first stage was the laissez-faire period, shaped largely by the U.S. government, the World Bank and the IMF. Much of the literature is produced by the International Financial Institutions and their officials and consultants. Williamson (1993) coined the memorable phrase, the ‘Washington Consensus,’ to describe the tripod of deregulation, liberalisation and privatisation which the Bretton-Woods institutions, under the influence of a Republican U.S. government, routinely prescribed for countries in economic difficulty from the 1980s.

The Washington Consensus was moulded in U.S-backed economic reform programmes in Latin America (Stanislaw and Yergin 1998) and was premised on the belief that free markets were the cure-all across the developing world. Everything else would fall into place once a laissez-faire ethos was applied across the polity. The Washington Consensus brought a unitary global framework to mainstream development thinking and deployed an analysis of national development that was devoid of specific historicism. Hitherto, as Gore (2000) and Cypher and Dietz (2003) observed, only structuralists and dependency theorists (like Prebisch, Singer, Frank, Cardoso and Sunkel) had analysed development in global terms by arguing that underdevelopment was rooted in a global dichotomy by which a periphery was beholden to a successful core.

The Washington Consensus was based on neoliberal theory which argued that neo-classical ('orthodox') economic principles were as applicable to Africa, Asia and Latin America as they were to Europe or North America (Jenkins 1992). The human being was *homo economicus*, rational economic man, whose motivations were the same everywhere. The Washington Consensus dismissed fears expressed by political scientists like Callaghy (1984), Sandbrook (1986) and Fearon (1988) that the political character of state and society in Africa was unique so that rational actor there behaved differently from rational actor elsewhere. Those fears would not receive attention until a decade later when Chabal and Daloz (1999) resuscitated them in a chastened and more receptive intellectual climate.

By the early 1980s, most sub-Saharan economies were battling debt-induced crises. The one-size-fits-all prescriptions of the World Bank and IMF were transferred from Latin America to Africa. Following the World Bank's Berg Report of 1981, no less than two-thirds of the countries in Africa were soon implementing reform programmes. At this time, the Rule of Law did not figure in the relevant literature. Structural adjustment, cast in largely economic terms, (as in World Bank 1984, 1986 and 1989a, Zulu and Nsouli 1985, Gulhati 1988, O'Connell 1988, Mills 1989), was all the rage. As late as 1989, the World Bank published a landmark study, *Sub-Saharan Africa: From Crises to Sustainable Growth*, which mentioned the Rule of Law just once and even then, only in passing. Instead, the study emphasised that an 'enabling environment' for growth was needed in Africa. This enabling environment was of course the free-market one favoured by the Washington Consensus. It was with the

collapse of communism in Eastern Europe at the turn of the 1990s that the Rule of Law entered the lexicon of development (Rose 2003, Trubek 2004, Barron 2005).

2.3 PARADIGM TWO: RULE OF LAW AS INSTRUMENT FOR DEVELOPMENT

2.3.1 Rhetoric and the Laissez Faire Approach

Development discourse first started using the Rule of Law rhetorically (Santos 2006). It was a metaphor for some fundamental difference between communist systems and Western capitalist systems which had resulted in the latter triumphing (Berman 1992, Ohnesorge 2007). Rhetoric soon found practical expression in law-reform programmes designed to implement the Washington Consensus in post-communist states (Santos 2006). Initially, the reforms were targeted at getting the state out of the way. The assumption was that free markets were alchemy that would produce everything else, including the Rule of Law. The conception of Rule of Law was a limited one that focused on tensions between the state and the individual, with the individual needing protection from the state. Co-opting this conception to the neoliberal cause involved the addition of an instrumentalism that had Hayek written all over it. Rather than the neutral ideal of purists like Raz and Fuller, neoliberals turned the Rule of Law into an ideological device for limiting government and freeing up markets (Kennedy 2006, Ohnesorge 2007).

The Washington Consensus was premised on the belief that problems of development outside the West were the result of Leviathan-like state forms which not only stifled innovation and private enterprise but often resulted in authoritarianism. Getting the state out of the way would therefore unleash private capital and defeat

authoritarianism in one fell swoop. If this seemed evident in Eastern Europe, it appeared even more so in Africa. Whether civilian or military, communist or capitalist, or in-between, the state in Africa in the 1970s and 1980s was dominated by autocrats. Many were characters of parody such as Amin, Bokassa, Mobutu, Nguema and Tolbert (Coren 1974, Decalo 1985, Wrong 2001, Meredith 2006). Notions of ‘state bad, society good,’ became popular wisdom as typified by Callaghy’s (1984) *State-Society Struggle: Zaire in Comparative Perspective*. Incorporating this wisdom, the Washington Consensus did not countenance the need for mechanisms to protect individuals against each other in free markets, a flaw which would shortly be revealed in Eastern Europe.

When getting the state out of the way did not produce the magical transformations that had been promised, the literature started to reflect a loss of faith in the power of markets. None was more dramatic than the *mea culpa* of Stiglitz, a former chief economist at the World Bank. Whereas Williamson (1993:1330) had once labelled those who challenged the Washington Consensus as ‘cranks,’ Stiglitz (1998a and 1998b) argued for a post-Washington consensus and a new paradigm for development. As early as 1994, Stiglitz had been tentatively calling for the learning of lessons from experience with the free-market approach to development. By 2002, the kid-gloves were off and his *Globalisation and its Discontents* poured scorn on the belief that free markets alone could bring much more than disaster in developing countries:

‘More recent advances in economic theory – ironically occurring precisely during the period of the most relentless pursuit of the Washington Consensus policies – have shown that whenever information is [incomplete] and markets are [imperfect] ... especially in developing countries, then the invisible hand

works most imperfectly. Significantly, there are desirable government interventions which, in principle, can improve upon the efficiency of the markets' (Stiglitz 2002:73-74).

Stiglitz had been heavily influenced by developments in Eastern Europe, especially Russia, which seemed to suggest that rushing the state out of the way in developing countries opened the door to robber capitalism and greater social inequality. Corruption, in particular, was recognised as detrimental to markets (Shihata 1997, Rose-Ackerman 1997a and 1997b, Tanzi and Davoodi 1997, Mauro 1998) and something that markets alone might not cure. Indeed, the transition to markets led to more corruption rather than less (Scheppelle 1999, Stephan 1999, Gathii 2000b). To prevent market failure, something else was needed to temper corruption.

The Washington Consensus grudgingly moved from a laissez faire approach to admitting the necessity of the state, albeit of a market-friendly variety, in securing the Rule of Law (Plateau 1994a and 1994b, Sachs and Pistor 1997, World Bank 1997, Sachs 1998, Ngugi 2005). This was a Rule of Law that encompassed not only the conflict between state and individual but also that between individuals. The Rule of Law as so enlarged was needed to keep both market and state in check; otherwise, either would run rampant. Rather than the previous expectation that the invisible hand of the markets would sort out the Rule of Law, an active and directed attempt at building it had to be undertaken.

2.3.2 Neo-Institutionalism and the Proactive Approach

Within the World Bank, Shihata developed most of the initial theory grounding the new Rule-of-Law reform programmes. A lawyer and General Counsel of the Bank

from 1983 to 1998, Shihata (1991:85) drew up a legalistic, neo-Diceyan table of components for the Rule of Law:

‘(a) there is a set of rules which are known in advance (b) such rules are actually in force; (c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures; (d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body; and e) there are known procedures for amending the rules when they no longer serve their purpose.’

Shihata (1991:85) emphasised that the Rule of Law was ‘a system, based on abstract rules which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules.’ Shihata (1999) suggested that the Rule of Law did not necessarily inhere only in formal legal structures but this was little more than a footnote; nothing in his writing developed that suggestion. Rather, the general tendency at the Bank, as in other International Financial Institutions, was to look at the formal legal systems of the Western countries that were acknowledged to have the Rule of Law and hold them out as constituting the institutional framework for the Rule of Law. This thinking purported to draw credence from neo-institutional economic theory, championed by North (1987, 1989, 1990 and 1992), North and Weingast (1989), Olson (1996) and Keefer and Knack (1997), which argued that legal rules and institutions determined economic performance. The Rule-of-Law reformers interpreted ‘institutions’ as government bodies rather than cultural processes. The doyens of neo-institutional economics had clearly meant the latter.

North (1990:3-5) defined ‘institutions’ as the ‘rules of the game in society’; institutions were ‘the humanly devised constraints [both formal and informal] that shape human interaction.’ North differentiated between institutions in that sense and organisations such as legislatures, regulatory bodies, unions, etc. Writing on the law

merchant, Milgrom, North and Weingast (1990) extolled law-enforcement institutions of medieval Europe in the absence of state mechanisms. Revisiting his theses, North (1993 and 1994) emphasised that the most important question was of credible commitments and how institutions that facilitate them evolve. He stressed the importance of belief systems and path-dependent nature of institutional change. North (1993 and 1994) further argued the need to go beyond the simplistic institutional-rationality postulates of neoclassical economics in order to understand institutional evolution. As with Shihata's (1999) unexplored suggestion that the Rule of Law was possible in informal systems, there might have been benefit in deeper analysis of North's theses. The burgeoning corps of writers gave short shrift to such analysis.

Literature on the Rule of Law in the early 1990s was dominated by 'practical' people – development technocrats with little time for philosophical reflection. There were countries to be salvaged and perhaps more importantly from the technocrats' point of view, grant deadlines to beat. Rather than dwell on the jurisprudence, the literature was full of practical prescriptions on law reform. These prescriptions seemed to proceed from stock assumptions bereft of specific enquiry or prolonged study (Naim 1999, Krygier 2007). If a judicial system was ineffective, it was because judges were not well-trained or adequately empowered and funded. If crime was rampant, the police needed training and more money.

A template of projects for Rule-of Law reform soon resulted (Bankson 1996). The typical framework, as set out by USAID (2002), comprises judicial reform, reform of laws and legal procedure, increasing public awareness, access and advocacy, and

strengthening legal education. Perhaps reflecting a perception that there were additional problems of modernity in Africa, USAID's template for Africa also included developing 'modern' legal frameworks, development of human resources and organisational and physical infrastructure.

2.3.3 Missing Questions

The lack of deep philosophical reflection in designing these templates meant that reformers missed a trick – they did not find out what made officials, however well-trained, care to abide by training. This was an esoteric enquiry, unworthy of wasting time on. Prescriptions for building the Rule of Law which had been developed with regard to Eastern Europe, where there was a lack of knowledge of Western nuances to the administration of justice, were transformed into a global template. Unlike Eastern Europe however, the judicial and administrative corps of most African countries were already trained in the Western tradition. They had inherited their modern legal frameworks from Western Europe. The question of what had made the judicial and bureaucratic legacies of colonialism disappear was not sufficiently enquired into in Africa. At independence, countries like Nigeria and Ghana had small but well-trained indigenous judiciaries and civil servants (Adu 1965, Gower 1967) that could have provided the requisite base if that was really all the Rule of Law depended on. Conventional wisdom was that the traditions had not been ingrained enough (Gyekye 1997) but this still left untouched an enquiry into the counter-cultures that eroded the traditions and of how to combat entrenched deviation from those traditions.

As the likes of Tamanaha (2004), Krygier (2007) and Zimmerman (2007) would later identify, the fundamental question was not asked of how to produce social commitment to particular sets of rules or ways of doing things. It was alright to talk about the necessity of due process but how to secure commitment to due process was not investigated. If there was an entrenched culture of deviation from due process, then how could it be corrected? This was either not regarded as problematic by reformers or assumed away under the basic rationality of human beings. North (1994) meanwhile had touched on it in pondering how change was produced. As had Weber before him, North (1994) emphasised the importance of European culture (which he argued was an integrated framework despite the fragmented polities) in developing a certain type of rules and institutions and producing commitment to them. The natural question which should have arisen from this was whether these rules and institutions were culturally neutral and if not, whether there were institutional alternatives to Western-style legal systems that could produce a parity of development.

There were also questions about the wisdom of focusing efforts on legal systems. Was the Rule of Law mainly about the form and content of legal rules? Definitions and practice at this point converged on an affirmative answer. Yet, the 1957 Chicago Colloquium on the Rule of Law had warned that the Rule of Law could not be reduced to due process and courts:

‘A consideration of the importance to the rule of law of institutions outside what had been termed lawyers’ law and of the range and variety of these institutions, leads to consideration of the forces, derives or desires which cause these institutions to come into being, of the purposes which these institutions are created to satisfied, and of the values or ideas embodied in them. The Rule of Law as achieved in the West appears here as a result or the product of such forces’ (International Association of Legal Science (1957: 7).

Voices of caution in that vein were few and far between in the early 1990s. Macdonald's (1990) criticism of access-to-justice programs as too preoccupied with legal institutions and procedural justice was one of the few. Even after the IMF and the World Bank had recognised that Africa represented a more complex and difficult development challenge than anywhere else, the solution advanced was to continue with the same reforms but to make them faster (Feinberg 1991). From the mid-1990s however, as the results of law reform continued to disappoint, the volume of criticism rose.

Moore (1994) reflected that there was insufficient evidence on whether it was an impersonal market or personal ties that were needed for capitalism to succeed. Montenegro (1995) pointed out that no rich country had the long constitution that reformers prescribed. He suggested that cultural traits rather than the form and content of rules determined receptivity to matters such as the Rule of Law. Hay *et al* (1996) warned that rules prescribed by law reformers should be consistent with existing business practice to have a chance of succeeding. Posner (1998) argued that as many nations could not afford the costly judicial reforms prescribed, legal reform should be made more modest and the rules which were prescribed simple to implement. Messick (1999) called for efforts to be directed at building on or enhancing the informal legal systems.

Holmes (1999) captured the mood at the end of the decade by saying that the law was not a kitchen appliance which could be unplugged in the United States and simply plugged in again elsewhere. There were thornier issues involved in the Rule of Law than prescribing rules and educating officials on due process. The national will to

reform was identified as important and something that could only be actuated from within (Blair and Hansen 1994, Ishrat 1994, Carothers 1998 and 2003, Golub 2003). Carothers (1998) pointed out that reform would only succeed if it got at the fundamental problem of people who refused to be ruled by law. He argued that respect for the rule of law could not take root in systems rife with corruption and cynicism.

2.3.4 Critical Reflection and the Rule of Law Orthodoxy

The increase in critical reflection led to an exponential increase in writing on the Rule of Law. Ohnesorge (2007) estimated that scholarly publications on the Rule of Law in development increased at an average rate of 25% per year between 1998 and 2006. The literature was no longer confined to articles and occasional papers; books focusing on the Rule of Law became more common. Tamanaha (2004 and 2006) attempted two comprehensive books in two years, the first general and abstract and the second from an American perspective.

The recognition of all sorts of complication bedevilling what had been thought to be a straightforward process led not only to critical reflection on the promise of reform but also to deeper conceptual analysis of the Rule of Law itself. The traditional division between formal and substantive conceptions was expanded into three by Stephenson (1996) to include functional conceptions. A decade later, Santos (2006) could distil as many as four conceptions, to wit institutional, substantive, instrumental and intrinsic conceptions. The importance of distinction between the Rule of Law itself and the Rule of Law Orthodoxy – ‘a set of ideas, activities and strategies geared

towards bringing about the rule of law' (Golub 2003:7) - was highlighted. Literature from Dicey through Shihata had merely described what the Rule of Law was without explaining how countries went from not having it to having it. This seems elementary enough but confusion between what is and why it is had consolidated an Orthodoxy that focused on formal legal institutions (Maravall and Przeworski 2003, Krygier 2005 and 2007).

Deriving from the Western law-faculty origins of the term, definition was circumscribed by reference to rules of law and legal institutions even as the concept was being adopted outside legal circles. The legalistic bent of definition shaped the design and focus of the practice. The Orthodoxy remained a blend of strategies focusing on matters of state law and legal institutions, particularly judiciaries, despite the Rule of Law being touted to guarantee rewards that extended far beyond the administration of justice (Golub 2003, Tamanaha 2004).

From the late 1990s, definition of the Rule of Law was revisited with a view to pointing out the gap between the narrow, legalistic preoccupation of intellectuals and the popular usage. Tamanaha (2004) and Rose (2004) argued that facing up to the popular usage was necessary to bridge the gulf between popular expectations and the practice of Rule of Law. While there continued to be agreement that precise or comprehensive definition was impossible, as is evident in Weinrib (1987), Toope (1997), Clark (1999), Endicott (1999), Grote (1999) and Ohnesorge (2007), it came to be acknowledged that the Rule of Law in popular usage far transcended the scope of existing academic definitions that concentrated on laws and due process. Yet again,

this was a realisation that had been presaged by 1950s scholars, with Jolowicz declaring at the 1957 Chicago Colloquium:

‘The Rule of Law must not be reduced to the area of conflict between the individual and the State, nor yet to the scope of judicial intervention. To the man in the street, the Rule of Law represents a complex notion which are [*sic*] independent of the written law and even of actual decisions, but which constitute the juristic reserve to secure the protection of the individual against both the State and against other individuals. One may, therefore, think of the Rule of Law as something separate and distinct from the actual rules of law’ (International Association of Legal Science 1957:22).

Another assumption which came up for scrutiny was whether formal, Western-style legal systems and rule regimes guaranteed economic development everywhere. From Weber through Hayek to Shihata, the synopsis was that the Western legal genus provided the predictability necessary for enforcement of contract and property rights, and therefore for capitalism. Weber (1954 and 1978) had argued that formal, rational law was a precondition for capitalism, notwithstanding the English exception. Once capitalism took root, both capitalism and this legal system became self-reinforcing: the more there was of capitalism, the more there was the Rule of Law (Jayasuriya 1996).

Yet, writers like Trubek (1972a) and Neumann (1986) would point out that while Weber’s observations might have been an accurate description of the reality of his time, it was a reality of only one form of capitalism – a model of liberal, competitive capitalism. Allied to this subtle critique of neo-Weberian beliefs was the more fundamental question (investigated by Messick 1999, Chong and Calderon 2000, Upham 2002, Carothers 2003) of whether law influenced economic development at all. An earlier drive for law-reform in developing countries had unravelled precisely on that point.

2.4 PARADIGM THREE: RULE OF LAW AS DEVELOPMENT

2.4.1 Resurrecting the Law and Development Movement

The original Law and Development movement was a significant adjunct of the ‘modernisation’ development theory that prevailed in the 1950s and 1960s. In its basic form, modernisation theory held that development – ‘modernisation’ - everywhere followed an inevitable and unilinear path of evolution that would eventually result in economic, political and social institutions like those in the West (Lewis 1955, Rostow 1960). In the 1960s, American donor agencies such as the Ford Foundation and USAID underwrote an ambitious scheme of law reform and legal education in developing countries in Africa and elsewhere (Trubek and Galanter 1974, Burg 1975, Merryman 1977, Kennedy 2003, Newton 2006). The intellectual impetus was provided by scholars from leading American law schools who produced a body of rich literature canvassing the importance of modern law in development.

Law and Development was always an eclectic movement but its adherents implicitly subscribed to modernisation theory and believed that the inescapable path of developing countries was towards modern (Western) legal ideals and institutions. Galanter (1966:156) argued in ‘Modernisation of Law’ that ‘developments [in the developing world] should be seen as phases in a world-wide transformation to legal systems of this “modern” type.’ The progress of developing countries could therefore be quickened by law reform and legal-education projects to make law and the legal community play the same ‘social engineering’ role they were alleged to play in the West. The majority of literature constituting the school was produced in the period between 1965 and 1975, as shown in reviews by Burg (1975) and Merryman (1977)).

After one prolific decade, the movement collapsed under the weight of criticism by its leading lights. Trubek (1972b) deplored the ethnocentricity and evolutionism of the core conception of the movement, on the first count in its interpreting all societies according to Western history and on the second in its seeing history as a sequence of identical stages passed through by all societies. Trubek's and Galanter's (1974) iconic 'Scholars in Self-Estrangement' then sounded the death knell, citing Law and Development scholars' loss of faith in many of the assumptions forming the core conception (which they called 'legal liberalism'). This loss of faith, they argued, resulted from empirical knowledge emerging from the developing world which contradicted legal liberalism, a loss of faith in legal liberalism as a picture of the United States and doubts about the universality or desirability of the American experience.

Echoing Trubek's and Galanter's (1974) view, Merryman (1977) argued that Law and Development scholarship was concerned with action rather than enquiry but that such action was ungrounded as foreign scholars lacked a feel for local cultures in developing countries. The focus instead ought to have been on enquiry through a quantitative methodology and the gradual building of theory based on specific research. Critics of Trubek and Galanter (1974) did argue that the views stemmed from home-grown disillusionment rather than rejection of law reform by developing countries (Burg 1975, Seidman 1978b, Tamanaha 1995). This devil's advocacy mattered little because by the end of the 1970s, with funding having dried up and the scholars moving on to other things, the Law and Development movement in the U.S. was all but dead (Tenga 1986, Tamanaha 1995, Carothers 2003, Trubek 2004).

A major criticism of the Law and Development movement was its assumption that developing societies viewed and used the formal legal system and legalism in the same way as the West, particularly Anglo-American society. Literature in the late 1990s tried to decipher whether the law-reform efforts of the 1980s and 1990s were oblivious to that criticism. Despite Faundez's (1996) considerable efforts to show differences between the later efforts and those attempted in the 1960s, on the basis of the differing roles of the state, the definitive principle – attempted replication of Western-type legal structures and legal thought - was identical. Finding that questions which had stumped the Law and Development movement, such as on the role of law and the formal legal system in development, still remained, Faundez expressed concern that the same mistakes could be repeated. McAuslan (1996) and Thome (1996) were in no doubt that they had already been, as was Rose (1998) who found that the criticisms of law and development held true of Rule of Law Orthodoxy.

Jayasuriya (1999a and 1999b) argued that the rational-choice, institutional theories of the Rule-of-Law movement were as flawed as the modernisation theories of the law-and-development movement. The lack of empirical data to support the practice of Rule of Law was continuously cited, with McAuslan (1996) going further to criticise the lack of reflection on such empirical data as did exist. McAuslan (1996) argued that like the law-and-development movement before it, the Rule-of-Law movement rested on three assumptions that were discredited by empiricism - that there could be no development without the modern legal framework, that this model provided clear and predictable rules and that the model could be easily transferred.

On whether legal transplants worked at all, Kahn-Freund (1974) had famously prevaricated, saying it depended on the social context. Looking at Africa, Seidman (1970 and 1978a) concluded that transplants did not work and propounded the 'Law of Non-transferability of Law,' a view approved of by Kulcsar (1989). Watson (1993) argued that transplanting of legal rules was quite easy and common but that the transplanted law was always likely to be changed in its new environment, a point supported in principle by Kamarul and Tomasic (1999) and Jayasuriya (1999b). Mattei (1994) observed that comparative law lacked satisfactory theory on when and why legal transplants would succeed. Mattei (1995) also noted that the Western conception of the Rule of Law involved a separation of religion and politics but that this was not necessarily a good thing in Africa. Even Dam (2006), who advised developing countries not to attempt to re-invent the wheel, admitted that transplanting did not always work because of differences in social context.

2.4.2 Repudiating Link between Law Reform and Economic Growth

The deeper reflection from the mid-1990s on both the assumptions grounding the Rule of Law Orthodoxy and the outcomes of implementation would eventually result in the discrediting of the notion that the Rule of Law (or the reforms to achieve it) would guarantee economic development. It was of course questionable whether the reforms were given enough time to work or, as Harris (2007) has noted, implemented to the letter. In an increasingly sceptical intellectual environment, more weight was given to the argument that if reforms had not been properly implemented, it was because they were incapable of better implementation in the real world. Worse still, if they had actually been implemented, then they had failed to bring about the expected economic growth. Dissident voices requiring the reforms to be given more time to

work were drowned out. The economic rise of East Asia, particularly China, was seized upon as empirical negation of a causal link between the Rule of Law and economic development (Jarasuriya 1996 and 1999a, Ohnesorge 2003, Carothers 2003).

A variety of studies (Barro 1997, Sala-i-Martin 1997, Kaufmann *et al* 1999, Boettke and Subrick 2002), using methods such as regression analyses, still showed a positive correlation between the Rule of Law and economic development. However, it could not be established that the correlation was of the Rule of Law as causative of economic development (Chong and Calderon 2000, Carothers 2003). Instead, Messick's (1999) review of studies attempting to find causal relationships between law reform and development surmised that 'the relationship is probably better modelled as a series of on-and-off connections, or of couplings and decouplings.' Causation could go therefore in either direction and sometimes was totally absent.

Upham (2002) went on to demonstrate that the alleged relationship between an idealized, apolitical, rule-based system of law and the economic development of the United States and Japan was not as clear-cut as many supposed. Carothers (2003:7) would submit on that basis that the assumptions, 'which have become common among aid agencies,' to the effect that the Rule of Law was 'gross modo necessary for [economic] development are at best badly oversimplified and probably misleading in many ways.'

One reason for the collapse of the Law and Development movement had of course been the doubts cast on the link between law and economic development, with Trubek

(1972b) and Trubek and Galanter (1974) pointing out the possible irrelevance to economic development of law, legal reform and improvements in the legal system. When confronted with the same problem, the Rule of Law Orthodoxy proved hardier. For one thing (as Kennedy 2006 observes), the vested interests, financial and intellectual, in the Rule of Law Orthodoxy were much larger and more geographically diverse than had ever been in the Law and Development movement. Furthermore, the Rule of Law Orthodoxy survived falsification of the development-causation premise by a canny reinvention.

2.4.3 Rule of Law as End in Itself

Going into the new millennium, development began to be defined as much more than economic growth by the likes of Sen (1999 and 2000) and Nussbaum (2000). At best, economic growth was only one kind of development. Things like happiness, freedom and quality of life which were ‘not well correlated with wealth and income’ (Nussbaum 2000:61) also counted as development. The Rule of Law was one of those things; it was an intrinsic rather than an instrumental good (Kennedy 2006, Santos 2006). Sen (2000) purveyed the new thinking when he declared that the Rule of Law had to be seen as a development objective on its own and not merely as a means to other ends, such as economic development. According to Sen (2000:10), even if legal and judicial reform were not to contribute ‘an iota to economic development,’ it would still be a critical part of the overall development process.

Once the Rule of Law was recast as an end in itself, it could remain paramount in development dialogue without having to prove its instrumentality to economic growth

or anything else. This enabled the Rule of Law Orthodoxy to re-focus on the administration of formal justice without worrying whether there was economic growth resulting from it. Golub (2003) describes the Orthodoxy as having a focus on state institutions, particularly judiciaries. This focus is largely determined by the legal profession and the donor community with the result that there is a tendency to ‘define the legal system’s problems and cures narrowly, in terms of courts, prosecutors, contracts, law reform, and other institutions and processes in which lawyers play central roles’ (Golub 2003: 9). Civil-society engagement was usually only as means towards the goal development of the state institutions. Furthermore, there is a distinct reliance on expertise, initiative and models emanating from industrialised societies (Golub 2003, Jensen 2003, Carothers 2003 and 1999).

2.5 INSUFFICIENCY OF EXISTING RESEARCH

2.5.1 The Unseen Problem of Modern Law

This dissertation meets the Rule of Law Orthodoxy in the state described by Golub (2003). The Orthodoxy still imbibes the essentialism of modern law and its institutions in establishing Rule of Law. But what if the problem in some areas of the world is the modern legal system or formally rational law itself? What if the modern legal system is not culturally compatible with the Rule of Law in certain areas? Weber after all had been at great pains to point out cultural reasons – the Calvinist ethic - at the heart of Europe having developed formally rational law (Weber 1954, Weber 1978, Trubek 1972a, Weber, Baehr and Wells 2002). What if this system of law is actually impotent or at least, a ‘hard sell’ in other cultures such as black Africa (and in many other areas of the world where the Rule of Law remains problematic) so that something else should be sought? Even with the various paradigm shifts on the

Rule of Law, these are queries that have not been sufficiently confronted or developed in the existing literature. It is only by reading between the lines in the existing literature that the possibility starts to arise.

Tamanaha (2004:140) for instance proposes that *the* essential ingredient to establishing the Rule of Law, however it is understood, is ‘pervasive social attitudes about fidelity to law’ and it is this ‘mysterious quality that makes the rule of law work.’ Tamanaha (2004) then acknowledges the futility of searching for a formula that can be replicated in every situation since each socio-political context is different. Krygier (2007) and Zimmerman (2007) recognise that exploration into systemic fidelity to the legal form requires a political sociology of the Rule of Law but that such an approach seems to be irksome to lawyers as it would involve a less juridical and more sociological approach to their investigation of the Rule of Law. Criticisms of the Law and Development Movement, such as Trubek’s and Galanter’s (1974), highlight the fact that legal training, by nature, does not equip lawyers for such an interdisciplinary endeavour.

2.5.2 African Adherence to Something Else

Criticisms of Law and Development and of the Rule of Law Orthodoxy also highlight the difficulty of transfer of Western legal thought and Western society’s relationship with law. Trubek (1972b) in particular had rejected the notion that modern law was necessary for development and argued that it only supported a centralised bureaucratic state which depends for its legitimacy on the belief that its decisions are rational. He also noted the paradox that while evolutionist thinking assumes the rest

of the world will repeat the Western experience, it presupposes that legal development is not guaranteed so that active efforts had to be made to ensure that modern law was adopted. Yet, if an evolution towards modern law is not certain so that active channelling were needed to make other regions ape the West, then modern law was not inevitable but merely something possible under certain historical conditions.

Woodman (1989) argued that contrary to conventional wisdom, there was a strong adherence to the Rule of Law in Africa; it was only that this adherence was to the rule of a law different from modern, state-based law. If Woodman (1989) is to be believed, then perhaps the case can be made that Africa's yearning is for a form of law different from modern law? After all, Trubek (1972b:2) had said in no uncertain terms:

‘[T]he core conception of modern law ... has misdirected the study of law and development by asserting that one type of law – that found in the West is essential for economic, political, and social development in the Third World. This conclusion ... stems from the core conception's ethnocentric and evolutionist generalization from Western history.’

A lot of imagination and even more courage will however be required, in research and practice, to break free of an Orthodoxy whose understanding of law is dictated by the legal form found in the most economically and technologically advanced countries of the world, in the West. Leeway may be sought from certain critical perspectives, mostly lying outside legal discourse, to which we now turn.

2.6 CHALLENGING THE HEGEMONY OF MODERN LAW

2.6.1 Critical Legal Perspectives

A possible basis for challenging the centrality of modern law in the Rule of Law Orthodoxy is provided already by Critical Legal Studies (‘CLS’). The official birth of

CLS came shortly after the publication of Trubek and Galanter's (1974) 'Scholars in Self-Estrangement.' Trubek would go on to become an influential member of the school.

CLS had its intellectual roots in Legal Realism, a school of legal thought which held sway in the first half of the 20th century, reaching its peak between the 1920s and 1940s in America and several Scandinavian countries. Its central tenet was that since law was made by human beings, it was subject to human foible (Radin 1925). Legal realists claimed that law was really indeterminate and judges often had to apply extra-legal considerations to resolve cases (Pound 1931, Llewellyn 1931). There was therefore a difference between law on the books and law in action (Pound 1910). Law in action was nothing but whatever judges said it was (Holmes 1897, Llewellyn 1930, Cohen 1935). Holmes (1920:173) would memorably declare: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.'

Having ventured into sociology and anthropology in aid of their themes, many legal realists canvassed an interdisciplinary approach. 1941's *The Cheyenne Way* was a product of this trend, Llewellyn the jurist working with Hoebel the anthropologist on a study of Native-American tribal law. Legal Realism was on the wane by the end of World War II as its main proponents retired. In the 1970s, the themes were resurrected in more radical fashion by the CLS movement (Binder 1999, Duxbury 1999, Leiter 1999).

CLS officially began at a Conference held in 1977 at the University of Wisconsin-Madison (Schlegel 1984, Bauman 1996, Tamanaha 1995). Like all such movements, it was eclectic but drew together theorists who challenged and sought to overturn accepted wisdoms about how modern law worked (Levinson 1983, Unger 1983, Gordon 1984, Fitzpatrick and Hunt 1987, Boyle 1992). Critical legal theorists argued that law's supposed rationality and objectivity were really the products of power relations (Douzinas *et al* 1994, Davies 2008). Law was an instrument which the rich and powerful used to maintain their positions of advantage. It was neither neutral nor value-free but a series of political and social judgements, leading to the rallying cry of critical legal scholars that 'law is politics' (Kelman 1987, Alschuler 2002). The scholars resuscitated arguments about the indeterminacy of law (Singer 1984, Boyle 1985, Peller 1985, Davies 2008), which led to fierce debates with opponents of indeterminacy in the 1980s heyday of CLS.

At its strongest, the indeterminacy thesis of CLS held that a judge could 'square' any variety of results in a case using legitimate arguments (Kairys 1984, Solum 1987, Davies 2008). Legal doctrine was said to be indeterminate because for every rule in any given body of doctrine, it could be demonstrated that there was an opposing counter-rule which could be used in legal reasoning (Kennedy 1976, Hutchinson and Monahan 1984). Indeterminacy was attacked by liberal and conservative defenders of the Rule of Law who believed that indeterminacy imperilled not just the concept of the Rule of Law but also put the intellectual foundations of modern Western society at risk. By the end of the 1980s, CLS was on the wane for want of anything new to say (Fischl 1993, Schlegel 2006, Davies 2008). Many of the tenets had been quietly assimilated into orthodox jurisprudence and defused (Davies 2008). Indeterminacy

was accepted as a given but was countered with the predictability of legal outcomes despite indeterminacy; CLS' riposte that the predictability came from indoctrination was little more than a parting shot (Gordon 1989, Tamanaha 2004).

By attacking the foundations of modern Western legal thought however and showing the false necessity of legal doctrine, CLS opened a door for questioning the inviolability of the modern legal form. As Tebbit (2005) and Davies (2008) observe, CLS rode a larger wave of critical thought. From the 1960s, post-structuralism and postmodernism made significant in-roads into Western scholarship, subjecting to intense scrutiny the basis for what qualified as knowledge. The intellectual currents emanated from social and cultural discontent in the 1960s and 1970s, as the post-World-War generation came of age in the Western World, consciously questioning the truths that had seemed certain until the cataclysms of war. Vietnam, the Cold War, the civil rights movement, flower power, the French workers' and students' riots, etc all contributed to the currents that shaped an age of intellectual revolt (Davies 2008).

2.6.2 Anti-foundationalism, Representation and the Other

Writings of the likes of Deleuze, Guattari, Foucault and Derrida created a new vista of critical reflection that questioned the basis of knowledge, the centring of certain things to the detriment of others and the dichotomies of the Western way of knowing. The effects were particularly felt in anthropology. Anthropology had contrived a picture of law which set off African indigenous law as inferior to the Western legal form. Anthropologists from pre-colonial times portrayed African traditional legal systems as pre-modern and destined to eventually fade away as the social systems

evolved towards Western modernity. The critical movement in the 1960s and 1970s meant that questions started to be asked why social systems outside the West were being analysed from a Western perspective and why they were regarded as inferior.

To be fair, anthropology had also affected a certain degree of empathy towards non-Western systems. The legal anthropologists Gluckman (1955, 1965, and 1969) and Bohannan (1957 and 1969) had debated long and hard in the 1950s and 1960s on how indigenous African jurisprudence could be represented in its own right. Going farther back, the founding fathers of anthropology, including Boas (1896 and 1943) and Malinowski (1922), had insisted that the essence of anthropology, and particularly the ethnographic fieldwork on which it was based, should be to understand life from the eyes of the subjects of study. Whether this could actually be carried out by foreigners remains a moot point to date (Evans-Pritchard 1965, Owusu 1978, Mafeje 1998, Ntarangwi *et al* 2006) but it was clear that even with the best of intentions, those great pioneers of anthropology could not help but believe that Western systems of thought and knowledge were superior to non-Western systems, particularly those in Africa.

Evans-Pritchard (1937) after making a then-novel case for regarding Azande beliefs in witchcraft as no less rational than European scientific thinking, still asserted that witchcraft as believed in by the Azande simply could not exist. Similarly, Bohannan (1969) and Gluckman (1969) cannot escape intermittent condescension towards indigenous African legal systems that belies their best efforts to represent those systems in their own rights as comparable to Western jurisprudence. With the rise of the postmodernist and post-structural critique in the 1960s, protest at such condescension would be taken from the margins to the foreground of not just

anthropology but also the rest of the social sciences and even, sometimes, to the pure sciences.

In 1973, Asad attacked anthropology as being the handmaid of colonialism, arguing that its jaundiced representations of traditional society in Africa provided the moral justification for colonialism – to bring salvation to the pre-literate savage. Asad's (1973) views, and those of like minds including Leclerc (1972) and Faris (1973), would be tempered by others like James (1973), Moore (1994) and Apter (1999) who showed that the relationship between colonial administrator and anthropologist was often ambiguous and sometimes downright hostile. Asad (1991) himself would later modify his views on the nature of engagement between anthropology and colonialism but the point had been made that there was basis to suspect anthropology's 'truths' of traditional society in Africa and elsewhere. Owusu (1978) fomented an African critique of ethnography which lamented the mistranslation, by Western ethnographers, of African cultural realities into the 'so-called valid, cross-cultural, universally applicable institutional types' (p.317).

2.6.3 Orientalism and Postcolonialism

The highpoint of protest on Western representations of non-Western systems was reached in 1978 when Said published *Orientalism: Western Conceptions of the Orient*. Said (1978) drew on Foucault as well as on earlier critics of Western representations of the Orient, including Asad. He argued that the Western representations of the Orient were tainted with prejudices that even the most objective Western scholars could not recognise in themselves. With the power provided in part

by centuries of political conquest and economic dominance, Western scholars had appropriated representation of the Orient and constructed an imaginary Oriental that was an exotic and inscrutable deviant from a genteel, civilised European norm. Said (1978) submitted that Western literature contrived to depict the Orient as an irrational, weak and inferior 'Other' in comparison to a rational, strong and superior West. This, he said, arose from a deep-seated desire to create some essential difference between West and East which not only pandered to Western superiority complexes but also justified Western hegemony over the Orient.

Orientalism understandably ignited controversy, drawing fierce criticism from Oriental scholars (such as Lewis 1982, Robinson 1987 and Watt 1991) who challenged its sweeping generalisations on their scholarship. Brombert (1979), Irwin (2006) and Warraq (2007) accused Said of doing exactly what he purported to deprecate, by creating a monolithic Occidentalism that he accused of Orientalism. Yet, as Kramer (2001) observes, Said's book was iconic and highlighted the concept of Othering in terms that were far more decipherable than the difficult prose of the likes of Foucault and Derrida.

Within Western scholarship, *Orientalism* contributed to a crisis of representation in the social sciences which stretched through the 1980s. Western ethnographers of non-Western social systems who sought credibility for their representations thereafter tried to distance themselves from the aloofness of past representations. Hutchinson (1996), Piot (1999), and Ferme (2001) who conducted ethnographies in West and Central Africa, made a point of highlighting their self-reflexivity and social participation in

distinction from the likes of Fortes, Griaule, Goody and Evans-Pritchard who had studied those societies earlier in the century.

Said's (1978) themes were picked up by other scholars, particularly in Africa and Asia, and gave rise to the demarcation of a body of scholarship as 'postcolonialism'. Postcolonialism is an eclectic school whose defining works reach back in time to include the likes of Césaire's (1950) *Discourse on Colonialism*, Fanon's (1952) *Black Skins, White Masks* and (1961) *Wretched of the Earth*, Memmi's (1957) *The Colonizer and the Colonized* and Nkrumah's (1970) *Consciencism*. The retrospective reach takes in the Africa-specific theme of negritude, developed by Diop (1954, 1960a and 1960b) and Senghor (1964 and 1965), of which afrocentrism (championed by Asante 1987 and 1988) is the intellectual successor.

Negritude and afrocentrism celebrate the uniqueness of African personality, culture and psychology with the aim of negating notions of African inferiority (Mudimbe 1988). Both themes have been criticised by, among others, Towa (1971), Rombaut (1976), Soyinka (1976) and Said (1993) for being racialist and consolidating the very discourses that they seek to rebut but many of their averments of difference have been quietly assimilated into contemporary postcolonial theory. Shutte (1993), Smith (1999), Nyamnjoh (2001) and Idowu and Oke (2008) all write of fundamental difference between the Cartesian *cogito* and the African self in terms which could have been taken straight out of negritude or afrocentrism.

2.6.4 Postcolonial Theory and the Law

The cornucopia of postcolonial theory defies definition in the singular but as Moore-Gilbert (1997), Young (2001), Abrahamsen (2003), Loomba (2005) and Davies (2008) show, the matters it covers include the creation of knowledge in the context of relations between the powerful ('coloniser') and the powerless ('colonised') and how this knowledge, legitimated through repetition, is deployed in the interest of imperialism. Achebe (1977:785) is in postcolonial mode when he detects the desire in the West 'to set up Africa as a foil to Europe, as a place of negations at once remote and vaguely familiar, in comparison with which Europe's own state of spiritual grace will be manifest.' Similarly, Mveng (1983:141) is espousing postcolonial theory when he argues that even though the West 'agrees with us today that the way to Truth passes by numerous paths, other than Aristotelian-Thomistic logic or Hegelian dialectic,' social and human sciences still need to be decolonised.

Postcolonialism's subaltern studies – the history from below – aim to disrupt grand narratives of Western scholarship by challenging histories that 'centre the West and deny agency to the so-called "peoples without a history"' (Piot 1999:6). Subaltern scholars like Bhabha (1985), Spivak (1988 and 1989), Sivaramakrishnan (1994), and Chakrabarty (2000) object to depiction of the colonised as passive recipients of power and strive to demonstrate that anti-colonial resistance accompanies every deployment of power. While postcolonial theory has borrowed heavily from poststructuralism and postmodernism, as epitomised by Mudimbe's (1988) copious referencing of Foucault, some postcolonial writers seek to repudiate even those intellectual currents as

‘nothing but another stage in the West’s crisis of consciousness’ (Quayson 2000:87). Ekpo (1995:122) says that nothing stops the African from ‘viewing the celebrated postmodern condition sarcastically as nothing but the hypocritical self-flattering cry of the bored and spoilt children of hypercapitalism.’

Postcolonialism’s currents have been limited in law. Kumar (2003) remarks the paucity of postcolonial legal theory while Fitzpatrick and Darian-Smith (1999) describe the lack of engagement between postcolonialism and law as ‘astonishing.’ It is perhaps only in international law that postcolonial writing has established a niche in legal theory. Mutua (1995a and 2000a), Sinha (1996), Grovogui (1996), Gathii (1998 and 2000a), Chimni (2002 and 2006) and Ngugi (2002) all critique the ‘Eurocentricity’ of international law in a fashion that has come to be known as Third World Approaches to International Law (‘TWAIL’). TWAIL is an eclectic school, a ‘chorus of voices rather than a simple monolithic collegium’ (Okafor 2005:176). It is unified by a view of international law as an instrument of subjugation of the ‘Third World’ (Mutua 2000b, Okafor 2005, Chimni 2006).

Anghie (1999 and 2007) provides the archetypal TWAIL critique. Channelling Said (1978), Anghie (1999 and 2007) argues that international law was historically premised on the Othering of non-Western systems of law which were cast as ‘backward,’ in contrast to ‘advanced’ Western systems, and therefore unworthy of sovereignty. This ‘dynamic of difference’ (Anghie 2007:5) justified a colonial mission to ‘civilise’ (Westernise) the ‘Other.’ Anghie (2007) argues that the Othering continues today with the distinction between ‘developed’ and ‘undeveloped’ countries. The decolonised world is deemed ‘undeveloped’ because of social

structures that continue to defy Western values and norms of behaviour. The international system therefore requires those countries to adopt (primarily Western notions) of good governance and law reform if they are to become proper international citizens.

TWAIL notwithstanding, nothing can be found in legal theory faintly approaching the potency by which Ngugi Wa Thongio's (1986) *Decolonising the Mind: The Politics of Language in African Literature* seeks to repudiate the colonial narrative and emancipate an indigenous, Africa alternative. 'The dry reality of post-colonial writing [on law in Africa]' leaves Menski (2006:489) with 'a feeling of severe disappointment.' An East African School led from Dar es Salaam by Shivji *et al* showed promise in the 1980s but largely mired in Marxism, they failed to develop any of the interesting possibilities that they hinted at about an African legal theory that would challenge the hegemony of modern law. A succeeding East African School, peopled by the likes of Gathii (1999 and 2000b) and Ngugi (2005), has produced a non-Marxist critique of the 'good governance' narratives and discourses relating to Africa. Theirs is however more of an 'internal critique' of neoliberal orthodoxy and does not broach the appropriateness of modern law for the Rule of Law in Africa.

It takes reading between the lines of literature produced by each of the East African Schools to extract possible strands of challenge to modern law. Ojwang (1992) for instance, who bestrides both schools, argues that the influence of Western jurisprudence in Africa is overwhelming and given the different social context, unwarranted. He suggests that the jurisprudence needs to be replaced if Africa is to achieve its developmental goals. Immediately thereafter, Ojwang (1992) adopts the

familiar route of Western legal theory in trying to develop a rights-based jurisprudence for African development.

The problem for critics of Western legal theory is, as Chiba (1986) identified, that no alternative jurisprudence has yet been written that can match the centuries of rich jurisprudence from the West. Despite their best efforts, Woodman and Obilade (1995) find themselves unable to establish definitive parameters for the beginnings of an African legal theory. In the circumstances, putative attempts at developing alternative theories of law invariably have only the concepts of Western jurisprudence to draw on, in the process consolidating the modern legal theory that is sought to be challenged.

2.7 ALTERNATIVE TO MODERN LAW

2.7.1 Customary Law

A locus for contestation of the hegemony of modern law and Western legal theory could have been African customary law but postmodernism and postcolonialism came too late for customary law. Customary law was one of the greatest victims of the representation of everything indigenous to pre-colonial Africa as primitive, preliterate, savage and at an early stage of evolution. There had been academic interest in the customary law before and immediately after independence but mainly as to how fast it could be done away with. It was the law of the past, said Seidman (1967), and any time wasted studying it was a flirtation with stagnation and irrelevance. Even literature empathetic to a future role for customary law (such as Roberts-Wray 1957, Allott 1965 and Verhelst 1968) betrayed a sense of resignation towards its imminent diminution in the scheme of things. Kuper and Kuper (1965)

were open to the possibility that post-independence systems could lean either towards the norms and ethos of customary law or those of modern law but theirs was a rare view. Most explorations were sure that customary law was heading towards extinction.

The majority of African socio-legal literature up to and through the early 1960s had focused on either the interaction between customary law and received European law or on customary law itself. This reflected the clear dualism of African legal systems in the colonial years, with there often being a separate system of European courts for colonials and African courts, applying customary law, for Africans (Benton 2002, Marshall 1966, Verhelst 1968, Ghai 1987, Mamdani 1996). During the 1960s, as African countries became independent, they rapidly unified their legal systems (Verhelst 1968, Ghai 1987, Bush 1979). Instead of running parallel to received European law, customary law was usually slotted into the lower reaches of an integrated legal system. There followed a progressive diminution in the volume of customary-law literature as interest turned to ‘modern’ law topics. The trajectory of Elias, the Nigerian jurist, is typical. He has *The Nature of African Customary Law* in 1956. In 1965, he is writing about the evolution of ‘law and government in modern Africa.’ By 1990, he has turned his attention to judicial process in the new commonwealth.

Instead of the customary law which dominated its 1960s editions, the revamped 2000s *Journal of African Law* has quite a showing by articles on human rights, one of the buzz topics of the last decade for African scholars. One such article, by Okafor (2004), advises local human rights groups to seek legitimisation by teasing out and

harnessing popular aspects of local cultures. This is an endorsement of the growing chorus that Africa should look inwards, at its indigenous norms and values, for salvation. Osaghae (1989), Nigeria's two-time President Obasanjo (1989), Ayittey (1991, 1992, and 1998), Sklar (1994), Mbaku (1995 and 1997), Dia (1996), Skalnik (1996) and Odinkalu (2003) all chime into that chorus. From various angles, they touch on the need and possibilities for Africa's indigenous institutions to constitute the locus of renewal.

In 2007, the United Nations' Economic Commission for Africa published *The Relevance of African Traditional Institutions of Governance* which attempted to explain how Africa's traditional institutions would be relevant for socio-economic development and called for further research. This new 'wisdom' has coincided with a fledgling reawakening of interest in African customary law, inducing the effusion in Hinz's preface to Okupa (1998):

'After generations of missionaries, anthropologists and lawyers, whose first interest was to force African customary law into the Procrustean bed of either the bible, civilisation or a western paradigm of the Rule of Law, African customary law begins to breathe again: to breathe the air of Africa. The flexibility of customary law stands a chance against the Rule of Law campaigners who have never tried to understand the origins of customary law, but also never left the positivistic education behind which taught them a very narrow concept of the Rule of Law.'

The problem however is that revivalist studies of customary law, such as Nduka (1977), Ebo (1979) and Eboh (2003), often read like archaeological excursions, seeking the order of custom as it existed in pre-colonial times. Ebo (1979:1), for instance, opens his article on 'Indigenous Law and Justice' with the sentence, 'In their pristine state of society, Nigerian peoples were not lawless.' Using that historic order as the basis for evaluating Africa's 'indigenous norms' raises questions about its

relevance to modern conditions. As Mugambi (1998) recognises, most of the old customs would probably be as foreign, to the several generations that have had no direct contact with them, as received European law was. There is also the case, argued by Twining (1964), Chanock (1978 and 1989), Ranger (1983) and Woodman (1983), that most of what is now known as ‘customary law’ was a colonial invention.

Allott (1960b) says clearly that African customary law as it was when colonialism arrived no longer exists. Elias (1956) had already written about the effect of the European legal and cultural invasion as well as new economic and commercial values. Chanock (1985), Moore (1986), Snyder (1987), Fitzpatrick (1984b and 1990), Mann and Roberts (1991) and Merry (1991) all present proof that customary law as is today is but a creation of the court system first introduced by colonialism. Yet, invented or not – Benda-Beckmann (1984) does ask why it should be regarded as ‘created’ rather than just ‘changed’ - customary law continues to exist as a distinct system from the modern law. The expectation that it would disappear has so far not been borne out. Its survival yields another possible avenue for contestation of the inevitability and inviolability of modern law. The relevant question is whether this customary law represents a different form of law from modern law. A false dawn to such an enquiry was provided by legal pluralism which is examined next.

2.7.2 Legal Pluralism

Merry (1988), Tamanaha (2001) and Eberhard and Gupta (2005), among others, note that interest in legal pluralism initially focused on analyses of the dualism of law – the received European law and indigenous or customary law - in colonised society.

Africa was the locus for much of early pluralism studies to the extent that the *Journal of Legal Pluralism* started life as *African Law Studies*. Griffiths (1986) and Merry (1988) do excellent studies of both the subject and literature of legal pluralism up to the late 1980s. Subsequently, legal pluralism has sought to show that *all* modern society is legally pluralist (Merry 1988, Eberhard and Gupta 2005). Griffiths (1986) and Vanderlinden (1989) even go so far as to exclude the dualism between customary law and received Western law from 'legal pluralism' in this new sense. Arguing that legal pluralism in its 'strong sense' is where not all law is state law, Griffiths (1986) and Vanderlinden (1989) submit that customary law is merely part of a single, vertical hierarchy of law legitimised by the state and can therefore only constitute legal pluralism in a 'weak sense.'

Literature critical of pursuit of the 'new legal pluralism,' as Merry (1988) calls it, is evident from the 1990s. Tamanaha (1993 and 2001) is one of the most strident critics and writes on 'the folly' of the concept of legal pluralism. Benton (1994) looks 'beyond pluralism' for a new approach to law in the informal sector. Benda-Beckmann (2002) weighs in for the defence with 'Who's Afraid of Legal Pluralism?' which also contains a good review of literature. That Tamanaha is a critic of legal pluralism is perhaps ironic. His *A General Jurisprudence of Law and Society* (2001) is dedicated to rebutting the positivist notion that the modern law is the primary norm-setter in every society. His disagreement with the legal pluralism school seems to mainly be one of nomenclature. Simply put, he does not agree that the label 'law' should be given to social norms. Criticism duly considered, inspiration for challenging the hegemony of modern law may still be drawn from the rich body of legal pluralism literature.

Slaats and Portier (1985) look at the possibilities for implementation of state law through 'folk law.' Bell (1991) offers up the concept of 'polycentric law,' which is a system based on open competition between private legal jurisdictions, instead of a state monopoly on law and adjudication. Carre and Zorn (2001) write on legislating pluralism with reference to Papua, New Guinea. Moore (1978) introduces the influential concept of 'semi-autonomous fields' to describe social fields which set up norms that rival that of state law. A major part of her study is based on the Chagga people in Tanzania. Woodman (1989), building on Moore, refers to 'powerful' social fields in Africa that yield 'transethnic' norms and to an unappreciated rule of law in Africa according to norms of a 'non-state' law. In Africa, Mozambique (Isaacman and Isaacman 1982, Gundersen 1992) and Ghana (Gyandoh 1988, Ray 1996, Schmid, 2001) stand out in the literature as having consciously attempted to discover and inculcate some norms of the informal sector into official adjudicative processes.

Still, the literature contains scarcely anything that amounts to directly questioning whether the Rule of Law could be obtained in Africa (or elsewhere) by a form of law other than modern law. This is notwithstanding widespread recognition noted by Carothers (1998), Golub (2003) and Tamanaha (2004) that after several decades and hundreds of millions of dollars in funding, efforts towards developing the Rule of Law around the world have produced minimal results. As Tamanaha (2004:4) says, 'If it is not already firmly in place, the rule of law appears mysteriously difficult to establish.' There should be justification for an argument that it is because the same thing – the attempted replication of Western-style modern law and legal thought – has been the object of the Rule of Law Orthodoxy.

Ocran (1978) and Kulcsar (1987) condemn the persistence with reform in Africa whereby the response to ineffectual legal rules is to impose more of the same. They suggest that the focus should instead be on the problematic relationship between the value-content of new legal rules and the legal norms linked to indigenous values. Ocran's (1978) and Kulcsar's (1987) criticism may be applied to even the harshest critics of the Rule of Law Orthodoxy. Golub (2003) scolds the Orthodoxy but does not really offer up any alternative except more of the same. The prospect of an alternative to social formations of Western modernity seem beyond fathom even to many of the finest critical minds. It would appear therefore (as Anghie 2007 and Abonyi 2009 effectively argue) that the core conception of modernisation is still writ large, in socio-legal theory as elsewhere, despite avowed renunciations in the literature.

2.7.3 Modernisation, Social Evolutionism and Alternative Modernity

Modernisation is premised on social evolutionism – the idea that societies have a standard evolutionary path and that Western society is the most advanced along this path (Offiong 2001, Ferguson 2005, Abonyi 2009). Parsons, also known for his work in systems theory, was one of the foremost proponents of social evolutionism in the twentieth century. Parsons (1960, 1964 and 1966), an American, considered Western civilisation the epitome of modern society and of all Western society, he declared the United States the most dynamic. Parsons (1960, 1964 and 1966) divided social evolution into four parts, namely differentiation of functional subsystems, adaption of the subsystems into more efficient subsystems, inclusion of previously excluded

elements and generalisation of values. Parsons then explored these sub-processes within three stages of evolution – primitive societies, archaic societies (which have writing) and modern societies (which have law).

Ideas like those that Parsons expressed had been canvassed widely in sociology through the first half of the twentieth century and applied to Africa. African societies were ‘primitive societies’ which knew neither writing nor law (Morgan 1877, Hartland 1924, Driberg 1934, Evans-Pritchard 1940, Smith 1965). This was used in part to justify colonialism as a process by which law was brought to societies that lacked it (Furnivall 1956, Pye 1966). The modernisation theory of development in the 1950s and 1960s also built on the same assumptions, with proponents of the theory such as Lewis (1955) and Rostow (1960) outlining stages-of-growth theories in relation to non-Western society. Law-and-development scholarship, as earlier noted, was strongly influenced by prevalent beliefs in modernisation.

Modernisation involved progression towards modernity in the image of Western society (Offiong 2001, Abonyi 2009). Modernity was an integrated package of elements including industrial economies, scientific technologies, liberal democracies and a secular world view (Gyekye 1997, Ferguson 2005). From the late 1960s, postmodernism started attacking the ethnocentricity of modernity and the equation of modernisation with Westernisation until, eventually, modernity unravelled (in theory at least). Instead of a uniform modernity – based on the Western ‘norm’ - modernity was split into alternate modernities (Berman 1983, Comaroff and Comaroff 1993, Piot 1999, Eisenstadt 2000, Moore and Sanders 2001). Ferguson’s (2005) study of the history of modernity remarks Africa’s failed experience with Western modernity as

one of the reasons for abdication on the notion of a single modernity. Again however, law has so far been impervious to the concept of alternative modernity. There is only one modern law and it unapologetically reflects a Western norm.

Chanock (1989:82) observes that the notion of social institutions developing according to a Western evolutionary framework has been ‘a remarkably resistant strain of legal thought’ which has persisted ‘long after it has been cleared from other areas of social understanding.’ Whereas ‘grand European teleologies that hold Western hegemony as human destiny’ (Comaroff and Comaroff 1993:xi) are now regarded as dated, there has been no sustained attempt in the literature to establish an alternative to modern law. A fledgling school that Manderson (2001) calls ‘apocryphal jurisprudence,’ in which is included the likes of Fitzpatrick (1984a, 1989 and 1992) and Goodrich (1990 and 1995), has argued the possibility but their views constitute, as yet, footnotes in the literature.

Galligan (2007) spares time to ponder the source of modern law’s authority, Casper (2004:6) fleetingly questions whether the Rule of Law ‘is rule of *the* law i.e. law that is universal in nature,’ while Milovanovic (1992) proposes the use of chaos theory to set up a replacement discourse for modern law. That is usually as far as it gets. This is another area that the literature yields little in exploring questions relevant to our thesis. It could be that the only things standing in the way of evincing an alternative are imagination and courage. On the other hand, it could be of course that there is nothing to pursue out there, there really being no alternative to modern law. After all, what are the alternatives to courts and police, to legislatures and to the whole legal framework of the modern state? Anarchist literature provides a possible vision.

2.7.4 Anarchism

Anarchists share a loathing of the state but beyond that cover a wide range of the intellectual spectrum so that there are communist anarchists, collectivist anarchists, individualist anarchists, mutualists, etc (Marshall 1991, Sheehan 2003). Individualist anarchy and market anarchy (or anarcho-capitalism) lie to the far right of libertarian beliefs and their proponents espouse beliefs resembling an extreme form of neo-liberal economic theory (Sheehan 2003). Market anarchists possess faith in the superiority of private ordering and an affinity for free markets. These themes formed the basis ultimately of the Washington Consensus on development which dictated the 1980s structural adjustment programmes in Africa and across the developing world. The Washington Consensus was grounded in *homo-economicus* rationalisations of the Law-and-Economics School, led by Coase (1960), Alchian (1965) and Demsetz (1967), which produced the influential property-rights and public-choice theories.

Property rights theory held that the right to private property gave people the incentives to manage them properly on the basis of rational self-interest (Starr 1988). Public-choice theory on the other hand holds that when rational self-interest is applied in the management of public property, it leads to pathological decisions (Starr 1988). Public choice theory has been applied widely by its adherents, including (Rubin 1977, Priest (1984), Cooter (1993 and 1996a), to explain even the efficiency of common law.

Ellickson's *Order without Law* (1991) takes its author into anarchism in trying to justify public-choice theory. Explaining his aim in a subsequent article, Ellickson

(1994:97) opens with the statement, ‘Informal interactions can spontaneously generate complex institutions.’ However, the Washington Consensus, even in its most free-market oriented, hardly went so far as to advocate doing away entirely with the modern legal framework or the modern state. It sought to privilege private-sector ordering over public-sector control but still within the bounds of modern law and the modern state. This is where anarcho-capitalists distinguish themselves, denouncing neo-liberalism as ‘state capitalism’ which Rothbard (1978) defined as a collective partnership between big business and government to subvert the free market.

Anarchism is the philosophy that society can be wholly organised by private ordering. In contemporary times, when the world is divided into modern states, anarchism is mainly confined to theory of what can be. Sheehan (2003:18) acknowledges that anarchism is often denigrated as utopianism, ‘quixotic at best, menacing nonsense at worst.’ There is little empirical evidence that anarchy can work in the real world. The title chosen by Marshall (1991) for his authoritative history of anarchism, *Demanding the Impossible*, seems to bear this out. Anarchists have had to resort to vague examples from history, as Rothbard (1978) does with the development of *lex mercatoria*, to substantiate their claims. But Africa yields some contemporary test cases for anarchist theory, with the state becoming dysfunctional and sometimes disappearing entirely in various parts of the continent from the late 1980s.

The problems of statehood in Africa have motivated a string of derogatory epithets such as ‘quasi,’ ‘shadow,’ ‘vampire,’ ‘kleptocratic’ and ‘lame Leviathan’ to describe the African state (Frimpong-Ansah 1991, Englebert 1997, Villalon 1998, Coolidge and Rose-Ackerman 2000, Young 2004, Blundo and Olivier de Sardan 2006). Evans

(1989 and 1995), in shades of Krueger (1974), provides a division of state types into three – the predatory, the intermediate and the developmental. Evans' proto-type predatory state is the African state. Similar terms carry through in White (1987) and O'Donnell (1987) and to a lesser extent, Frye and Shleifer (1997). As antidote to her own version of the predatory state, Krueger (1974) had advocated state minimalism. This is a concept that Nozick (1980) and Bobbio (1989), in favour, dwell on in at length. Damaska (1986) distinguishes between the activist state and the reactive state, the latter being the kind of minimalist state that Krueger, Nozick and Bobbio might endorse.

Kaplan's (2000) *The Coming Anarchy* paints a dark picture of the postcolonial state in Africa being on a steady descent into anarchy, 'anarchy' used here as coterminous with a Hobbesian condition of utter chaos, violence and strife in which life is nasty, brutish and short. Somalia provides the most extreme example yet of the disappearance of the state. Since the early 1990s, there has been nothing resembling a modern state in most of the territory comprised as Somalia. Yet, Little's (2003) study of Somalia shows that in many parts, instead of Kaplan's (2000) dire vision coming to pass, private ordering has provided a semblance of efficient social organisation in the absence of any of the structures of the modern state.

Little's (2003) exposition of a working statelessness is not tinged with the irony of Chabal's and Daloz's (1999) *Africa Works* whose provocative title is little more than a back-handed compliment. For all their rationalisation of the logic of disorder in Africa, Chabal and Daloz (1999) share in an 'Afro-pessimism' (Steadman 1993) that portends an unsavoury end for Africans if they do not adopt the Western norm of

modernity. Even if there is no explicit acknowledgement of the modernisation theory in *Africa Works*, it is an endorsement at least of the view that there is no alternative to the Western form of modernity as far as human progress is concerned. Perhaps anarchist theory would benefit from more works like Little's (2003) in substantiation of the view that society might work otherwise. Africa continues to provide the perfect laboratory.

2.7.5 Paucity of African Socio-Legal Research

There is however still too little sociology (anarchist or otherwise) of contemporary Africa, compared to other regions. This has caused Neubert (2005:430) to remark, 'Sociology in general has no interest in Africa at all.' The problem is pronounced in the socio-legal theory of Africa. Salamone (1983) notes the position to still be as true as when Kuper and Kuper (1965) lamented the paucity of theoretical studies of African law. Woodman and Obilade (1995) are compelled to mention the sparseness of literature that met the conditions for inclusion in their socio-legal volume, *African Law and Legal Theory*.

Compared to the colonial period, there has even been a diminution of socio-legal studies in Africa, especially since the 1970s (Guadagni 1989). This is partly down to the nature of legal training in African universities where the concentration is on technical subjects, even at postgraduate level. Guadagni (1989:15) describes law curricula in African universities as 'professionally rather than culturally or social oriented.' He finds that four classical subjects – constitutional law, criminal law, contract and tort – are given a premium over subjects such as law and development,

legal history and customary law. This concentration has been driven by the perception that Africa is short of practical ('bread and butter') lawyers.

The need for practicality is highlighted by Owolabi (1996) who disparages as a 'futile academic exercise' the search for Kelsen's *grundnorm* in contemporary African society and would rather have African scholars devote themselves to those 'practical problems' that hinder the administration of justice. Cowen (1963) and Guadagni (1989) acknowledge the need for practical lawyers but lament the lack of attention given to socio-legal education in Africa. Of the socio-legal works that exist on Africa, including during colonialism, the authorship is preponderantly non-African. Obilade (1984:153) complains that major research in the legal scholarship of Africa has been 'left in the hands of scholars [from] the developed countries.' Many foreign authors through the years, including the likes of Allott, Cotran and Woodman, have had extensive 'field experience' in Africa but this still begs the old anthropological and Foucauldian questions of the perspectives that influence the knowledge sought and produced by their studies.

2.8 CONCLUSION: RESEARCH QUESTION JUSTIFIED

Three successive paradigms of the Rule of Law are identifiable in development literature. The first is of absence, with the Rule of Law being confined to law and political science literature through the 1980s. The second paradigm involved development studies co-opting the Rule of Law and holding it out as an instrument for economic development. The third paradigm, from the turn of the millennium, saw development literature re-casting the Rule of Law as a development end in itself.

The Rule of Law emerged from law textbooks into development dialogue and literature in the 1990s. Following the fall of the Berlin Wall, the ‘Rule of Law’ was used to rationalise the failure of Soviet-style communism. Development literature held that the Rule of Law was required for capitalist economic development and had been missing in Eastern Europe. The literature, emanating mainly from international financial institutions, suggested at first that getting the state out of the way and giving free reign to markets would produce Western-style benefits including the Rule of law.

When the promised transformations did not happen, the literature started to reflect a loss of faith in the laissez-faire approach. Rather than leaving it to the invisible hand, an active and directed attempt was required to build the Rule of Law. Writing on the Rule of Law increased exponentially from the mid 1990s. The recognition of complications bedevilling what had been thought a straightforward process led to critical reflection and deeper conceptual analysis. Questions arose on whether law-reform was crucial for economic development at all. The 1960s ‘Law and Development’ Movement had unravelled on the point. The Rule of Law Movement survived this potential pitfall when conventional wisdom shifted to the Rule of Law as a development end in itself rather than a means to an end.

The Rule of Law Orthodoxy – a constellation of ideas, activities and strategies for producing the Rule of Law – had emerged in the 1990s. The Orthodoxy imbibes the essentialism of modern law and its institutions in establishing Rule of Law. But what if the problem with the Rule of Law in some places is the formal legal system or formally rational law itself? What if the modern legal system is not culturally

amenable to the Rule of Law in certain areas? Critics of the Law and Development Movement had after all queried what they saw as an underlying assumption that developing societies would respond to legalism and modern law in the same way as the West. A lot of imagination and even more courage will however be required, in research and practice, to break free of a Rule of Law Orthodoxy whose understanding of law is dictated by the modern legal form found in the West.

The relative dearth of socio-legal studies on Africa has meant that theory on the Rule of Law remains premised on tenets developed elsewhere. Perhaps this is why it has hardly been broached in the literature that Africa's enduring problems with the Rule of Law reveals the limitations of modern law as universal rationality. That unexplored perspective raises questions, which find little expression in the literature, of whether grappling with modern law might yet be Africa's Rule of Law problem and whether there is indeed an alternative modernity to law that might prove more appropriate. The literature review thus justifies exploration of the research question which is whether it can be demonstrated on current knowledge that the Rule of Law in Africa needs and can be built on another type of modern law. The next chapter, on research methodology, discusses the methodology by which this question is tackled in the dissertation.

CHAPTER 3 – RESEARCH METHODOLOGY

‘Since all research takes its impetus from theoretical suppositions, the clear place of the theoretical dissertation lies in the work of reviewing and remaking the terms which govern that which other researchers have done or will do’ (Tedre 2006:11).

3.1 INTRODUCTION

The previous chapter reviewed the literature on the Rule of Law in development, with reference to Africa, and included justification of the research questions. This chapter explains and justifies the research methodology by which those questions are explored. The chapter first explains the methodological imperatives arising from the dissertation being theoretical research. The chapter next describes the multidisciplinary nature of the ‘data’ used in the dissertation, all of which data are from library-based, secondary sources. The chapter then rationalises the use of Africa as unit of analysis by locating it within an established academic tradition. Thereafter, the chapter explains critical discourse analysis, a particular theoretical and methodological approach to critique, which the dissertation applies to discourse of the Rule of Law in Africa. The chapter ends with a summary.

3.2 RESEARCH DESIGN

3.2.1 Theoretical Dissertation

As mentioned in Chapter 1 (section 1.5), this is a theoretical dissertation the research for which is based entirely on secondary literature. A theoretical dissertation should result in a seminal statement of knowledge on a particular field or a novel interpretation of existing writing (Silverman 2009, Tedre 2006, Bhatt 2004, Silbergh 2001). The aim of this kind of dissertation is ‘not necessarily to be comprehensive [or] to summarise everything published that is relevant to the topic’ but to marshal

evidence from existing literature to state a case (Jankowicz 2005:76). The current dissertation states the case that the Rule of Law in Africa would profit from a kind of law that is different from modern law.

Theoretical dissertations stand in contrast to empirical dissertations in which the research usually seeks to generate data, by experimentation, measurement or observation, for analysis (Silverman 2009, Tedre 2006, Bhatt 2004, Silbergh 2001). There is scant assistance in the literature on reportage of research methodology for theoretical dissertations. Literature on research methodology is skewed instead towards empirical research, the surfeit of guidance assuming a methodology where empirical data is collected and analysed using qualitative or quantitative evaluative techniques.¹⁷

It is true that certain requirements are common to empirical and theoretical dissertations including, notably, the development of a rigorous theoretical statement that potentially advances knowledge (Tedre 2006, University of Denver 2005, Silbergh 2001).¹⁸ Yet, fundamental differences between the two types of research mean that most of the taxonomies and reporting formats of empirical research cannot be used for theoretical dissertations (Tedre 2006, Silbergh 2001).¹⁹ Trying to fit a theoretical dissertation into the empirical dissertation formats that are the subject of

¹⁷ Even where allusion is made to the theoretical dissertation (as in Silverman 2009, Bhatt 2004 and Silbergh 2001), it is usually only to distinguish it from empirical dissertations before the rest of attention is concentrated on methodologies of and reporting formats for empirical dissertations. Tedre (2006) and Day (1993) are rare expositions of theoretical dissertations, with both implicitly acknowledging and lamenting the paucity of studies on research methodology for the theoretical dissertation.

¹⁸ Satisfying the criterion of new contribution to knowledge is however regarded more difficult for the theoretical dissertation than for the empirical dissertation (University of Denver 2005, Silbergh 2001).

¹⁹ The recommended format for empirical dissertations is usually divided into five chapters namely, introduction, literature review, methodology, results and analysis, and conclusion (Cooper and Schindler 2008, Saunders *et al* 2007, Collis and Hussey 2003, Silbergh 2001).

most research methodology literature would probably result in ‘a misshapen monstrosity that pleases no one’ (Merrill 2000:77).

3.2.2 Methodological Imperatives

Theoretical and empirical dissertations proceed by formulating research questions and reviewing relevant literature. The two types of research then start to diverge from the source material used to answer the research questions. The theoretical dissertation continues to focus on the literature beyond the foundational literature review while the empirical researcher will usually seek to generate new or original data for analysis. Even if the literature on which theoretical research proceeds can be regarded as ‘data,’ the two types of dissertation approach data in different ways from each other (Tedre 2006).

Empirical research usually generates its data by observation or experiment and uses that data to test its hypothesis. A lot of the evaluative emphasis in empirical research is therefore placed on the methods by which the data have been generated and analysed, ‘whether interesting or uninteresting results are obtained’ (University of Denver 2005:1). As a consequence, standard elements of evaluation relating to methodology and analytical techniques have developed for empirical work and the methodology part of an empirical dissertation will seek to satisfy these ‘methodological markers’ (University of Denver 2005, Silbergh 2001).

In theoretical research, the emphasis is on the creation of a coherent argument rather than the generation and analysis of data. The theoretical researcher responds not only

analytically but also rhetorically and conjecturally to existing literature. The object is to critique and possibly reformulate concepts, ideas and arguments in existing literature without looking at or generating new data. The theoretical dissertation is however not an extended literature review even though it is entirely literature-based (Burnett 2009). Going beyond describing or analysing what has already been said, the theoretical dissertation attempts to advance a particular point of view, produce new theoretical constructs or bring a novel interpretation to existing knowledge (Silverman 2009, Bhatt 2004, Scotter and Culligan 2003).²⁰

It follows that little purpose would be served to report theoretical research as if it could be judged mainly on the techniques by which new data have been collected or analysed (Tedre 2006, University of Denver 2005). The methodology section of a theoretical dissertation does not therefore demand the prominence that the section would have in an empirical dissertation. Conversely, the literature review warrants more depth and extensiveness in a theoretical dissertation than it would in an empirical dissertation (University of Leicester 2009). The literature review in the theoretical dissertation not only provides the prelude to research but also contains the ‘data’ upon which the research is carried out and ‘results’ obtained.

Yet, as Tedre (2006) acknowledges, there is still some scope in the theoretical dissertation for reflecting on the methodology by which the constitutive argument has been created. According to Silverman (2009), the methodology chapter in a theoretical dissertation should demonstrate that the argument has been systematically conducted.

²⁰ The University of Denver (2005) suggests that theoretical research should compare the predictions of the theory to existing data as a test of whether the new theory being proposed better accounts for known empirical phenomena than previous theories.

The methodological imperatives of theoretical research are borne out in this dissertation. It has been found necessary to make the literature review more extensive than it would probably have been in an empirical dissertation (University of Leicester 2009). The literature review contains the ‘data’ upon which research is carried out and results derived rather than just the foundations for research (as would have been the case in an empirical dissertation). The ‘data’ is not such as is seminally elicited by observation, surveying or experimentation so there is little basis for narrating why certain techniques of data production, collation or measurement have been chosen in preference to others. There is still scope however for reflection on research methodology including explicating and justifying the method of argumentation that constitutes the dissertation (Silverman 2009, Tedre 2006). Accordingly, the sections that follow rationalise the nature of data collated, the unitisation of sub-Saharan Africa for analysis and the use of critical discourse analysis to interrogate the Rule of Law Orthodoxy in Africa.

3.3 NATURE OF DATA

3.3.1 Primary and Secondary Data

A theoretical dissertation need not include primary data (University of Denver 2005) as its object lies in ‘reviewing and remaking the terms which govern what other researchers have done or will do’ (Tedre 2006:11). Primary data is data originated for the purposes of the research while secondary data is data generated for other purposes but used in the research (Zikmund 1994). This being a theoretical dissertation, it has

relied entirely on library-based, secondary literature and source material.²¹ No primary data has been generated for the research.

3.3.2 Multidisciplinary Secondary Sources

The dissertation is primarily about law but research for it straddles other fields too, including sociology, anthropology, development studies, politics and history.²² This multidisciplinary coverage is aimed at capturing the broad context of Rule of Law discourse pertaining to Africa.²³ It is a method that has been gainfully employed by several schools of legal scholarship, including Legal Realism, Law and Development, and Critical Legal Studies. The method has also been used to effect by sociologists with legal training including Weber and Marx.²⁴

²¹ May (2001:176-177,196) recognises that despite the richness of insights that documentary research is capable of, it has sometimes been criticised as being inferior to other methods such as interviews, surveys and participatory observation. He observes that the criticisms appear to stem from how the documents are used, as opposed to their use in the first place. The key thing in meeting the criticisms, he suggests, is to always keep in view the potential bias of documents. Gupta (1995:376-377) goes further to question the assumption regarding natural superiority – the assertion of authenticity – implicit in knowledge claims generated by the fact of ‘being there’ in fieldwork.

²² The problems of law in Africa ‘have placed on [African lawyers] an obligation ... [demanding] that they be smoked out of their accustomed disciplinary parochialism into the open-air of cross-disciplinary learning’ (Ocran 1978:19).

²³ The multidisciplinary nature of the research necessitated metaethnography. Metaethnography involves distilling relevant conclusions or definitive statements from literature from diverse fields and fusing them into a coherent body of evidence on the subject of research (Noblit and Hare 1988, Pielstick 1998). In the course of researching the dissertation, studies have been translated into one another not only from within particular fields but also across different fields. In the process, concepts, ideas and metaphors have been compared and synthesized across the fields in order to produce second order theory on the Rule of Law in an African context.

²⁴ The researcher’s grounding in the non-law aspects of the research was especially assisted by a one-year hiatus from SOAS to pursue (and successfully obtain) a masters degree in African studies from the University of Oxford. The Oxonian studies provided intensive and structured training in, among other things, the philosophical debates concerning the historical and contemporary representation of Africa.

3.4 UNIT OF ANALYSIS

3.4.1 Unitising Black Africa South of the Sahara

In the course of writing, opportunities have been sought to subject interpretations and key propositions to academic debate. Different parts of the work (in précis form) have been discussed at seminars and other intellectual forums. A common query that emerged on methodology was whether cogent analysis was possible on the level of ‘Africa,’ particularly with regard to law, given the sheer diversity of legal and political systems and cultures. Yet, the use of Africa as unit of analysis is neither new nor rare. In that regard, the dissertation follows an established academic tradition. The recurrence of the query however commends some elaboration on the method.

The ‘Africa’ for this study was defined in Chapter 1 (section 1.6) as sub-Saharan Africa, excluding South Africa. Validation, at least by way of precedent, is provided by the frequency of adoption of this delineation in the social sciences. Elias (1956:7) had delineated his study of African customary law as covering ‘indigenous Africa south of the Sahara’ but excluding, on ‘considerations of strictly un-African characteristics,’ North Africa, Ethiopia and the Islamic areas of Sudan. Chabal and Daloz (1999:xxi) describe the coverage as that area usually called ‘Black Africa – that is the former European colonies lying south of the Sahara.’²⁵ They expressly exclude South Africa ‘whose history is so distinct as to make comparison difficult at this stage.’ Like Elias (1956), they exclude in addition to North Africa, the Horn of Africa, ‘where areas like Ethiopia ... and Northern Sudan have dissimilar social structures and have had a different political experience’ (Chabal and Daloz 1999:xxi).

²⁵ Discussing the ‘study of “democratization” as it is applied to Black Africa,’ Chabal (2005:482) calls it ‘an appropriate, well-defined and theoretically coherent study’ in which the ‘area is clearly demarcated: Black (or formerly colonized) Africa.’

There is such a surfeit of analysis premised on the same delineation that noted Africanist writers such as Ayittey, Davidson, Gathii, Mamdani, Mazrui, Mbaku, Mbembe and Mudimbe thrive on the Africa method without bothering any longer to explain or justify it.²⁶ They take as sufficiently established the integrity of the delineation and the second-order homogeneity posited therein. Homogeneity is a function of certain historical and contemporary commonalities as well as geographical contiguity. The successive conditions of colonialism and postcolonialism are major common factors as is the pre-colonial condition of ‘pre-literacy’ (namely, oral cultures, lack of industrial-age technologies and absence of the modern-state system).

Chitepo (1961: 61), for instance, observes that whatever the detail of colonial experience, the ‘States of Black Africa display certain general characteristic [*sic*] features that transcend the divergent elements.’ He points to the identity of pre-colonial conditions as the most apparent common factor, observing that the period immediately preceding colonial conquest ‘certainly knew nothing of the modern system of state.’²⁷ Phillips and Seck (2004) extend such analysis by observing that despite varying paths to nationhood, post-independence African nations soon displayed many common elements. The structural commonalities, argue Philips and Seck (2004:8), were rooted in ‘nationalism, the logic of nation building and certain ... features of African political culture, such as paternalism and patron-client hierarchies.’²⁸

²⁶ Reader’s (1999) critically acclaimed *Africa: Biography of a Continent*, for instance, ignores Africa north of the Sahara completely and does not bother with any explanation of why it does so.

²⁷ Chitepo (1961) further notes that it is not that these factors do not exist anywhere else but that there is nowhere else that they all exist together in the way they do in Africa.

²⁸ The identification of commonalities, even whilst diversities are acknowledged, runs through decades of literature. For example, the University of Denver (1968:1) says that their ‘survey of this vast

3.4.2 The African Exception

The contemporary commonality most relevant to this dissertation is the problematic state of development and, particularly, the Rule of Law across the region.

Transparency International (2007) puts it thus:

...[T]he development challenges faced by sub-Saharan Africa are enormous: It is the only region of the world where poverty has increased in the past 25 years and half of the continent's population lives on less than 1 USD per day. 32 of the world's 38 highly indebted poor countries (HIPC) are in Africa. In addition to corruption, protracted armed conflict, the HIV/AIDs pandemic and declining terms of trade for non-mineral primary products continue to exacerbate the many challenges faced in the region.

The indicators for the Rule of Law in the Worldwide Governance Indicators published annually by the World Bank have consistently placed the majority of African countries in the lowest 0-10th percentile ranking. The world map of rankings for 2009 is reproduced as figure 1 below. Of all the countries within the compass of our 'Africa,' only Botswana, Ghana and Namibia exceed the 50th percentile ranking. The map makes it clear that Africa is the region with the largest expanse and concentration of the lowest Rule-of-Law rankings.²⁹ In no other continent in the world is there the spread and gravity of the conundrum that the Rule of Law faces in Africa. This must

literature' makes it possible to delineate a level of analysis 'in which Africa is treated as a unit.' Knight and Newman (1976:2) say that 'there are a number of commonalities that make treatment of Black Africa as a unit both important and meaningful.' Nsamenang (1993:171) argues that 'in spite of enormous diversities, countries of the sub-region display considerable commonalities ...' UNESCO (1985) has published a study with the telling title, *Distinctive Characteristics and Common Features of African Cultural Areas*. Hanna and Hanna (2009:7) express the belief that 'using Black Africa as ... unit of analysis is a viable research strategy because of the area's marked similarities in colonial past, revolutionary change and contemporary dynamics.'

²⁹ The Ibrahim Index of African Governance also scores African countries on the Rule of Law, Transparency and Corruption. With 100 the maximum score for performance, 25 of the 46 Sub-Saharan African countries assessed on the 2011 Index scored below 50% (Mo Ibrahim Foundation 2011). Of the remaining 21, 16 score below 60%. The average regional score was less than 50%. Considering that two out of the Index's seven scoring parameters are the ratification of core international human rights conventions and the existence of laws on contract and property rights, even the Index's less stringent parameters highlight the seriousness of the conundrum facing the Rule of Law in Africa.

prompt the question ‘why Africa?’ Without prejudice to country specificities, the question justifies an ‘area-studies’ Africa analysis on account of the demonstrated uniqueness of the region.³⁰

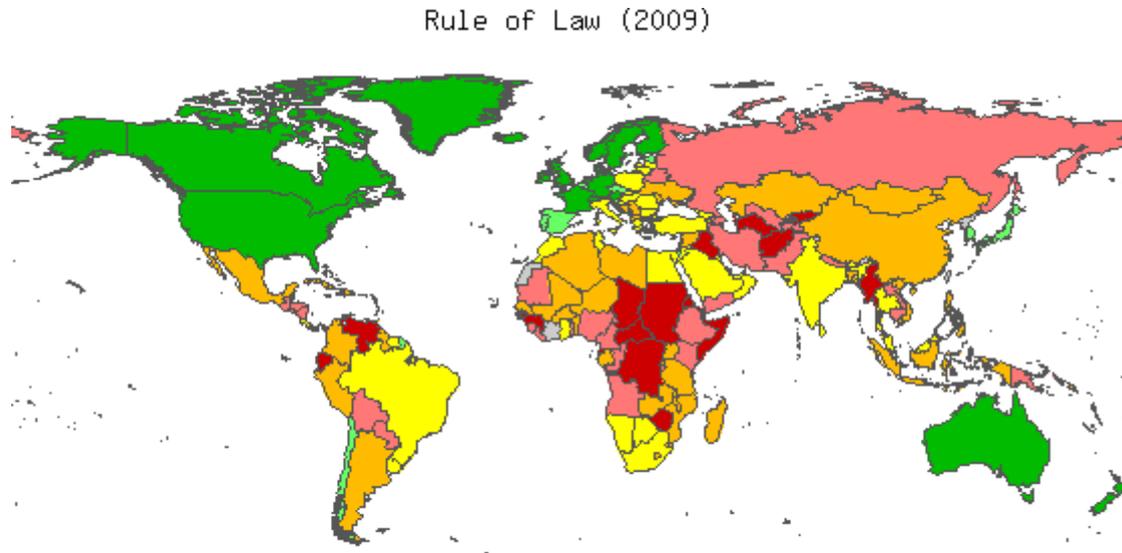


Figure 1³¹

3.4.3 Commonalities in Diversity

The lingering objection nonetheless to any socio-legal analysis on the scale of ‘Africa’ is that no theory can be valid for such expansive geographical coverage.³²

Bohannon (1969) provided a useful response to this objection by challenging social scientists’ penchant for rejecting any proposition to which an exception can be found

³⁰ Africa has been described as the ‘exception to development’ among regions. The ‘African exception’ is the theme for the collection by Engel and Olsen (2005). One of the contributors, Therkildsen (2005:35), argues that the continent challenges ‘our understanding of the nature of ... economics [and] politics’ and ‘accentuates the need to replace current normative and overoptimistic paradigms’ with more realistic ones that get to grips with Africa’s problems.

³¹ Kaufmann *et al* (2010). Red indicates the 0-10th percentile; pink, the 10-20th percentile; orange, the 25-50th percentile; yellow, the 50th-75th percentile; light green, the 75-90th percentile and dark green, the 90-100th percentile.

³² Hoogvelt *et al* (1992) object to the World Bank’s Africa analyses on this ground. In their estimation, the World Bank ascribes the crises of African economies to a fixed set of economic variables which constitute a commonality that necessitates a common strategy. Using statistical techniques, Hoogvelt *et al* (1992) claim to discern four different clusters of African countries from poorest to richest. The irony however of the argument is that the clustering, on which a case is made for differing with the World Bank, proceeds on exactly the same rationales for unitisation as the World Bank has used in holding Africa a credible unit.

whether or not the exception repudiates the proposition. Quoting Potter (1951), Bohannan (1969) calls that kind of objection the 'but-not-in-the-South' technique of one-upmanship. The objection would probably be applicable to any attempt at formulating social theory on the activities of any group ranging from a small, nuclear family to a nation-state and beyond. Bohannan (1969) complains that the progress of the social sciences has been stunted because all social theory is prey to falsification in this manner.

The Africa method does not pretend to be blind to the diversity across the delineated 'Africa.' Chabal and Daloz (1999), who employed the method for their thesis on political disorder as rationality in Africa, provide the logic behind it. They acknowledge the 'significant differences in ... norms of bureaucratic efficiency between African countries' and the dangers of 'generalizing excessively' but insist that whenever the state in Africa is studied, there is 'revealed a number of analytically significant similarities' (Chabal and Daloz 1999:8). In other words, the Africa method does not operate in oblivion of difference but on the insistence that commonalities can nevertheless be observed and theory abstracted from varied manifestations across Africa. Meredith's (2006) magisterial *The State of Africa* is similarly prefaced with the observation that while Africa is a continent of great diversity, 'African states have much in common, not only in their origins as colonial territories, but the similar hazards ... they have faced' (p.14). Meredith (2006) says further that the most striking thing about the fifty-year period after independence is the extent to which African states suffered the same misfortunes.

3.4.4 Stylistic Range of Unitisation

The stylistic range of the Africa method is displayed as between Chabal and Daloz (1999) on the one hand and Meredith (2006) on the other. Chabal and Daloz (1999) do not break up the Africa that they analyse. They dip in a few times to pick up examples from individual countries but on the whole analyze the state in Africa as one abstract entity. In contrast, Meredith (2006) tells detailed histories from specific countries but breaks them up into periodic narratives, grouping together narratives from different countries from approximately the same period to show trends prevalent in Africa at the time.

Meredith's (2006) and Chabal's and Daloz's (1999) varying applications of the Africa method are to be distinguished from studying a specific community within an African country and then passing off the findings as epitomising Africa as a whole. The latter representation would be justifiably deprecated for its randomness and should not be allowed to taint an Africa method which claims its epistemic legitimacy from having extrapolated from the many collations of specific studies across Africa or the many bodies of theory established from such studies. The study of specificities within Africa has long since generated the commonalities on which Africa-wide analyses are made and theories are propounded at a certain level of abstraction.³³

There even seems to be an Africa abstraction operating at a higher level than Chabal's and Daloz's (1999). This abstraction is more than just drawing on commonalities among African countries and formulating them as the characteristics of Africa for the

³³ African Studies is growing in popularity in universities (especially at postgraduate level) The curriculum of a typical African-Studies course, such as the Masters Degree programme at Oxford University, substantially adopts the Africa method used here, hovering between the Meredith treatment and the Chabal-and-Daloz abstraction.

purposes of analysis. This Africa is one that while emanating from the interplay of the different cultures, politics and ways of the different African peoples, and is inseparable from them, is yet an autonomous notion. Elias' (1978) concept of figuration provides useful terms of reference. Elias (1978) says that it is possible to speak of a game as if it had a separate existence from its players, as in 'Isn't the game slow tonight?' This objectification of the game does not detract from the fact that the game is relatively autonomous for every single player and that the game has no substance, being or existence independently of the players. Yet, the game is not an idea constructed from observing the behaviour of each player and abstracting characteristics which they have in common.

Elias (1978:130) defines 'figuration' as the 'changing pattern created by the players as a whole ... by the totality of their dealings.' The figuration 'forms a flexible lattice-work of tensions' and emanates from *both* difference and similarity between the players. An 'Africa' figuration arises in such terms, formed of the totality of the workings of the different African countries. This figuration is 'Africa' as an autonomous idea; it is what Bayart (1993:ix) uses to 'conceptualise [the] arena' for his politics-of-the-belly thesis in *The State of Africa*.³⁴ It is also such a figuration that constitutes the 'Africa' in Mudimbe's (1988 and 1994) philosophical musings on the 'invention of Africa' and the 'idea of Africa.'

³⁴ Political science is particularly fond of the Africa method. Bayart (1993) and Chabal and Daloz (1999) merely continued an established tradition among Africanist political scientists to analyse the African state in singular. The practice has produced epithets such as the 'quasi-state' (Jackson and Rosberg 1982), 'lame Leviathan' (Callaghy 1984), 'rhizome state' (Bayart 1993) and 'suspended state' (Hyden 1993) for their varied theories on heterodoxy of statehood in Africa.

3.4.5 Jurisprudential Otherness

The Africa method is less manifest in legal studies than it is in philosophy, political science or history but this is probably because of the tendency in law studies to concentrate on what Twining (1997:223) calls ‘law talk’ rather than ‘talk about law.’ Law talk resides in micro-level analysis, involving the construction and interpretation of legal rules and doctrines. Talk about law is macro-level analysis. Analysis at the latter level is no less legitimate for its marginalisation in legal discourse by law talk.

As Orucu (2004:42-43) says, macro-level analyses move the focus away from laws and legal systems to legal cultures and traditions. It is on this level for instance that Woodman and Obilade (1995) identify the need for an African legal theory. It is on the same level that Elias (1956) can unitize African customary law for purpose of analysis. Allott (1960a, 1960b) and Menski (2006) also find little difficulty in writing about ‘African law’ in terms of a comprehensive singular. At this level, the study of law has entered the province of jurisprudence.³⁵ Jurisprudence has always operated at a high level of philosophical abstraction, enabling it to bestride diverse (and often conflicting) legal systems and multifarious laws at the same time and still present itself successfully as a legitimate intellectual enterprise.

Justifying the analytical homogeneity of Africa on a certain jurisprudential plane is the cornerstone for construction of a jurisprudence of African Otherness. Otherness is not located in a simplistic assumption that cultural divergences are not manifest among Africa peoples, *inter se*. Rather Otherness is a unifying metaphor for the

³⁵ Salmond (2004) defines Jurisprudence as the name given to an investigation of an abstract, general and theoretical nature into law, the investigation seeking to lay bare the essential principles of law and legal systems.

different narratives which, it is argued, together foil the putative meta-narrative that emanates from the Western model of ‘modernity.’

There have been two currents to challenging Eurocentric constructs of the Other. The first is a critique that draws attention to and exposes the Eurocentrism by which an Other is created as a foil against whom a complex of superiority, domination or oppression can then be invoked. This first current of Otherness is epitomised by Said’s (1978) *Orientalism: Western Conceptions of the Orient*. *Orientalism* chronicles how Eurocentric discourse constructs an Oriental Other as the antithesis of the ‘civilised’ West. *Orientalism* however leaves open the question of whether there is a ‘real’ Other.

The second current to Otherness, a progression from the first, actively claims the possibility of another Other that is repressed by the Eurocentric misconstructions of the Other. This second current tries not just to deconstruct Eurocentric discourse but also to give vent and shape to that Other so repressed by Eurocentrism. This is Mudimbe’s (1988) purpose when he not only interrogates the Africa ‘invented’ by Eurocentric discourses but also seeks to identify an African *gnosis* – a way of knowing that is African. Thus Mudimbe (1988) not only opposes the African Other defined by Eurocentrism but also suggests another African Other that is not an Other of inferiority but an Other of difference *simpliciter*. In this vein, suggesting an Otherness of African legal rationality is not to suggest irrationality or an inferiority of rationality. It is merely to suggest an alterity of rationality.³⁶

³⁶ It is on the basis of such a conception of Otherness that Afrocentrism proceeds to present itself as a worthy counterfoil of Eurocentrism. The argument is not one of a superiority or immanence of an ‘African way’ but for, first, the recognition of an African way as a fact and, thereafter, its elaboration and the accord of parity with Indo-European ways. Asante (1987:9-10) says that the Afrocentric

3.4.6 Between Grand and Middle Range Theory

An Africa method that canvasses the possibility of a certain plane of African homogeneity and then Otherness must risk being accused of grand theory.³⁷ It is worthy first to observe that for all the condemnation of grand theory that is now fashionable in the social sciences, all social science stands rooted in grand theory. Sociology and Jurisprudence (including their confluence in socio-legal studies) are agglomerations of grand theories.³⁸ All the canonical figures of socio-legal studies, from Marx to Durkheim to Weber to Parsons, engage unapologetically in grand theorising (Turner and Boyns 2006). Weber's theory on the evolving types of legal rationality, for instance, forms at once one of the grandest theories of all and yet continues to pass muster as a veritable foundation for modern legal philosophy.

In defence of grand theory, Turner (2004) has argued that concentration on narrower-range theory leads to 'abstract empiricism' without grounding. Grand theory is then justifiable on the basis that it provides the canvas upon which narrower-range theories can be sketched. Turner and Boyns (2006) and Turner (2004) say it is time to reground sociology in its grand theoretical base.³⁹

analysis 'expands human history by creating a new path for interpretation ... *African* is identified with time, place and perspective.' He says further that without the Afrocentric perspective, 'the imposition of the European line as universal hinders cultural understanding and demeans humanity.'

³⁷ 'Grand theory' is any theory that attempts to explain the human experience generally or as Skinner (1985:1) puts it, 'a systematic theory of the nature of man and society.'

³⁸ The disavowal of grand theory in the social sciences stems from the same tradition that wants to make the social sciences more like the natural sciences. Fieldwork is therefore king and any theory worthy of enunciation must be capable of testing by some pseudo-quantitative methodology or run the risk of peremptory falsification. The only cognisable theories are those produced from the methods of an 'exact science' such as sampling, questionnaires, etc. Yet even these smaller range theories are susceptible to the same kind of criticism that attends grand theory, as long as it is human behaviour that is being dealt with.

³⁹ The fissure between affinities for grand theory and those for narrow-range theory occupies much the same space as that between theoretical and empirical sociology. As Wagner (1992:200) explains it,

Indeed, there is often little separating grand theory from the so-called mid-range theories that are currently deemed more acceptable. Turner (2004:11) argues that it has never been clear what middle-range theorising has meant, whether as used by its pioneering advocates or by those who currently invoke ‘this legitimating mantra.’

Turner (2004) has a point. Merton (1949) is the primogenitor of the fashion in sociology for preference of mid-range theory over grand theory.⁴⁰ Merton (1949) argued that Weber’s theory of ‘the protestant ethic’ and ‘the spirit of capitalism’ was a perfect example of mid-range theory. Hawkins’ (1997) exclusion of social Darwinism from grand theory further demonstrates how confounding the distinction can be. According to Hawkins (1997:32), social Darwinism fails to meet the criteria of grand theory because it possesses neither ‘a concrete specification of social and mental development nor any particular vision of the optimal conditions for human social and spiritual existence.’

If however we accept Hawkins’ (1997) parameters for demarcation of ‘grand theory,’ then accusations of grand theorising hereby are reasonably capable of rebuttal. It has already been notified in section 1.4.3 that little attempt is made to prescribe the optimality for achieving the Rule of Law. What is attempted is to meet the discourse

theoretical sociology emphasises the exegesis and interpretation of text. At its core are philosophical questions such as the nature of human existence; theoretical work is ‘justified by the depth and originality’ of its response to one or more of those questions. Empirical sociology by contrast places emphasis on the generation, analysis and interpretation of data and the methodological techniques used to accomplish the tasks. Empirical work is justified by the depth and originality of its contribution to one or more of the well-supported empirical generalisations that can be made about a social phenomenon.

⁴⁰ Merton’s (1949) call for theories of the middle range is essentially an attempt to integrate theoretical and empirical sociology. Merton, as Wagner (1992: 202-204) argues, was not discounting grand theory; rather he was proposing a methodology for achieving it. To Merton, both theoretical knowledge and empirical research were on their own sterile and useless. What was required, at least initially, was middle-range theory - a specialised theory about a particular sociological phenomenon, based upon empirical research about that phenomenon. As work continued on a middle-range theory, its scope would gradually enlarge and it would become less specialised. Eventually, there would be a natural progression from middle-range theories to a general theory of society.

of the Rule of Law on its current terms and subject it to critical analysis in the context of Africa.⁴¹ In other words, rather than formulating a grand theory, the dissertation is an exercise in critical discourse analysis, a specific kind of analysis which is elaborated upon next.

3.5 CRITICAL DISCOURSE ANALYSIS

3.5.1 Nature of Critical Discourse Analysis

The demarcation of critical discourse analysis as not just method but also goal of research is of relatively recent provenance. Discourse analysis is rooted in linguistics where at the turn of 20th century, the Swiss linguist Saussure provoked interest in investigating the structures on which meaning is built in verbal communication.⁴² Discourse analysis has since gone further to claim as its object the investigation of the underlying structures of knowledge generally.⁴³ In this broader context, it is known as ‘critical discourse analysis’ (Denzin and Lincoln 2005, Vaara and Tienari 2004, Jørgensen and Phillips 2002, Fairclough 1995).

⁴¹ In presenting this alternative perspective, much grand theory concerning the Rule of Law is up for question. Those conditions which are portrayed as culture-neutral and providing optimality for the Rule of Law, such as the existence of an independent judiciary and the separation of powers, are subject to critique.

⁴² Saussure (1916) fomented a shift in linguistics from the study of the origins and evolutions of particular languages to the study of the underlying structures of language. Saussure (1916) found that these were two axes upon which a language could be studied. The first axis was diachronic which studied a language as it changes over time; the other axis was synchronic and studied the constants which made up the system (structure) of the language. The import of Saussurean logic on structures into other fields gave rise to the demarcation of structuralism as a perspective to knowledge.

⁴³ Emphasising the progression beyond linguistics, Gee (2005:7) distinguishes between ‘discourse’ which refers to ‘language in use’ and ‘Discourse’ which refers to ‘ways of acting, interacting, feeling, believing, valuing and using various sorts of objects, symbols, tools and technologies – to recognize yourself and others as meaning and meaningful in certain ways.’ Phillips and Hardy (2002:5) define discourse analysis in its broad context as ‘a related collection of approaches to discourse, approaches that entail not only practices of data collection and analysis, but also a set of metatheoretical and theoretical assumptions and a body of research claims and studies.’ ‘Discourse’ is ‘an interrelated set of texts and the practices of their production, dissemination and reception that bring an object into being’ (Phillips and Hardy 2002:3).

By focusing on the structures of a discourse, critical discourse analysis brings under scrutiny the assumptions, biases, constraints, constructions, manipulations and politics that shape a discourse. Critical discourse analysis might not provide remediation but facilitates critique by questioning the basis of beliefs that would ordinarily be taken for granted as constituting ‘knowledge.’ One of the aims of critical discourse analysis is to demonstrate the lack of closure at the heart of conceptual systems and how that lack of closure is often suppressed in the pursuit of certitude.⁴⁴ Two major methods of critical discourse analysis are Foucault’s historical discourse analyses and Derrida’s deconstruction. The critique of Rule-of-Law discourse in this dissertation draws on both methods and they deserve a little explanation.

3.5.2 Foucauldian Discourse Analysis

‘Discourse’ in Foucauldian terms is a group of statements that determines the knowledge of a particular topic and assigns meaning to it at a particular period in history (Foucault 2003, Hall 2001). Those statements, Foucault (2003) argued, change over time in sudden and major shifts, brought about by shifts in the patterns of power. Knowledge is therefore a product of relations of power; what is regarded as ‘Truth’ at any point in time is but a particularistic signification which is without immanence and has been filtered through multiple forms and layers of manipulation and subjectivity:

‘...truth isn’t outside power or lacking in power: contrary to a myth whose history and functions would repay further study, truth isn’t the reward of free spirits, the child of protracted solitude ... Truth is a thing of this world: it is

⁴⁴ Critical discourse analysis is regarded as not just a methodology but also as a particular theoretical perspective linked with the social constructivist paradigm (Gee 2005, Vaara and Tienari 2004, Jørgensen and Phillips 2002). Jørgensen and Phillips (2002:4) explain that it is a complete methodological and theoretical package containing ontological and epistemological premises, theoretical models, methodological guidelines for approaching a research domain and specific techniques for analysis. Like Vaara and Tienari (2004) however, Jørgensen and Phillips (2002) are keen to stress that critical discourse analysis can be approached and applied in various ways and, where appropriate, even combined with non-discourse analytical perspectives.

produced only by virtue of multiple forms of constraints. And it induces regular effects of power. Every society has its regime of truth, its 'general politics of truth – that is, the types of discourse it accepts and makes function as true; the mechanisms and instances that enable one to distinguish true and false statements; the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true' (Foucault 2003:316).

Discourse in Foucauldian terms is 'so complex a reality that we not only can but should approach it at different levels and by different methods' (Mudimbe 1988: xi). Foucault himself directed his energies towards examining how and to what purpose and effect that knowledge was constructed. There were no power relations, he argued, 'without the correlative constitution of a field of knowledge, or any knowledge that does not presuppose and constitute at the same time power relations' (Foucault 1977:27). He identified 'statement,' a direct translation from the French 'énoncé', as the basic unit of discourse. The Foucauldian statement is not a proposition, utterance or speech acts but that which gives meaning to propositions, utterances and speech acts. Statements establish a network of rules – discursive formations - that determine what is meaningful and what is not, what can be narrated and what cannot, and what is arguable and what is not.

Foucault's purpose was not to find some transcendental Truth beneath discursive formations but to analyse the conditions by which truth or meaning came about. He did not denounce or laud the way truth was produced but, by chronicling how truth-claims arose and changed over different epochs, sought to show the contingency of the product on the manner, source and time of production. The approach has found expression in studies of how knowledge about Africa is created. Achebe (1977), Appiah (1992), Comaroff and Comaroff (1997), Ferguson (1990) and Mazrui (2005), among others, bear out Foucault to the extent that they show how conventional

wisdoms about Africa emanate variously from pre-colonial adventurers, missionaries, anthropologists, imperialists, nationalists, postcolonial academics and international financial institutions.⁴⁵

Mudimbe's (1988) *The Invention of Africa: Gnosis, Philosophy and the Order of Knowledge* is a remarkable work in the field. Outlining his object of study as the 'foundations of discourse about Africa,' Mudimbe (1988: xi) states that he is not looking at the results of classical issues of African anthropology or history but 'upstream of the results.' He explains that he is looking at 'precisely at what makes [the results] possible, before accepting them as commentary on the revelation, or restitution, of an African experience' (Mudimbe 1988: x). Mudimbe (1988) argues that knowledge about Africa derives exclusively from categorisations and conceptual systems of a Western epistemological order. He questions whether an 'African *Weltanschauungen*' and African systems of thought 'cannot be made explicit within the framework of their own rationality' (Mudimbe 1988: x). Mudimbe's (1988) object then is not only to challenge the hegemony of Western epistemology but to explore the possibility of another epistemology that is distinctly African. In doing the latter, he steps into the province of deconstruction, another popular approach to discourse analysis to which we now turn.

3.5.3 Derrida and Deconstruction

Deconstruction is commonly associated with Derrida although by Derrida's own writing a longer provenance may be drawn to Heidegger, the 20th century German

⁴⁵ In Foucauldian fashion, the essence of such analyses is not usually to discover the truth (which might not exist in the singular in any event) but to demonstrate how and why that which discourse contrives is not necessarily the 'Truth, the whole Truth and nothing but the Truth.'

philosopher.⁴⁶ While Derrida himself denied that deconstruction was a method or theory, the term has since been used to describe a method of critical analysis that emanates from or is similar to Derrida's.⁴⁷ The emphasis is on 'binary oppositions and strategies of displacement and reversal' which destabilise text 'by confronting it with the Other which it excludes and on which it depends' (Lacey 1998:173).

'Text' in its Derridan conception ultimately means more than written material or even speech; it refers to any physical or metaphysical knowledge acquired through reasoning, intuition or perception.⁴⁸ Deconstruction tries to expose gaps in text not as a way of suggesting how to complete it but to show its inevitable incompleteness.⁴⁹ The text is not compared with an external standard; rather it is examined within itself to demonstrate the fact of omission even if it may not be possible to specify what is actually omitted.⁵⁰ According to Johnson (1981) deconstruction is a specific kind of analysis that falsifies not the text but its claim to a transcendence of signification. With deconstruction, it is possible to demonstrate that Western thought (or any other

⁴⁶ Derrida discussed Heidegger at length and surmised that 'deconstruction owes a lot to Heidegger' (Derrida and Caputo 1997:14). In his 'Letter to a Japanese Friend' (1983) (hereinafter 'Letter'), an exposition of the origin and meaning of 'deconstruction,' Derrida stated that in using the term he was translating and adapting to his own ends the Heideggerian word '*Destruktion*' or '*Abbau*.'

⁴⁷ In the 'Letter' (1983), Derrida stated that deconstruction was neither an analysis nor a critique; it was also not a method. Cryptically, Derrida submitted that deconstruction was at the same time everything and nothing because all its predicates and significations were also deconstructible.

⁴⁸ Caputo's (1997) commentary to Derrida's explication of deconstruction at a 1994 Roundtable at the Villanova university, explains that 'the very meaning and mission of deconstruction is to show that things – texts, institutions, traditions, societies, beliefs, and practices of whatever size and sort you need – do not have definable meanings and determinable missions ... that they exceed the boundaries they currently occupy' (Derrida and Caputo 1997:31). While Derrida refused to be drawn into specifically defining deconstruction (preferring as in 'Letter' to describe what it was *not*), Caputo captures the meaning that is now conventionally assigned to deconstruction.

⁴⁹ Rosenfeld (1992) says that deconstruction stresses that every text refers to other texts. A text is not therefore 'a pure presence that immediately and transparently reveals a distinct meaning ... [but] embodies a failed attempt at reconciling identity and difference, unity and diversity and self and other' (Rosenfeld 1992:152).

⁵⁰ As Culler (2003:53) says, 'deconstruction appeals to no higher logical principle or superior reason but uses the very principle it deconstructs.'

thought for that matter) has not found that transcendental signifier which will give meaning to all other signs.

At its simplest, the Derridan neologism *differance*, formed from combining the French ‘*différer*’ (to differ) and ‘*déferer*’ (to defer), alludes to the continuous difference and deferral of meaning constituted between signifiers. Each signifier takes its meaning from its difference from and deference to other signifiers which while not being present are not completely absent since they help to establish whatever meaning is given to the signifier. All other signifiers leave a ‘trace,’ that trace being the amalgam of all other meanings which the signifier does not have but on which it must rely for its own meaning. The signifier is complete in itself but forever needing a ‘supplement’ for that completeness cannot be truly complete. The supplement enhances presence at the same time as it underscores absence. Thus there is never a unique, self-contained meaning but a play of signification.

Derrida therefore questioned the ‘logocentric’ bias of Western philosophy which, he argued, privileges presence over absence. If there is no transcendental signifier, no sign that stands on its own and is complete by itself, then the privileging is really arbitrary. The privileged term relates to the non-privileged term in a system of mutual differentiation and dependence (*differance*). The privileged term is not complete in itself; it is only a supplement just like the non-privileged term. By privileging, one of two mutually dependent terms is made foundational. Once the privileging becomes accepted, it is forgotten that the privileged term is only really a supplement or a metaphor. Deconstruction ‘ungrounds’ the privileging by showing that the same basis used to privilege one term over another can be used to privilege the other. In the

event, Derrida (2004:155) saw deconstruction not as ‘an enclosure in nothingness but an openness to the other.’⁵¹

3.6 DOING CRITICAL DISCOURSE ANALYSIS

3.6.1 Critical Discourse Analysis and the Research Question

The dissertation states the case that not only does the Rule of Law in Africa require a different kind of law from the familiar modern law but also that such other law is plausible in Africa. The dissertation constitutes an affirmative answer to the research question which asks whether it can be demonstrated, on the state of current knowledge, that another kind of law is needed for the Rule of Law in Africa. The current discourse of the Rule of Law, resulting in the Rule of Orthodoxy (about how the Rule of Law is brought about), does not admit to such enquiry. The dissertation applies critical discourse analysis in order to demonstrate that the enquiry is not only valid but also that its repression in current discourse is as a result of certain assumptions and power-knowledge structures which privilege a certain way of knowing about Africa and law over others.

Vaara and Tienari (2004) distil four essential features of critical discourse analysis as methodology for critique. The first is the revelation of assumptions that are taken for granted in social, societal, political and economic spheres and the examination of power relationships between different types of actors. Secondly, the researcher using

⁵¹ Derrida denied that his critique of logocentrism was nihilistic or meant that there was nothing beyond language. Rather it was about ‘the search for the *other* and the *other of language*’ (Derrida 2004:154). He emphasized that to deconstruct the subject was not to deny its existence. There were incontrovertibly subjects resulting from subjectivity. However, this did not mean that the subject was what it said it was: ‘[T]he subject is not some metalinguistic substance or identity, some pure *cogito* of self-presence; it is always inscribed in language ... [Derrida’s] work does not, therefore, destroy the subject; it simply tries to resituate it’ (Derrida 2004:156).

the methodology is not neutral as his role involves the adoption of a certain type of critical perspective. Thirdly, critical discourse analysis requires the location of specific texts in context. Finally, ‘intertextuality’ – the linking of specific texts or discursive acts to other texts or discursive acts – is crucial for understanding. These four features are discussed below in the context of the methodology of argumentation in this dissertation.

3.6.2 Revelation of Assumptions

The argumentation is premised on bringing into relief and challenging two major sets of assumptions underlying the Rule of Law Orthodoxy. The central theme of the first cluster of assumptions is that modern law, regarded as most developed in the West, is necessary for the Rule of Law. The second cluster of assumptions informs the belief that the Rule of Law cannot exist unless certain legal or political configurations, such as the separation of powers, are in place. The strategy of argumentation is then to draw attention to the historical contingency of such assumptions and the power-knowledge structures that maintain them or to ‘unground’ them based on deconstructive techniques.⁵² By so doing, discursive opening is created for challenging the beliefs about the Rule of Law that the assumptions prop up and for then going further to state the case for an alternative discourse of the Rule of Law.

⁵² In Chapter 4 for instance, the assumption of automatic linkages between the Rule of Law and modern law is examined and challenged. A Foucauldian style analysis is applied to show how the modern idea of the Rule of Law emerged and crystallised as well as how the concept came to be understood as inextricably linked with modern, positivist law in contrast to its earlier conceptualisation as the Rule of reason. The analysis then takes a deconstructive turn by challenging fusion of the Rule of Law with modern law and seeking to show that even in contemporary usage of the term there is a subliminal hearkening to the Rule of a higher-order ‘Law’ rather than merely the Rule of modern, positive law.

The methodology, as distinct perhaps from the substance of argumentation, is not without precedent in legal scholarship. As is discussed in Chapter 6, critical discourse analyses, including deconstruction and explorations of the power-knowledge nexus, have been applied to modern law by critical legal movements including Critical Legal Studies, Critical Race Studies and Feminism. In the fashion of Foucault and Derrida, such movements have generally been anti-foundational in their analysis of the modern legal order. They draw attention to the assumptions underlying modern law (and its fundamental doctrines), argue historical specificity and contingency, and, at the most extreme, broach the possibility of an Other or Others.⁵³ The critiques and perspectives provided by the critical movements offer both methodological and theoretical support for arguing the inappropriateness of modern law in Africa and the possibility of an Other that better facilitates the Rule of Law in Africa.

3.6.3 Non-neutral Stance

It is implicit in critical discourse analysis that the researcher-analyst is not a neutral observer and his role involves the acknowledgement of a certain type of critical perspective (Vaara and Tienari 2004). Interrogating a settled way of knowing requires taking a confrontational stance to the settlement, from the beginning, in order to challenge the underlying assumptions that are usually taken for granted. No pretensions are made to neutrality in this theoretical dissertation which states a case challenging the Rule of Law Orthodoxy. Opposition to current Orthodoxy is

⁵³ Constable's (2005) *Just Silences: The Limits and Possibilities of Modern Law* is an example of a critical discourse analysis of modern law. Constable draws parallels between language and law in terms of what is left unsaid by what is. She argues that law has not always been conceived in modern terms and need not always be so. '[The modern conception] has its own particular extension and limits – and, at those limits, its own particular openings to what Heidegger and Foucault have called the unthought' (Constable 2005:10).

indicated from the outset, the object of the dissertation then being to see if enough evidence can be marshalled from existing literature to support that position.⁵⁴ Indeed, critical discourse analysis is implicated by the nature of the research question: whether the plausibility of an alternative to a hegemonic discourse can be demonstrated.

Furthermore, critical discourse analysis is a social constructivist approach to critique (Wang 2006, Jørgensen and Phillips 2002). By adopting critical discourse analysis as basis of argumentation, the researcher subscribes to the particularity of perspective offered by social constructivism. Social constructivism holds knowledge to be socially constructed rather than comprising objective facts (Burr 2006, Jørgensen and Phillips 2002). The perspective ranges from moderate social constructivism to strong social constructivism, the former acknowledging some factual objective realities while the latter sees everything, including the notions of ‘real’ and ‘unreal’ as socially constructed (De Block and Du Laing 2008, Fopp 2008, Jones 2002, Mertz 1994). The argumentation in this dissertation is one of moderate social constructivism. Moderate constructivism permits the acceptance of an objective state of affairs known as the ‘Rule of Law’ while holding modern law as a socially constructed variable that can be dispensed with in pursuit of that objective state of affairs.

3.6.4 Location of Texts (and Discourses) in Context

With regard to critical discourse analysis, ‘text’ means not only written material but any matter capable of knowledge, including concepts and notions (Wang 2006).

⁵⁴ As has been seen in section 3.2, this non-neutrality is compatible with theoretical dissertations, the purpose of which could be to argue a particular point of view or state a case based on existing literature (Silverman 2009, Tedre 2006, Bhatt 2004, Silbergh 2001).

Locating texts in context, for the purposes of the dissertation, requires placing Rule-of-Law literature and even more importantly, the notions and theories expounded in that literature, in context in order to challenge them.

Of particular interest is the historical context. Discourse is often perceived as history so that the basis of the discourse is made manifest and better understood when the discourse is examined in historical context (Wang 2006, van Dijk 2005). Historical context of texts and discourses is therefore an important feature of this dissertation.

In Chapter 5 of the dissertation for instance, the Rule of Law Orthodoxy is falsified by locating its underlying assumptions in the Western contexts from which they historically emanate as well as showing the fundamental problems which an African context poses to the universality of such notions. This analysis is carried into Chapter 6 where an Afrocentric critique of modern law contextualises the hegemony of the modern legal form over the notions of ‘law’ that inform the Rule of Law Orthodoxy. The contextualisation provides the basis for challenging the inviolability of those notions of law in order to provide discursive opening to entertain other notions.

Chapter 6 goes further to analyse the contextual basis for early assessments of pre-colonial African law as not constituting ‘law’ properly speaking. Such analysis lays the foundations for the holding up, in Chapter 7, of African customary law as historically being a different kind of law from modern law. The argument then is that African customary law has historically required, produced and instilled different legal rationalities and social relationships to law from those required, produced and instilled by modern law. In Chapter 8, the discourse of modernity is historicised in order to

establish the basis for the putative concept of alternative modernity. This concept of alternative modernity permits Africa's problematic relationship with modern law (and statehood) to be viewed as normality rather than abnormality in the context of Africa, in which case an argument for a different kind of law is supported.

3.6.5 Intertextuality and Interdiscursivity

Texts and discourses do not occur in isolation. Individual texts are related to past or present texts and this is known as 'intertextuality' (Wang 2006, Wodak and Weiss 2005, Bazerman 2004, Fairclough 1995). Similarly, discourses are interconnected and overlap, the relationship being characterised 'interdiscursivity' (Wodak and Weiss 2005). Dealing with the dissertation's research questions on the Rule of Law in Africa involves contending with substantial intertextuality and interdiscursivity. Texts from different times and different disciplines as well as different levels and categories of discourse intersect and overlap to produce a discourse of Rule of Law in Africa.

In recognition of inherent intertextuality and interdiscursivity, the Rule of Law in Africa has not been approached in this dissertation as an isolated event confined to a particular discipline. Intertextuality and interdiscursivity necessitate an interdisciplinary approach (van Leeuwen 2005, Wodak and Weiss 2005). The analysis in the dissertation simultaneously makes and reveals connections between texts and discourses from law and development as well as from other disciplines including anthropology, history, sociology and political science. Chapter 8 for instance integrates discourses of modernity, African statehood and anarchism,

drawing on texts and contexts from different disciplines. This intertextual and interdiscursive approach is in aid of a composite argument that an African Otherness dictates recourse to other forms of law and statehood in the search for the Rule of Law.

3.7 LIMITATIONS OF CRITICAL DISCOURSE ANALYSIS

Critical discourse analysis has been criticised for the vagueness of the term ‘discourse’ and the lack of a clear demarcation between text and discourse (Wang 2006, Widdowson 1995).⁵⁵ More fundamentally, as a methodology for critique, critical discourse analysis has been called an ‘ideological interpretation’ rather than an analysis strictly speaking (Wang 2006, Widdowson 2004 and 1995). Proper ‘analysis,’ argues Widdowson (1995), involves the open-minded examination of several interpretations but critical discourse analysis does not do this. Instead, critical discourse analysis is a biased undertaking on two counts: first, it is ‘prejudiced on the basis of some [prior] ideological commitment’ and ‘then it selects for analysis such texts as will support the preferred interpretation’ (Widdowson 1995:169).⁵⁶

Wang (2006) submits that although there is validity to the criticisms, they do not ultimately detract from the value of work done with critical discourse analysis. Critical discourse analysis is more of a confrontational critique than one which pretends to objectivism. The major aim is to uncover ‘opaqueness and power

⁵⁵ ‘Discourse is something everybody is talking about but without knowing with any certainty just what it is: in vogue and vague’ (Widdowson 1995:158).

⁵⁶ Widdowson (2004:103) argues that the ‘interpretative partiality’ of critical discourse analysis ‘leaves a vast amount of text unanalysed and unaccounted for’ so that what is found are ‘critical discourse *interpretations*.’ While Widdowson’s (1995 and 2004) criticisms and Fairclough’s (1996) defensive responses are directed at critical discourse analysis in linguistics, the points both make are equally applicable to the broader forms of critical discourse analysis that focus on social theory.

relationships' (Wang 2006:62). Unlike most other approaches, critical discourse analysis makes its critical position explicit from the onset and involves an open-endedness that permits for new readings and new contextual information (Wang 2006, Fairclough 1996). Despite the criticisms therefore, Wang (2006:62) finds in critical discourse analysis a 'socially-committed scientific paradigm' that 'attempts to bring about change in communicative and socio-political practices.'

3.8 SUMMARY

This dissertation bears out the methodological imperatives of theoretical research. Theoretical dissertations need not contain primary data, their object being to extract new understandings from existing literature. This dissertation has relied entirely on library-based, secondary data from multidisciplinary sources to capture the broad context of discourse pertaining to the Rule of Law in Africa.

The literature review already contains much of the 'data' upon which research is conducted and results derived rather than just the foundations for research (as would have been the case in an empirical dissertation). The data is not such as is seminally elicited by observation, surveying or experimentation so there is little basis for narrating why certain techniques of data production, collation or measurement have been chosen over others. Theoretical dissertations should however still contain a methodology chapter like this one, reflecting on argumentative strategy and showing that the argument has been systematic. The methodology chapter of this dissertation accordingly rationalises the nature of data collated, the unit of analysis and the use of critical discourse analysis to challenge the Rule of Law Orthodoxy.

The unit of analysis is 'Africa,' defined as sub-Saharan Africa excluding South Africa. This unitisation is frequently adopted for research. It is regarded as a viable strategy because of certain peculiar commonalities across the delineated 'Africa.' The problematic state of the Rule of Law is the relevant commonality for this dissertation. Global Rule-of-Law Indexes establish Africa as the region with the lowest Rule of Law rankings, prompting the question 'why Africa?' Without prejudice to country specificities, the question justifies an 'area-studies' Africa analysis.

The dissertation is an exercise in critical discourse analysis. Critical discourse analysis is both a methodological and theoretical approach to critique that is located within social constructivism. Social constructivism is the view that knowledge is socially constructed. Critical discourse analysis focuses on the structures of a discourse to bring into relief and interrogate the assumptions, constraints and constructions that shape the discourse. Critical discourse analysis might not provide alternative constructions or solutions but improves understanding by questioning beliefs that are ordinarily taken for granted.

There are many approaches to critical discourse analysis, including Foucault's historical discourse analysis and Derrida's deconstruction. Foucault analysed the historical conditions by which 'truth' or meaning was produced and argued that the product was contingent on the manner, source and time of production. Derrida's deconstruction emphasises binary oppositions and strategies which destabilise 'text' by confronting it with the Other on which it depends for existence but which it excludes. Derrida questioned the 'logocentric' bias of Western systems of knowledge

which, he argued, privileged presence over absence. Deconstruction seeks to ‘unground’ that privileging by showing that the same basis for privileging one term over another can be used to privilege that other.

The research question is whether it can be demonstrated, on the state of current knowledge, that another kind of law is needed for the Rule of Law in Africa. The dissertation applies critical discourse analysis to demonstrate that not only is that enquiry valid but also that its repression in contemporary discourse of the Rule of Law results from certain assumptions and power-knowledge structures which privilege a particular way of knowing about law and Africa over others.

CHAPTER 4 – DECONSTRUCTING THE ‘LAW’ IN RULE OF LAW

‘Of all the dreams that drove men and women into the streets ... the “Rule of Law” is the most puzzling. We have a pretty good idea of what we mean by “free markets” and “democratic elections.” But legality and the “Rule of Law” are ideals that present themselves as opaque even to legal philosophers’ (Fletcher 1996:11).

4.1 INTRODUCTION

This chapter tackles the first subsidiary research question which is whether it can be shown that the Rule of Law is not necessarily the Rule of modern law. If the Rule of Law as an idea is inseparable from modern law, then the dissertation has no basis. If however, it can be established that the ‘Rule of Law’ is not synonymous with the ‘Rule of Modern Law,’ then space has been created for an argument that Rule of Law in Africa can be achieved by another kind of law.

This chapter analyses what the Rule of Law is, as distinct from the literature review in Chapter 2 which examined the place of the Rule of Law in development discourse. This chapter starts by tracking the idea from its modern origins in the Enlightenment in the West. The chapter then explains the fundamentals of the idea before revisiting the traditional division into formal and substantive conceptions. The chapter argues that the two conceptions do not quite do justice to contemporary notions of the Rule of Law. The chapter provides a third conception, which interprets the Rule of Law as a state of functionalism. The chapter argues that this third conception is closest in meaning and coverage to contemporary usage.

The chapter argues that when the Rule of Law becomes conceived of as a state of functionalism, the case can be more easily made that it does not need to be predicated on modern law. Continuing with the historical discourse analysis, the chapter justifies the preference for the functional conception by showing that originally the ‘Rule of Law’ was tantamount to the Rule of Reason. The term alluded to a supervening order of natural justice to which positive or temporal laws would be subject. The chapter argues that contemporary usage of the term retains that allusion despite a Rule of Law Orthodoxy that equates ‘Law’ in the term to a certain type of legal configuration. The chapter then makes the case for liberating the ‘Law’ in the Rule of Law from capture by modern law. The chapter ends with a summary.

4.2 MODERN HISTORY OF AN ANCIENT IDEA

4.2.1 An Enlightenment Idea

The Rule of Law is hardly a modern invention. With a provenance stretching as far back as ancient Greco-Roman philosophy, it has long been an integral part of Western jurisprudence.⁵⁷ It is now routinely proclaimed a universal ideal.⁵⁸ There is evidence however that, historically, some legal cultures outside the West held the need for the Rule of Law as a less-than-salutary state of affairs.⁵⁹

⁵⁷ Mathews (1986:4-5) traces the evolution of the concept from the writings of Plato and Aristotle through medieval Western Europe to current day.

⁵⁸ Hunt (1978:142) calls it a ‘common presumption’ that not only is it desirable to have a system of authoritative rules but that a ‘civilised society ... is one characterised by the subjection of all, rulers and ruled, to a common set of rules.’ Hong (1999:147) says that the Rule of Law is ‘an ideal propagated as a universal organising principle for constitutional orders ... especially across the Third World.’

⁵⁹ Liu (2003) shows how Confucianism emphasised the rule of virtue as a higher ideal than the Rule of Law, the latter being necessary only for ignorant or uncivilised persons. Current writing from Asia indicates lingering scepticism about the Rule of Law. Hager (1999) analyses the Asian objections, one of which, in shades of Confucianism, is that the Rule of Law relies too heavily on rules and does not sufficiently trust the capacities of ‘wise persons.’ Interestingly, Tamanaha (2004) notes that even Plato and Aristotle preferred the rule of the ‘best men’ to the Rule of Law but finding no means to guarantee the former, opted for the second-best that the latter was.

The modern form of the concept is mainly the product of 18th and 19th century philosophising in Western Europe on the lawful state and the rights of man (Tamanaha 2004).⁶⁰ Support for monarchies and their divine rights to rule were rapidly eroding across Europe and scholars argued over what conferred governmental authority (Gordon 2006, Tamanaha 2004, Manent 1995, Zvesper 1993). The Englishman Locke provided one of the most influential early contributions, in the late 17th century. His view was that government is based on popular consent and without such consent a government's actions were without authority (Faiella 2006, Spellman 1997, Grant 1991, Locke 1689).

On the question of the proper layout of government, the French aristocrat Montesquieu prevailed (Gordon 2006, Manent 1995). Montesquieu argued in favour of constitutions, as original statements of the will of the people. He also proposed the separation of powers, arguing that if legislative, executive and judicial powers were not separated, there could be no liberty as the governed would then be exposed to the tyranny of an absolute ruler on whom there was no check (Gordon 2006, Manent 1995).

In this period too, the notion of individual rights was entrenched. In opposition to absolute monarchical, theocratic or military power, it was established that individuals were entitled to rights of which they could not be deprived except by due process in accordance with law (Manent 1995). Between 1776 and 1791, important landmarks occurred in Western constitutionalism and democratic development. Across the

⁶⁰ Rule governance had been notably enshrined in medieval Europe in the Magna Carta (1215) which forbade deprivation of property except according to the laws of the land.

Atlantic, the American Declaration of Independence on 4 July 1776 endorsed Locke's thesis on governmental legitimacy (Faiella 2006, Spellman 1997). The Declaration held it 'self-evident' that all men were endowed with 'inalienable rights' and that to secure those rights, governments were 'instituted among men, deriving their just powers from the consent of the governed.'

In 1791, the U.S. Bill of Rights, following on the French Declaration of the Rights of Man and the Citizen of 1789, articulated the need for protection of individual rights from potential tyranny through mechanisms that constrained the sovereign's arbitrary use of power. The phrase 'Rule of Law' did not appear in these documents but the spirit of the concept was already manifesting (Tamanaha 2004). The growing democracies of America and Europe subscribed, in theory at least, to constitutionalism as giving tangibility to popular consent, to limitation of government by law as curbing excess and arbitrariness, and to the endowment of individuals with certain inalienable rights. In the next century, the Rule of Law would gain conceptual specificity and become a term of art.

4.2.2 Continental European Versions

Continental Europe of the 19th century formulated state-centred versions of the Rule of Law, as in the German *Rechtsstaat* and French *Etat de Droit*, which emphasised the state acting according to law. The German philosophers, Stahl and Mohl, propounded the two main theories of the *Rechtsstaat* in the first half of the century (Costa 2007, Gozzi 2007, Laquieze 2007). Kant had earlier anticipated the concept by arguing that the state's role should be limited to realizing the law or 'the idea of law' (*Rechtsidee*).

Stahl saw the *Rechtsstaat* in terms of a state acting in legal form and determining the ambits of its powers according to law (*in der Weise des Rechts*) (Costa 2007, Gozzi 2007, Laquieze 2007). Stahl distinguished the *Rechtsstaat* from the traditional patrimonial state where kings and nobles used the law as their tool and from the notions of law and the state emanating from the popular will (*Volksggeist*). For Stahl, the emphasis in the *Rechtsstaat* was in the formal, legalistic manner in which the state acted rather than the values that constrained the state (Costa 2007, Gozzi 2007, Laquieze 2007).

Mohl had included both formal and value-laden elements in his conception of the *Rechtsstaat*, arguing that the prevention of state encroachment on such values as juridical equality and human rights were important guarantees against despotic government. Stahl's reformulation of the concept severed Mohl's link between legitimacy and legality, reducing the relevance of the *Rechtsstaat* to the manner and method of the carrying out of government action (Costa 2007, Gozzi 2007, Laquieze 2007).

By the middle of the 19th century, the *Rechtsstaat* had been popularised beyond the Rhine by the works of von Gerber, von Jhering, Laband and others (Laquieze 2007). It would have an important influence on French legal scholars of the Third Republic who used it to ground theories of *Etat de Droit* (Laquieze 2007). Under the French doctrine, the state had to act exclusively by means of law and was subjected to law. The development of parliamentary sovereignty raised questions of what limits could be placed on the state's law-making powers. The French doctrine did not accede easily to the German theory of self-limitation of the state which held that the power of

the state was limited only by the state itself. Duguit argued that a limit which lay at the discretion of those to whom it was applied was no limit while Michoud contended that the powers of the sovereign were subject to a higher rule of justice, the natural law (Laquieze 2007).

4.2.3 English Version

In England, Dicey's (1885) robust defence of the common law resulted in a formulation oriented more towards the rights of the individual (Zolo 2007, Matthews 1986).⁶¹ Dicey's three-pronged elaboration of the Rule of Law was to the effect that everyone is equal before the law, no one could be punished except according to the law in force and the constitution was as established by the rights determined by the courts. Dicey's last prong, privileging judicial decision over the need for a written constitution was not only a case for England's unwritten constitution but also an attack on the French administrative law system.

Dicey (1885) believed that what he called a judge-made constitution was superior to written constitutions like those of the U.S. and France. He argued that judicial decisions had the advantage of not just enunciating rights as written constitutions did but also of determining how those rights would be enforced. Written constitutions, he said, lacked the ability to provide for enforcement of rights in which case such documents were often nothing more than a sterile enunciation. While Dicey's deprecation of a written constitution might have failed the test of time, his first two

⁶¹ Whilst Dicey (1885) is acknowledged as popularising the phrase 'Rule of Law,' its coinage is credited to Hearn (1867) by Dicey himself and by Mathews (1986) and Zolo (2007). Hearn (1867:88) had written that the law was so indisputably supreme in England that although wind and rain could enter the hut of a pauper, the King ('the highest of the realm') could not.

principles along with the state-centred concept of *Rechtsstaat and Etat de Droit* have become the hallmarks of modern conceptions of the Rule of Law.

4.3 FUNDAMENTS OF THE IDEA

4.3.1 Supremacy of Law

The common thread of aspiration running through Dicey's and the continental formulations was the supremacy of law in the conduct of human affairs. The arbitrary exercise of power would be constrained by and through law. Government and individual alike would be subject to law. No power could be exercised by one over the other except in accordance with law.

The Rule of Law thus operates at two levels of analysis. The first is at the level of regulation of the intercourse between government and its citizens. This is the level at which 'government under laws,' the focus of the *Rechtsstaat and Etat de Droit*, approximates with the Rule of Law.⁶² At this level, the Rule of Law is a principle of constitutionalism.⁶³ Government is to be subject to law; its exercise of power over the governed is to be pre-ordained by law, accord with law and be constrained by law.

⁶² Rule-of-Law discourse usually focuses on the first aspect of the Rule of Law, relating to the power relations between the state and its citizens. Mathews (1986:1) calls the Rule of Law a doctrine of public law which concerns primarily the relationship between the government and the subjects of the state, although its prescriptions are binding on private persons as well.

⁶³ For instance, the treatment of the Rule of Law by Allan (1985 and 2003) is as a constitutional principle. Mathews (1986) also ultimately limits his analysis to the constitutional-law aspects.

The second level of analysis of the Rule of Law is the collective relationship of the citizenry, including government officials *qua* citizens, with law.⁶⁴ There is meant to be equality of citizens before the law, all are meant to be subject to law and the law is supreme in their interactions with one another. ‘Supreme’ here is multi-faceted, contemporaneously expressing various meanings such as ‘ultimate,’ ‘dominant,’ ‘omnipresent,’ ‘omnipotent,’ etc.⁶⁵

4.3.2 Liberalism

The Rule of Law, in both its English and Continental variations, is steeped in liberalism (Tamanaha 2004). This is only natural given that theories of the Rule of Law were products of the wave of liberalism that took root in Western philosophy in the 17th and 18th centuries (Tamanaha 2004, Manent 1995). The essence of liberalism was liberty and equality.

Liberal thinkers were united in opposition to intrusion on the privacy of the individual by others, especially the all-powerful state. The Englishman Mill, one of the foremost liberal thinkers, stated in 1859 that the only ‘freedom’ worthy of the name was that of pursuing ‘our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it’ (Tamanaha 2004:32). Competing

⁶⁴ From the perspective of this dual-faceted cognition, Dicey’s much-criticised formulation is still quite relevant. Abstracted from Dicey’s formulation are ‘three kindred conceptions’ which together make up the purport of the Rule of Law: (i) constraint by law of the arbitrary exercise of power by government (ii) subjection of all citizens equally to law (iii) independent adjudicative resolution of disputes. Dicey’s location of these principles in the workings of the common law has been the basis of much of the criticism. Undue nitpicking over the meaning of the terms that Dicey used inveighs much of the criticism with spuriousness as Rukwaro (1994:65-66) successfully shows.

⁶⁵ Paraphrasing the first Judeo-Christian commandment, the Rule of Law on this level of analysis implies that ‘law shall be the law and none shall be law but the law.’ On this second level of analysis, a society characterised by the Rule of Law is a ‘law-abiding’ (as opposed to ‘lawless’) society.’

theories of liberalism converged on the Rule of Law as the way to secure this freedom within the framework of the Westphalian state.

The liberal overtones of this 'modern' Rule of Law differentiated it from the Rule of Law in Greco-Roman philosophy which had scarcely countenanced individual liberty (Tamanaha 2004, Berlin 1969). The Greeks had conceived of liberty in collective terms. The law was supreme because it resulted from the collective will of the citizenry and enforced communal norms. In common with later liberal constructs, the restraint of tyranny was the rationale behind Greek conceptions of the Rule of Law but unlike the liberal constructs, considerations of the liberty of the individual to do as he wished were largely irrelevant to the Greeks. As Berlin (1969) says, the development of personal liberty as something sacred in its own right derives from conceptions of liberty which are no older than the Renaissance or Reformation.

Liberalism has three conceptions of liberty (Tamanaha 2004). Political liberty is the consent to and participation in the making of the laws which the individual was obliged to follow (Tamanaha 2004). The individual thus became ruler and ruled at the same time. There is also legal liberty, the essence of which Montesquieu captured in the statement that liberty is the doing of what the law permits (Tamanaha 2004). There is also personal liberty which is the freedom of the individual from infringement by government. Personal liberty was the minimum amount of autonomy left to the individual after he consented to be bound by the law (Tamanaha 2004).

The essence of the three liberties was submission to law in return for guarantees of freedom from imposition and tyranny. The problem that nags liberalism is that

submission to law means giving up the freedom to do whatever one wishes. The liberal argument however is that if everyone were free to do as they wished, then there would be no freedom as there would be innumerable encroachments on everyone by others. This is a sort of ‘negative freedom’ then. By submitting to the Rule of Law, the individual and society as a whole are guaranteed freedom from chaos and disorder.

4.3.3 Rule of not by Law

The Rule of Law as conceived by liberalism is much more than the existence of law and order although it is clear that there cannot be the Rule of Law without law and order. Law and order can however also be guaranteed by autocratic regimes which do not qualify as being Rule-of-Law compliant. It is also not sufficient that a government rules through laws as that would only be rule *by* law, the mere instrumental use of law by government to achieve its purposes.⁶⁶ For there to be the Rule of Law, the government must itself, as its citizens, be *under* law.⁶⁷

⁶⁶ The common example given of a rule-by-law regime is China (for instance, by Fogelklou 1997:38), where the government ostensibly justifies action by formal laws yet is not seen as a government under laws. Carothers (1998:2) defines rule by law as ‘regular, efficient application of law but [without] the necessity of government subordination to it.’

⁶⁷ Nonet’s and Selznick’s (2009) typology of legal ordering distinguishes between repressive, autonomous and responsive orders. In the repressive system, law serves the purposes of the politically powerful people who are only loosely bound by its constraints. In autonomous law systems, law is an independent restraint to political power. Thus autonomous law system is synonymous with contemporary understandings of the rule of law while repressive systems equate with rule by law. Responsive orders are aspirational. They represent Nonet and Selznick’s (2009) attempt to infuse in the formal legality usually associated with autonomous systems a substantive justice that remediates the inequity that sometimes results from uniform rule application.

4.4 TRADITIONAL CONCEPTIONS

4.4.1 Formal Conception

The distinction between rule under law and rule by law is not always easy to draw in practice. The ‘formal conception’ of the Rule of Law, usually set off against a ‘substantive conception,’ does not make that task easier. According to the formal conception, the Rule of Law will exist where laws have certainty, generality and prospective application, are made according to formally established procedures and published, and are the basis for resolving disputes by neutral judicial means (Ngugi 2005, Craig 1997).

The problem with the formal conception of the Rule of Law is that it is normatively empty.⁶⁸ It contains no guide as to the purpose or content of laws that are made according to the procedural prerequisites. Strictly speaking therefore, even rule by law would qualify as a formal version of the Rule of Law. In that case the Rule of Law would have no special utility as it would simply equate with rule by government.

As Tamanaha (2004:92) points out, every modern state would then have the Rule of Law in this sense, especially if the extreme view is entertained that all utterances of the sovereign are law. The German *Rechtsstaat* and French *Etat de Droit* which concentrate on the state acting by and according to law carry connotations of rule by law but there is little doubt that even those conceptions never identified the Rule of Law exclusively in terms of rule by law.

⁶⁸ Friedman (1972:489) says that the formal conception amounts to a rule of organisation and is ‘as unassailable as it is empty.’

4.4.2 Substantive Conception

Substantive conceptions of the Rule of Law attempt to fill the gap left by strictly formal conceptions by infusing substantive goals such as justice, freedom and human dignity into the Rule of Law. Legality is not enough and must function to produce material justice. Laws failing to advance material justice are bad laws and not in accordance with the Rule of Law, even if the tests of legality are satisfied (Ngugi 2005, Craig 1997).

A difficulty with the substantive approach is of course that there is no consensus on the bounds of 'justice' and it is open to subjective political colouration which laws are 'good' or 'bad.'⁶⁹ Allied to that is the criticism that infusing such goals as social justice serve to rob the Rule of Law, as a principle, of any specificity.⁷⁰ It is argued that the loss of faith in natural law and contemporary moral pluralism render it impossible to agree any *a priori* principles to which the content of laws must conform. Habermas (1996:449) thus declares that the justice of a law is determined not by its content but by the particular procedure by which it comes about.

Raz (1979) says that the doctrine should not be confused with democracy, substantive justice, etc. He argues that the good in the Rule of Law is something entirely different – it lies in the ability given to people to plan their activities by knowing in advance

⁶⁹ Craig (1997:487) says that where government action is criticised based on a substantive conception of the Rule of Law then intellectual honesty demands 'clarity as to the particular theory of justice which informs the critique.

⁷⁰ Raz (1977:196) says that if the Rule of Law is the rule of good law, to explain its nature would be to propound a complete social philosophy, in which case the term would lack any useful function. Intermediary conceptions such as Dworkin's (1985) and Mathews' (1986) have sought to sidestep the problem by advocating a rights-based vision of the Rule of Law. Even Raz (1994:373, 376) while maintaining his insistence that the core idea is the 'principled, faithful application of the law,' says that the protection of rights is presupposed because the 'Rule of Law respects those civil rights which are part of the backbone of legal culture'. The rights' based version however is little more than another substantive approach to the Rule of Law and suffers from the same criticism of open-endedness.

the legal consequences. Hayek (1944) had similarly contended that the basic intuition behind the Rule of Law was that law must be capable of guiding the behaviour of its subjects. The political neutrality of formal legality made it more likely to command consensus across the political spectrum. Conceptualising the Rule of Law in such formalistic terms made it easier to achieve than a substantive version on which there could never be consensus. Substantive legality would always be open to debate and the Rule of Law would thereby be rendered incapable of universality.

4.4.3 Insufficiency of Either Conception

Despite the imprecision of substantive conceptions, the formalistic approach cannot suffice. Even the strongest proponents of the formalist conception are the first to admit that a tyrannical regime, the anti-thesis of the ‘Rule of Law’ in common parlance, might make its laws in compliance with the Rule of Law as so ‘thinly’ delineated. Raz (1979:211) who adopts a purist, formal approach concedes that a non-democratic legal system, based on denial of human rights and on multi-faceted social inequalities ‘may, in principle, conform to the requirements of the Rule of Law better than any of the legal systems of the more enlightened Western democracies.’⁷¹

To ameliorate concern on the ambiguity of formal legality, Fuller (1964) argued further that legal systems with formal characteristics were more likely to have laws with fair and just content. The problem of course is that Fuller’s case is one of probability. No guarantees can be given that the formal version will yield justice, in

⁷¹ Allan (2003:38) criticises Raz’s formalist conception of the Rule of Law as ‘too modest to be of value for the purposes of constitutional theory.’

recognition of which Raz (1979:225-6) has likened the formalist Rule of Law to a sharp knife that may be put to good or bad use.

Formal theorists therefore seem to be motivated by expediency. Justification for formal legality as the limit of the Rule of Law proceeds on the inability to procure consensus on substantive content. We must settle for a formalist conception of the Rule of Law on which there is more likelihood of agreement and the achievement of which can be more easily measured in practice. Furthermore, even where repression is not constrained by the formal legality, such 'lawful repression' is to be preferred to 'lawless repression.' Still, the formal conception will not do if the Rule of Law is to live up to its philosophical billing. As Tamanaha (2004:96) observes, the 'emptiness' of formal legality is inconsistent with the long tradition of the Rule of Law.⁷²

Historically, subscription to the Rule of Law was motivated by the need to restrain tyranny by the sovereign. That object would hardly be satisfied if, consistent with formal legality, the sovereign could do as it wished provided it employed certain, clear and general legal rules which were publicized in advance. It was always understood that the Rule of Law meant there were limits to what the government could do, over and above the mere compliance with formal legality. The limits were substantive, even if based on shifting notions of natural law, custom, religious morality or the collective good. Tamanaha (2004) submits that by discarding this traditional orientation towards substantive limits on government power, formal legality veers more towards the idea of rule *by* law than the Rule of Law.

⁷² Hart (1961:202) finds the idea of legalism alone, being 'compatible with great inequity,' of limited value. Reynolds (1989:3) argues that any theory for the avoidance of totalitarianism 'will need more teeth' than formal legality since some of the most barbarous actions of the Nazi regime were carried out through laws that complied with formal legality.

The formal conception remains integral to the Rule of Law but as Reynolds (1989), Waldron (1989) and Matthews (1986) recognise, it cannot be the complete theory. At best, it must be regarded as the ‘kernel or core principle’ of the Rule of Law.⁷³ A ‘thicker’ conception is required. The Rule of Law must combine the formalistic approach with substantive elements.⁷⁴ Admittedly, infusing substantive elements of a particular morality into the concept might make the concept open-ended at the same time as it lays the concept open to charges of ideological absolutism. It becomes a concept to which an unending list of hazy things such as free markets and democracy can be added. However, whatever is added must have a libertarian purport. Recognising this libertarian bent directs conceptualisation towards a hybrid that is intuitively more fulfilling than either substantive or formalist conceptions.

4.4.4 Hybrid Conception

As has earlier been seen, the Rule of Law in its current incarnation is a product of liberal ideologies that took root in Western Europe during the Enlightenment. While notions of Rule of Law preceded liberalism, the current conception is inseparable from liberalism. In the transformation of the Rule of Law into a development paradigm however, the attempt has been made to enhance its claims to a universal ideal by downplaying its liberal orientations.⁷⁵ Yet, it is that underlying liberalism – even if not expressly acknowledged - that gives the Rule of Law its

⁷³ Allan (2003:1) purports to offer an account of the Rule of Law that, ‘though primarily an ideal of procedural fairness ... has important implications for permissible content of ... laws and policies.’

⁷⁴ In conceptualising the Rule of Law, Allan (2003:1) expressly rejects any rigid distinction between procedure and substance, as ‘artificial and unworkable.’

⁷⁵ ‘Liberalism’ is now something of a pejorative term. Hutchinson (1989:5) says that although liberalism once contributed to improving the social lot, it has ‘outlived its usefulness and become a dangerous political anachronism.’

current utility as a development paradigm. As Li (1999) says, the modern Rule of Law is the institutional realization of liberal ideals. Once the libertarianism of the Rule of Law is admitted, the Rule of Law becomes a term of art to describe a state of legal-rule governance pervaded by a normativeness that channels the legalistics towards the consistent achievement of a libertarian morality.⁷⁶

Formal theories of the Rule of Law might claim ideological neutrality but they are ultimately premised on a residue of liberal notions. Liberal ideology conceives of the human being as rational animal. With liberty as the rational craving of this animal, it is more likely than not that formal rule-governance will ultimately be captured by libertarian tendencies rather than repressive ones. This is the unspoken grounding for Fuller's (1964) assertion that formal rule-governance is likely to produce just substantive laws. Even as it is accepted that formal rule-governance will sometimes end up in Fascism, the event is assumed away as exception rather than the norm. Raz's (1979) scary commentary on the neutrality of the formal Rule of Law is thus tempered by the assurance that when forced to operate within the bounds of formal legality, rational human will more often than not opt for libertarian outcomes.

Close examination of formal theories reveals liberalism as the substantive prop for the formal version of the Rule of Law. The moral good of formal legality is grounded in liberal terms. The predictability celebrated by formal theorists as the essence of their version is 'legal liberty.' Hayek (1944) argued for this predictability as the instrument for actualization of a liberal economic system. Hayek also justified the formal version on the grounds of a formal equality. The requirement for generality of application of

⁷⁶ Ojwang and Kuria (1977:114) conceive of the Rule of Law as covering strict legalism but 'additionally imposing a transcendent, moral norm on the legalistics of the matter.'

law means that a certain type of equality is guaranteed as law would apply equally to everyone according to its terms, even if those terms produced substantive inequality.

Contrary to its representation as a 'neutral ideal' therefore, the Rule of Law is sequestered in liberal ideology. There are expectations of liberal outcomes that cannot be separated from the Rule of Law. Liberal primogenitors of the modern conception, such as Locke who observed that tyranny begins where law ends, would be hard put to understand that the Rule of Law and tyranny can stand together (as formal theorists say). The bounds of liberalism provide delimitation for the substantive content of the Rule of Law. Once that liberalism is openly acknowledged, then even the formalist version must be imbued with a liberal substantive bent or fail to pass muster. The Rule of Law is meant to secure the liberal goals of liberty, equality and autonomy of the individual. No matter how difficult those goals may be to define or even to measure, at least we have specific substantive direction.

The liberal context is manifest in the immediate genesis of the Rule of Law as a contemporary development paradigm. Neo-liberal economics and a human rights' advocacy steeped in liberalism were the source of current conventional wisdom on the Rule of Law as development (Trubek and Santos 2006, Kennedy 2006, Tamanaha 2004). Even when a narrow formalist definition is adopted in development discourse, the Rule of Law will hardly be said to be satisfied in practice if the outcome is antithetical to the major tropes of liberalism.⁷⁷ Formal legality will be probably be easily satisfied but the 'Rule of Law,' at least in current popular usage, would not.

Adverting to contemporary usage is important because, as Tamanaha (2004:111)

⁷⁷ It is unlikely that in the contemporary deployment of the term, a United States embroiled in violent rebellion against colonial law, genocide against Native Americans and slavery of and discrimination against African Americans will measure up to the set standards or expectations.

reminds us, popular opinion exerts considerable force in determining what an ideal represents, even if theorists will claim (as they are wont to) that the popular understanding is mistaken. The Rule of Law in contemporary usage is a cluster of standards, processes, expectations and outcomes that extend beyond formal legality.⁷⁸

4.4.5 Salvaging the Rule of Law

Raz (1977:196) has argued that if the Rule of Law is the rule of good law, to explain its nature would be to propound a complete social philosophy, in which case the term would lack any useful function. This seems to be an overstatement. The Rule of Law is ultimately intertwined with liberal philosophy. Even if it can be argued that the idea preceded the emergence of liberalism as singular ideology, it has now been so captured by liberalism that it cannot be given meaning without recourse to liberalism. Contrary to the arguments of formalists like Raz (1977) therefore, the conceptual problems of combining formal and substantive approaches should not serve as justification for discountenancing the ideal of the Rule of Law.

In any event, definitional imprecision has never been the reason for denying cognition to legal or political doctrine. As Zolo (2007) says, what matters is not semantic definiteness or ideological neutrality but the theory's ability to reasonably communicate or convey an experiential state of affairs. Friedman (1972) even calls it a matter for rejoicing, not lament, that the content of the Rule of Law cannot be

⁷⁸ Allan (1993:21-22) proceeds along the same lines when he says that the Rule of Law primarily means 'a corpus of basic principles and values, which together lend some stability and coherence to the legal order ... The Rule of Law is an amalgam of standards, expectations, and aspirations: it encompasses traditional [liberal] ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and the governed. Nor can substantive and procedural fairness be easily distinguished: each is premised on respect for the dignity of the individual person.'

determined for all time. That way, according to Friedman (1972:503), the concept ‘is not so petrified as to be unable to respond to the unending challenges of ... changes in society.’ Moreover, as we shall now argue, it is possible to sidestep the polarization between formal and substantive conceptions and approach the Rule of Law from another perspective. This third perspective is not only more than a sum of both conceptions but also seems to better bear out the ‘Rule of Law’ in contemporary usage.

4.5 FUNCTIONAL CONCEPTION

4.5.1 Rule of a Higher Order ‘Law’

Accepting the liberal orientation of the Rule of Law and adverting to contemporary usage of the term directs us towards the proposition that the Rule of Law is actually a term of functionalism that privileges outcomes over the form and content of temporal laws. In contemporary usage, the ‘Rule of Law’ is not just about the form and content of law but about a functional state of affairs that is premised on liberal ideals. This directs us to a conception of the Rule of Law as a state of social functionalism that contains an optimal mix of predictability, cohesion, equity, security, law and order, freedom and other libertarian desirables. The conception evokes much more than the legal purist’s view of the term as the rule over society by a particular type of legal structures and processes: it expresses social outcomes which go beyond law but of which the effectiveness of the prevalent legal form is a fundamental determinant. Conceived in this way, the term aspires to transcend particularistic forms and structures of mundane rules and harkens to a higher order. The academic fixation with the process and content of temporal legal rules operates to mask this higher-order

aspiration and may be the convenient end-product of an inability to provide tangibility to this higher order.

To elaborate this higher-order conception, Allott's (1980:2-5) three-pronged characterisation of the word 'law' is useful. '*Law*' is a particular legal system prevailing in a country or community while '*law*' is a rule or norm of the given legal system. Formal and substantive conceptions of the Rule of Law operate at the levels of '*Law*' and '*law*.' Our higher order operates at the level of LAW. Allott's LAW is a philosophical abstract proceeding from *law* and *Law*. Our LAW is however different. It is a higher order against the platonic form of which *law* and *Law* is ultimately to be evaluated. It is at the level of this higher order that law equates with 'pure reason' so that the Rule of Law is the rule of reason as Aristotle famously observed. This is a conception of LAW as rationalism; LAW is a synonym for reason. We thus have a higher order – LAW – by which to evaluate the actual *Law* and *law*.⁷⁹

A rare allusion to the distinction between the Rule of LAW and the Rule of *Law* or *law* is provided by Fletcher (1996:25):

'There are in fact two versions of the Rule of Law, a modest version of adhering to the rules and a more lofty [*sic*] ideal that incorporates criteria of justice. We shuffle back and forth between them because we are unsure of the term "law" in the expression "the Rule of Law."

To explicate what he calls a 'rarely perceived ambiguity in English,' Fletcher then goes on to show that the distinction between the two concepts of law is widely recognised in other languages but not in English. Continental European languages,

⁷⁹ Friedman (1972:489) finds that in its ideological sense, the Rule of Law implies the yardstick by which to measure 'good' against 'bad' law.

for instance, have a specific word for law that expresses positive law – those laws laid down by an authoritative temporal body. The word is ‘*Gesetz*’ in German, ‘*loi*’ in French and ‘*ley*’ in Spanish. Each of those languages then has a second word that means law of a higher notion. This alternative meaning of law is expressed as ‘*Recht*’ in German, ‘*droit*’ in French and ‘*derecho*’ in Spanish. The nearest translation of these terms in English would be ‘Right,’ which was expressed as ‘Law’ in archaic English. Accordingly Fletcher (1996:25) argues, ‘[t]he connotation of Right ... is typically that of good or just law, which is binding on us because it is good or just ...’

Flathman (1994) has similar analysis. He distinguishes between ‘law’ and ‘LAW,’ the latter being ‘pure and perfect law.’ ‘It is a law,’ says Flathman (1994:312) of LAW, ‘unsullied by the contingencies and indeterminacies that come along with historicity, narrativity and imagination.’ It is to the same effect, to give context to the ‘law’ in Rule of Law, that Neumann (1986) distinguishes between law in the political sense and law in the material sense. The former refers to every command of a sovereign state, whether just or not. The latter refers to ‘such norms of the state as are compatible with defined ethical postulates whether such postulates be those of justice, liberty, equality or anything else’ (Neumann 1986:4). The ‘law’ in the Rule of Law is then law in the material sense whereas casting the ‘law’ in the political sense would merely make Rule of Law synonymous with the rule of man.

From this perspective, the Rule of Law may be recognised as a compound term, the whole being greater than the sum of its parts. It signifies a state of functionalism in which there is organisation of society according to pre-ordained rules (‘laws’) but which rules must contrive to produce certain substantive outcomes including

predictability, equity, justice, liberty and other such utilitarian aspirations. The accent is neither on ‘rule’ nor on ‘law’ alone but on both together. The Rule of Law then becomes the short form of the phrase ‘LAW as the ruler of the rule of men.’

4.5.2 Capture of the ‘Law’ in Rule of Law by Positive Law

It is easy to see the coincidence between a higher order LAW and the concept of natural law especially in the latter’s incarnation not as divine will but as universal reason.⁸⁰ ‘The Rule of Law,’ declares Boullier (1958:24), ‘can only be understood as a return to the theory of the natural rights of man.’ One does not need to proceed as far as Hume’s empiricism or even Kant’s critique of pure reason to discern the conceptual problems posed by an *a priori* ‘law of nature.’⁸¹ This acknowledgement does not detract from location of the roots of the Rule of Law, as an ideal, in some form of rationalism: the subscription to universal and immutable truths, ultimately unjustifiable other than by recourse to intuition but inescapable as the starting point of liberal social theory.

The centuries-old problems with concretizing this higher order have contributed to conceptualisation of ‘law’ being limited to the empirical level.⁸² Positivism – in terms

⁸⁰ Friedman (1972:490) observes that the concepts of natural law and the rule of law do in fact converge.

⁸¹ Hume argued against natural law on three grounds. First, it was impossible for absolute and inevitable truths (apart from a few mathematical principles) to exist given the subjectivity of human behaviour. Secondly, cause-and-effect relationships between facts are based on selective and subjective empiricism. Thirdly, there was no such thing as reasonable human conduct which was universally valid on the basis of rational principles (Friedman 1972, Menski 2006). Kant had concluded that there was no pure reason as all reason was filtered through and limited by sensory perception. It was futile therefore for the science of metaphysics to try to reach beyond sensory experience to seek *a priori* truths; instead, it was the limits of experience that should be explored in order to further the understanding of the human as a thinking being.

⁸² Gierke (1950), who traces the progression of natural law between the 16th and 19th centuries, terms natural law a ‘speculation of theorists’ whose immediate life is ‘more in the world of thought than in the world of action’ (p. xlii).

of *Law* and *law* that can be identified and observed in action – thus forms the predominant basis of analysis for ‘law’ and therefore for the Rule of LAW.⁸³ Theories of the Rule of Law therefore concentrate on exposition of the concept within the parameters of positive law.⁸⁴ Thus the ‘law’ in the Rule of Law which started out as ‘reason’ has been appropriated by a positivist conception of law.

Yet, there is still something missing here. The obvious question that arises is why the Rule of Law should still be regarded as anything special if it is reduced to just the rule of positive law. Human participation cannot be separated from the making and operation of positivist law. The essence of the Rule of Law, the reason it is commended as an ideal worthy of universal pursuit, has been that it is the antithesis of ‘rule of man.’ Law, it is said, is reason while man is passion. Yet positive law is not self-made or self-applied. It is made and interpreted by man. Therefore, it is subject to the very ‘passion’ which is supposed to be avoided by the recourse to law. The fact that legal-rule governance is preferable to arbitrariness, on account of predictability, still does not make it sufficiently desirable if the legal rules would be applied by man and subject to the vagaries of human passion. Hobbes argued on those grounds that the Rule of Law as foil to the rule of man was a delusion (Tamanaha 2004). Yet, there is a long chain of rationalization in Western legal theory which culminates in holding the whole scheme of positive law as representing reason.

⁸³ Dallmayr (1992:4-5) provides a historical trajectory of how ‘law’ in the Rule of Law began conceptual life as the universal logos or ‘flame’ of reason. Gradually, it becomes anchored in medieval times in the ‘laws of the land,’ with legal rule-governance being passed off as an outgrowth of human rationality. Although Dallmayr does not mention an ideological context, it becomes obvious from the references to the Magna Carta and the likes of Locke and Rousseau that the appropriate ‘laws of the land’ are then progressively fixed with the flavour of liberal ideology.

⁸⁴ Fuller’s (1964) description of the procedural requirements of the Rule of Law as the ‘internal morality’ of law demonstrates the harkening to a universal morality that should underlie *LAW and law*.

4.5.3 Rule of Positive Law as Rule of Reason

Up to the Enlightenment in Europe, the prevalent theory was of natural law, a transcendental law whose content emanated from nature and had universal validity (Tamanaha 2006 and 2004, Skinner 2002b).⁸⁵ In Medieval Europe, two intersecting types of law were attributed with this characteristic. The first type was Divine Law which had been pre-ordained by God and was unchangeable by man. Divine Law embodied absolute morality and ultimate truths. It was based on faith and became known through revelation (as interpreted by religious authority). The other type of natural law was customary law. Customary law was believed to have existed from time immemorial. It sprang from the people's ways of life and at the same time, it was their way of life. In contrast to Divine Law, customary law came from the grassroots. It was not the product of any individual or group within society but of the collective will. Articulating the customary law inhered in the discovery of that which already lived through the community.

Natural law, whether as Divine Law or custom from time immemorial, was acknowledged as superior to positive law (Tamanaha 2006 and 2004, Skinner 2002b). Positive law could not stand if it was in conflict with natural law. Aquinas famously asserted that every human law had the nature of law as it is derived from the law of nature but if it deflected from the law of nature, it was 'no longer a law but a perversion of law' (Tamanaha 2006:216). Aquinas, a 13th century Dominican priest, had dredged up Aristotelian theory on natural law and used it to foment justification for Divine Law. Aristotle had indeed held natural law as the ultimate basis against

⁸⁵ Tamanaha (2004 and 2006), Menski (2006), Kelly (1992), Luckham (1987), Dias (1985), Watson (1985), Ogwurike (1979) and Gierke (1957) are valuable sources on the history of Western legal theory.

which man-made law should be judged but his natural law was a law of reason. Aquinas appreciated this but worked in Divine Law as the path unto reason (Tamanaha 2006, Skinner 2002b).

From the 17th century, the Enlightenment undercut the authority of Divine Law as natural law (Tamanaha 2006 and 2004).⁸⁶ The Enlightenment was defined by movement from spiritual beliefs to empiricism and science as more reliable sources of knowledge (Outram 2005, Tamanaha 2004, Porter 2001). Newton's discoveries provided laws that governed all physical relations in the universe and demonstrated the powers of science to explain mysteries of nature that seemed unfathomable before. The rapid advancements that followed in the natural sciences expanded the frontiers of knowledge and brought great technological innovation. A new confidence emerged that everything in the social order could be understood and mastered in the same way as the physical world was being mastered. Scientific enquiry was extended to the social, political, legal, economic and moral realms.

Many of the leading lights of the Enlightenment were sceptical of theology and subjected it to critical scrutiny (Tamanaha 2006, Outram 2005, Porter 2001). Following the sixteenth century Reformation, dogmatic disagreements between Catholics and Protestants had led to violent conflict. The fact of disputation and its

⁸⁶ The Enlightenment was preceded by the Renaissance and the Reformation which occurred between the 14th and 17th centuries. The Renaissance challenged and ultimately destroyed medieval thought which had held the individual to be a minuscule part of a larger scheme of things. The result was the emancipation of a new critical and skeptical individual. The Reformation saw a wave of fundamental critique of hitherto dominant Catholic theology and the rise, in the wake of the critique, of Protestantism. The Reformation consolidated the liberation of the individual, imbuing him with freedom of conscience. Together, the Renaissance and the Reformation contributed to the collapse of the Holy Roman Empire and the rise of the modern state. When the Enlightenment brought scientific rationality into the philosophical mix, a reconfiguration of natural law occurred in which it took on an increasingly secular character (Skinner 2002a and 2002b, Tamanaha 2006, Outram 2005, Porter 2001, Menski 2006, Friedman 1972).

bloody outcomes undermined belief in Divine revelation and the authority of the Church. The teachings of the Church had previously constituted the foundations of all knowledge; its questioning became the questioning of all aspects of existence (Tamanaha 2006, Outram 2005, Porter 2001). As Tamanaha (2006: 21) says, ‘what was once seen as wisdom of the ages came to be seen as blind fetters of the past holding back progress.’⁸⁷

It was not so much the belief in natural law that was affected by the Enlightenment as the belief in Divine Law as natural law.⁸⁸ Belief in natural law did not die but belief in Divine Law as natural law started to recede.⁸⁹ Reason still formed the limits of law but was no longer a matter for spiritual revelation; it was something to be determined empirically. Custom continued to form the basis of law but several mutually reinforcing events culminated in its diminution even in common-law countries. There was the separation of state and religion, following on the rise and consolidation of the Westphalian state across Europe (Tamanaha 2004 and 2001). Then there was the spread of comprehensive legal codification in the emergent state forms.

The development of printing technology facilitated wider access to the written word and made the dissemination of statute easier (Febvre and Martin 2010, Tamanaha

⁸⁷ Hobbes, the 17th century English philosopher, developed his social-contract theory on the basis of scientific materialism. He rejected the authority of the Church as the basis of natural law, referring power instead to a utilitarian and secular sovereign. With this came the new problem of restraint of the sovereign since the previous Catholic order providing Divine restraint was no more. Locke, another 17th century English philosopher, then argued that the sovereign must be limited by the constitution and that the absence of such limits was a violation of natural law. Sovereigns who infringed on the liberties of their subjects were in breach of the social contract, in which case revolution or disobedience was justified (Tamanaha 2006, Outram 2005, Porter 2001, Menski 2006, Dias 1985).

⁸⁸ Blackstone, a driver of Enlightenment thinking on law as rational science, would still write that the law of nature was superior in obligation to any other and that no human laws were of validity contrary to the law of nature (Tamanaha 2006:216).

⁸⁹ Grotius, the 17th century Dutch philosopher, argued that natural law was inherent in the nature of man and would exist even if God did not exist (Menski 2006, Dias 1985). Natural law, according to Grotius, was so immutable that even God could not change it (Menski 2006, Friedman 1959).

2001). Progressively, mechanical legislation replaced theology, customary rules and even judicial pronouncement as the primary source of law (Tamanaha 2001). Law took the form of technical regulation and discarded its earlier pretensions to being synonymous with immutable customary or religious norms. Law had therefore become positivistic and secularised but it was still held to represent reason. Positive law itself was reason.

It helped that the liberal thinkers who produced the Enlightenment equated legal-rule governance with freedom and therefore rationality. Liberal ideas are built on the notion of man as a rational animal. Rational man is an average of people in society. Individuals do behave irrationally from time to time but the collective behaviour of the people in society is as if each person is rational. In other words, it is not that everybody behaves rationally all the time; it is the average behaviour that is. Law is the product of this rationality and so it is rational too. Not all laws are rational but Law, the totality of all laws there are or can be, is.

4.6 LIBERATING 'LAW' IN THE RULE OF LAW

4.6.1 Rule of Positive Law as Rule of Man

Even if Law (or legal-rule governance) is held to be intrinsically rational, it is still not difficult to devise that not all positive laws are good laws and that Law is not automatically applied for good. Max Weber realised this and his seminal analysis distinguished between rational law and irrational law, the former being good and the latter bad.⁹⁰ For Weber, the highest order of rational law is logically formal law, which he saw as prevailing in modern Western society and was essential for capitalist

⁹⁰ Weber (1954: 224-256, 303-304), Kronman (1983:76-79).

development (Weber 1954 and 1978, Trubek 1972a, Kronman 1983). When law acquires formal rationality, it becomes self-legitimising.⁹¹ The populace finds it in keeping with common sense that the formal, rational order provided by the rules is the best means of social co-ordination and dispute resolution. In its generality of application, formal rational law provides the best guarantees of formal equality known to man.

Weber was a modernist. He believed that formal rational law, epitomised by law of the Western European vintage, was modern and that all other types were in a process of evolution towards that modern law. Weber's triumphal synopsis would seem to be borne out at two key points of the twentieth century. First of all, when former European colonies became independent in the middle of the century, they continued the process of consolidating the received Western legal form rather than jettisoning it and going back to the ways of the past. Again, several decades later, the great ideological divide of the century crumbled as former Soviet communist regimes also embarked on the Westernisation of their legal regimes. The logic of legal modernism, in terms of universal evolution towards and closure on the ultimate form of social organisation, seemed to have been established. Fukuyama (1992) therefore proclaimed the end of history.

4.6.2 Positive Law in Modern Form

Davies (2008:328) explains that modernist philosophies attempt to determine absolute grounds for knowledge: 'to discover abstract, transcendent principles which would be the foundation for all philosophical questioning ... a foundation which goes beyond

⁹¹ Weber (1978:212-262); Weber (1954: 336-337).

particular situations.’ The modernist conception of ‘law’ fixes the term according to certain criteria for identification. It is formally rational law; it is contrived in abstract principles, its cosmos is split between public and private realms, and there are specialised institutions for making and applying it.

Importantly, this form of law must have an adjudicative body, a judiciary, as the central organ for dispute resolution and enunciation of rights. This is supposed to be the only form of law by which the Rule of Law can be attained or at least pursued. The concept of ‘law’ has been entirely taken by this conception of law. The possibility is foreclosed of ‘law’ being entirely of another genus and yet still enabling the pursuit of the Rule of Law. The framework of this ‘law’ is formal. Even if the detail is still subject of jurisprudential debate, its broad attributes, in terms of form and process, have long since been settled and the terms of debate fixed.⁹²

The Rule of Law as we have seen may properly be considered a metaphor for a certain functionalism in social organisation. It symbolises rule-governed social organisation that functions according to the principles of predictability, equality, equity, justice and liberty. There is little doubt that the liberal ideology currently prevails in the conceptualisation of those principles, for the purpose of giving substance to that functionalism. Yet, even without contesting that liberal thrust, there is nothing scientific that establishes that the form and process we now accept as ‘law’ is the only way or best way to achieve the Rule of Law, as so defined. The justification may be just inferential, thriving on little more than arbitrary praxis.

⁹² Harris (1997:5): ‘Modern law is a continuous attempt at fixity and closure which is undermined by the impossibility of its own project.’

Modernism has successfully circumscribed legal reality and legitimated legal knowledge according to the familiar, the recognisable and the conventional. Ethnological closure has been achieved regarding the incarnation of law that can achieve the Rule of Law. Foucault (1980:113) has described such a state of affairs as an impasse resulting from following the works of ‘ethnologists, some of them great ethnologists.’ According to him, a dichotomy has been established ‘between structures (the *thinkable*) and the event considered the site of irrational, the unthinkable ... which does not and cannot enter into the mechanism and play of analysis at least in the form which this took in structuralism’ (Foucault 1980:113). Thus, although the Rule of Law has not been achieved using this kind of law in Africa, it is not within the thinkable of the Rule of Law Orthodoxy that another form of law should be sought. The suggestion would be irrational and unthinkable.

4.6.3 Obduracy of Modern, Positive Law

As Morgenthau (1940) argued long ago, if an event in the physical world contradicted all scientific forecasts, challenging the assumptions on which the forecasts were based, the natural scientific reaction would be to re-examine the foundations of the specific science and attempt to reconcile the scientific findings and empirical facts. The social sciences, Morgenthau (1940) argued, do not react in the same way. They have an inveterate tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts (Morgenthau 1940).

This resistance of the social sciences to change is uppermost in the history of law, argues Morgenthau (1940). Instead of asking whether the devices for law reform were adequate to the problems which they were supposed to solve, it was the general attitude of theorists to take the appropriateness of the devices for granted and to blame the facts for the failure. When the facts behave otherwise than predicted, theorists seem to say, 'too bad for the facts' (Morgenthau 1940:260). 'Not unlike the sorcerers of primitive ages, they attempt to exorcise social evils by the indefatigable repetition of magic formulae' (Morgenthau 1940:260). Morgenthau's (1940) argument would ring true if applied to the Rule of Law Orthodoxy today. Only a few writers like Trubek (1972a and 2006), Krygier (2007) and Zimmerman (2007) have fleetingly broached the possibility that modern law might not always be suitable for the Rule of Law. Others will express frustration about the failure of the Orthodoxy to bring about expected results but stick with conventional, 'more-of-the-same' discourse on what is required to bring about those results.

The boundaries of conventional discourse pose formidable barriers to breach even when it is noticed that the unconventional appears the norm rather than the exception. This is the dilemma, for instance, of De Soto (2000) who in wondering why the Western-style legal formalism has not worked in much of the developing world, calls for a listening to the voice of the people. He then immediately goes against his own advice by advocating the quick, wholesale imposition or mimicking of the formal legal framework of the West.

De Soto (2000) seems caught in the shackles of the known and ends up not braving any analysis outside its confines. Perhaps the voice of the people is actually

suggesting that the informal *is* their wisdom and should be consolidated rather than upturned. Unlike De Soto (2000), Kennedy (2003) has pointed out that while legal reform that encourages formalism might serve to make legal systems in developing countries more cognisable to foreign investors, it might actually do the opposite for the indigenous population. In other words, what seems irrational and incomprehensible to outsiders might actually be perfectly understood by and predictable to local actors. Perhaps this might go a little way in diminishing Weber's perplexity at the success which the 'irrational' common law of England had produced.

Shihata (1999) has even gone so far as to suggest the Rule of Law does not have to inhere in a formal system. He suggests that the Rule of Law might be produced by an informal system of law as long as there is general understanding of the rules and commitment to applying them. It should be reiterated that the argument here is not so much a case for informal legal orders as a case for recognition that there might be an alternative to what Menski (2006) calls 'legocentric theory.' This is a theory of law that privileges the modern, (Western and statist) legal form as 'law' and insists on universal linear convergence on the modern (Western) legal form.

Chabal and Daloz (1999) have similarly argued with regard to Africa that that seeming irrationality from an outsider perspective might be rationality from an insider perspective. Chabal and Daloz (1999:132) accept that given the current norms of political rationality in the Western world, the preference of Africa for the infra-institutional may be understood from the standpoint of disorder. Nevertheless, they argue, it is also possible to interpret the primacy of the informal as deriving from a different logic and resulting in a different modernity which goes against the grain of

existing models. This argument is not to admit historical charges of racial inferiority, Chabal and Daloz (1999:129) quickly point out; it is to meet obdurate uniqueness on its own terms and modulate analysis accordingly.⁹³

4.7 THE ARGUMENT RESTATED

The clarity of the argument so far benefits from its restating:

- The Rule of Law is not the Rule of any particular kind of law
- The Rule of Law is a functional state of affairs situated in liberal ideals
- The requisite state of affairs does not have to be achieved by modern law only
- The Rule of Law is not tantamount to the Rule of modern law

The next chapter looks at the limits of current legal theory in explaining the problems of the Rule of Law, or providing solutions, in Africa. This futility, and therefore falsification, of the Orthodoxy justifies the functional conception of the Rule of Law expounded herein and lends credence to the argument that the Rule of Law is not tantamount to the Rule of modern law.

⁹³ As far back as 1980, Hyden argued in *Beyond Ujamaa in Tanzania* that Africa's development problematic is unique and challenges conventional models of the social sciences. Hyden (1980) sees Africa as so historically unique that an innovative, alternative approach to development is required. Abonyi (2009:40) draws on *Beyond Ujamaa* to argue for development practitioners to 'think the unthinkable' to formulate a workable model for Africa.

4.8 SUMMARY

The modern notion of the Rule of Law resulted mainly from 18th and 19th century philosophising in Western Europe on the lawful state and the rights of humankind. Continental Europe formulated state-centred versions of the Rule of Law, as in the German *Rechtsstaat* and French *Etat de Droit*, which emphasised the state acting according to law. In England, Dicey's robust defence of the common law resulted in a formulation oriented more towards the rights of the individual. In the English and Continental variations, the Rule of Law had the supremacy of law and liberal ideals as its fundamentals.

The Rule of Law is traditionally conceived of in formal and substantive terms. In the formal conception, the Rule of Law exists where laws have certainty, generality and prospective application, are made according to formally established procedures, are published and are the basis for resolving disputes by neutral judicial means. Formal conceptions are however normatively empty. Substantive conceptions try to compensate by introducing substantive goals such as justice, freedom and human dignity but this makes the Rule of Law simultaneously open-ended and liable to charges of ideological absolutism.

The problems with formal and substantive conceptions inform preference for a third conception. This conception is more than a sum of both former conceptions but also seems to better bear out the 'Rule of Law' in contemporary usage. In contemporary usage, the 'Rule of Law' is not just about the form and content of law but about a functional state of affairs that is premised on liberal ideals. The term aspires to

transcend particularistic forms and structures of mundane rules and harkens to a higher order. The academic fixation with the process and content of temporal legal rules operates to mask this higher-order aspiration and may be the convenient end-product of an inability to provide tangibility to this higher order. Theories of the Rule of Law therefore concentrate on exposition of the concept within the parameters of positive law. Thus the 'law' in the Rule of Law which started out as 'reason' has been appropriated by a positivist conception of law. The positivist conception is in turn informed by modern law which is a form of law enshrined in institutions that are most manifest and most developed in the West.

Only a few writers have broached, albeit fleetingly, the possibility that modern law might not always be suitable for the Rule of Law. Yet, once the Rule of Law is conceived of in functionalist terms, there is nothing scientific that establishes that what is now accepted as 'modern law' is the only or best way to achieve the Rule of Law. The justification may be just inferential, thriving on little more than arbitrary praxis. This argument holds particularly in Africa where a few writers have argued that the norms of political rationality in the Western world seem to be perceived as irrationality. Building the argument, the next chapter looks at the limits of the Rule of Law Orthodoxy in explaining or solving the problems of the Rule of Law in Africa.

CHAPTER 5 – THE FUTILITY OF THE ORTHODOXY

‘[W]hat makes law count ... is one of the deepest mysteries of the Rule of Law, and it does not just depend on law. For ultimately what matters is how the law affects those to whom it is directed, not how, or the particular forms in which, it is sent. We, lawyers especially, know a lot about the latter but much less than we imagine about the former ... What we need, and what we don’t have is a political sociology of the Rule of Law, but only with that will we be able to say with any confidence, though still not in one-size-fits all terms, how to instantiate it’ (Krygier 2007:8).

5.1 INTRODUCTION

The last chapter put forward a functionalist conception in which the ‘Law’ in the Rule of Law is not necessarily synonymous with modern law. This chapter consolidates the argument by demonstrating, in the context of Africa, the flaws in the Orthodoxy on how the Rule of Law is achieved using modern law. The chapter provides an affirmative answer to the second subsidiary research question, on whether the assumptions on how modern law brings about the Rule of Law can be falsified.

This chapter argues that current theory on the prerequisites for the Rule of Law is fundamentally flawed. The chapter first raises and examines the question of systemic fidelity to law – the ‘spirit of the Rule of Law’ - which, it is argued, is missing from the Rule of Law Orthodoxy. The chapter then uses corruption and coups to demonstrate the futility of the Rule of Law Orthodoxy in the absence of systemic fidelity to law. Endemic corruption in Africa suggests the impotence of law where this spirit does not exist. The jurisprudence of coups also demonstrates that key requisites in prevalent theory, such as separation of powers, might be irrelevant even if achieved in ideal form where the spirit of the Rule of Law is lacking.

The chapter takes the analysis further by examining the debate on determinacy of law and submitting that it is the spirit of the Rule of Law that gives law the requisite of level of determinacy that guarantees those functional outcomes known as the Rule of Law. The chapter draws on critical legal theory to argue that an amorphous socio-cultural factor called ‘politics’ – as distinct from partisan politics – underlies determinacy (and therefore the spirit of the Rule of Law) given a certain form of law. The politics of African society, it is further argued, has so far proved antithetical to using the modern legal form to achieve the Rule of Law. The chapter submits that the case can therefore be made for looking for another form of law – an ‘Other’ of modern law - which is so compatible with the politics of Africa that the Rule of Law spirit will exist and the Rule of Law can be achieved. The chapter ends with a summary.

5.2 MISSING QUESTION OF SYSTEMIC FIDELITY

5.2.1 Fixation on ‘Type One’ and ‘Type Two’ Reforms

Theory informs development practice and the result of the modernist closure on ‘law’ has been that Rule-of-Law reform in Africa – the Rule of Law Orthodoxy - concentrates on what Carothers (2003) characterises as type-one and type-two reforms. Type-one reforms concentrate on improving laws while type-two reforms target the strengthening of law-related institutions such as judiciaries, police, legislatures, etc. Carothers (2003) goes further to identify the necessity (and absence) of type-three reforms which will tackle the question of how to produce societal commitment to law in its totality. Carothers (2003) calls this a deeper goal than type-one and type-two goals. Type-three reforms depend less on technical or

institutional measures and more on a society's values and its attitudes towards the totality of law.

Problems with the Rule of Law on the African subcontinent are captured by the following statement:

‘a general lack of social discipline ... signified by many weaknesses: deficiencies in their legislation and in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials on various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and, at bottom, a general inclination of people of all strata to resist public controls and their implementation.’ (Seidman 1978a:18)

‘Deficiencies in legislation’ would cover inadequacies both in the formalities of law-making and the substantive content of laws and would be covered by type one reforms. Deficiencies in observance and enforcement of law are within the contemplation of type two reforms to the Rule of Law but are much trickier to deal with in practice. The combination of non-observance and non-enforcement bespeaks a low level of commitment to legal rules and institutions – the entire scheme of law – that demands much more than money, training or indoctrination. It is not sufficient that ‘law’ is made up of ‘good’ laws, which are made in accordance with the principles of legality and are expressed to be of general application. Enforcement and observance still have to be committed to.

5.2.2 Absence of ‘Type Three’ Reforms

If the legal system ticks all the right boxes in terms of the content of its laws and the way they are made but the governing and governed do not pay any heed to this legal framework, then it becomes redundant and the chances are that there will be no Rule

of Law. This is a part of the enquiry into the ideal of Rule of Law that is yet recondite: the question of how to motivate systemic fidelity to law. The question does not seem sufficiently within the contemplation of development practitioners who are beholden to conceptions that gravitate within the boundaries of formal and substantive conceptions of the Rule of Law. Privileging the human factor behind the Rule of Law is not to discount the importance of formality and even of substantive approaches to the Rule of Law. It is rather to say that the mere combination of legalism and ‘good, just’ laws are insufficient to guarantee or even to characterise the Rule of Law.

The contention is that producing a society that can be said to be *under law*, as envisaged by the Rule-of-Law ideal, comprises a bigger equation than even a combination of substantive and formal approaches would allow. There is an elusive component which both conceptions do not advert to. There is nothing in the formal and substantive conceptions that tells us how to stimulate the systemic fidelity to law that ensures the Rule of Law.

There appears to be a conflation of epiphenomena with event in presenting the positivistic manifestations of modern law as the causes of the Rule of Law, or worse, the Rule of Law itself.⁹⁴ There is a level of circular reasoning or what Spann (1984:520) has called ‘analytical spin’ that attends discourse of the Rule of Law. If the question is asked for instance why there is no Rule of Law in a certain country in Africa, the likely response would be that there is no independence of the judiciary

⁹⁴ If legalism and ‘good’ legislation are, by themselves, the stimulus as opposed to the end-product of the Rule of Law, then the problems of the Rule of Law might have long been solved in Africa given the amount of legal reform undertaken there. Carothers (1998:4) points out that although more than 30 African countries have attempted political and economic transitions since 1990, Rule-of-Law reform is still scarce on the continent.

(among other things). If the question is then asked why there is no independence of the Judiciary, the answer is that there is no Rule of Law and so it continues, round and round. This problem goes right back to originators of the modern conception.

Dicey (1885), as we have seen, stated that England had the Rule of Law because no man could be punished except in accordance with law, no one was above the law and the courts are the ultimate determiners of legal rights. The question, which was not addressed by Dicey's formulation, was whether England had the Rule of Law because it did those things or it did those things because it had the Rule of Law. Theory which informs orthodox development practice adopts the first line of logic – you do those things to get the Rule of Law. Thus there is a fixation with type-one and type-two reforms which are targeted at laying down the rules and procedures for what people should be doing. It is implied by the orthodox approach that people do not know how to do the relevant things rather than that (for whatever reason) they cannot or will not do them. Insufficient attention is paid to Carothers' type-three reforms which necessitate asking what makes people agree to do those things that beget the Rule of Law.

5.2.3 Insufficiency of Good Laws and Institutional Design

Zimmerman (2007) submits that the claims of the orthodoxy on what laws can deliver in terms of the Rule of Law are exaggerated. Krygier (2007) argues that even if legal institutions of a certain kind are requisite for the Rule of Law, they will never be sufficient if they do not count in real life. The Rule of Law does not then rest as much on detailed institutional design as on 'an interconnected cluster of values' that can be

contained in a variety of institutional permutations (Krygier 2001, Zimmerman 2007). To demonstrate that the Rule of Law is actually more about social outcomes than formal legal-institutional mechanisms, Krygier (1993:52) draws attention to the fact that the Rule of Law has ‘thrived best where it was least designed’.

British constitutionalism provides strong corroboration that the Rule of Law depends more on the human factor – a group commitment towards producing the social, political and cultural conditions characterised as the Rule of Law – than on anything else, including the form or layout of legal institutions (Tamanaha 2004, Zimmerman 2007). While Britain continues to eschew a written constitution, its polity remains far more orderly than most of its former colonies which have adopted elaborate documents. The vital missing ingredient in the former colonies might therefore be the ‘tacit social approval needed to keep those documents alive’ (Zimmerman 2005:26). The Rule of Law was developed and continues to prosper in Britain despite the lack of the institutional elements, such as separation of powers, which are now canvassed as prerequisites for the Rule of Law. Recognition of the British ‘anomaly’ draws the following conclusion from Tamanaha (2004:35):

The Rule of Law existed [in Britain] owing to a widespread and unquestioned belief in the Rule of Law, in the inviolability of certain fundamental legal restraints on government, not to any specific legal mechanism. The answer to the ancient puzzle of how the law can limit itself is that it does not – attitudes about law provide the limits.

5.2.4 ‘Spirit’ of Rule of Law: the Missing Link

Acute analyses of the Rule of Law in Africa allude to the human-factor problem. The rote response in Africa to the inefficiency of law is ‘to superimpose more drastic, new laws ... as though a more severe piece of formalistic legislation could correct failures

in a milder rule' (Ocran 1978:187). Shihata (1995) appears to understand this well enough when he complains that legal reform is insufficient to the extent that it concentrates only on reform of primary and secondary legal rules. He points out that rules are seldom self-executing and even when they are, they need appropriate institutions to ensure their application and enforcement. If Shihata's (1995) analysis simply brings us back to 'institutions' and therefore Hart's (1961) secondary rules, Nwabueze (1973) takes us beyond them. He finds that the greatest danger to the Rule of Law in emergent states is the 'human factor.' Nwabueze (1973) recognises that institutional forms are important but says that however carefully the institutional forms may have been constructed, in the final analysis, much more will turn on the actual behaviour of individuals and how they apply the rules.⁹⁵

It is on the same basis that Ojwang and Kuria (1977) talk about the 'spirit' of the Rule of Law and lament an 'irreducible confidence' in mere forms and structures, in much of Western-oriented legal philosophy, as the basis of the Rule of Law. Ojwang and Kuria (1977) criticise what they see as Dicey's legacy. They say that Dicey was not interested in 'general illumination' of the Rule of Law but to merely to proclaim its presence in England and attribute this to English constitutional practice. For Ojwang and Kuria (1977), there was a spirit behind Rule of Law which made it possible. Any meaningful exposé of the Rule of Law would therefore have to encounter this fundamental aspect of it.

⁹⁵ Dicey (1885) displayed an insight that Nwabueze (1973) would find familiar. Even though he did not investigate it, Dicey had said that even if the proposition may at times be ignored, political institutions were the work of men and owed their origin and whole existence to human will. In every stage of their existence, he said, it was voluntary human agency that made institutions what they were.

Considering their critique of Dicey, it is somewhat ironic that Ojwang and Kuria (1977) too fail to provide any ‘illumination’ of the fundamentals of the spirit of the Rule of Law. If their critique thus falls victim of the flaw that they accuse Dicey of, there is little detracting from its import, which is to question the characterisation of the Rule of Law as inhering in a particular, fixed set of forms and structures. Ojwang and Kuria (1977) query the fixity of these forms and structures, including the centrality ascribed to the judicial function, in Rule-of-Law discourse. They say that much of the reasoning is superficial because it assumes perfection of this form of law and presupposes automatic commitment to the ‘spirit’ of the Rule of Law once this form of law is present.

Ojwang and Kuria (1977) are Kenyans and it would not be far-fetched to surmise that their highlighting of the spirit of the Rule of Law is dictated by their African experience. The African situation must lead to questions about acceptance by rote of concepts such as separation of powers and independence of the judiciary as being, in themselves, the reason for or even the Rule of Law. It is difficult to escape the suspicion that the celebration of such concepts is not so much grounded in rationality as a vast exercise in *after-the-fact* rationalisation.⁹⁶ A simple allegory may be relevant here. To the question why a person is eating, the answer would not be because he has a mouth but more reasonably because he is hungry. The Rule-of-Law analysis seems to concentrate on the ‘he-has-a-mouth’ type of rationalisation. Our

⁹⁶ Ojwang and Kuria’s (1977) disenchantment with the Dicey formula may be placed in the context of the circular reasoning process we have referred to aforesaid. For Dicey (1885), there was the Rule of Law in England because all citizens were equal before the law, law restricted arbitrary government power and rights were determined by neutral adjudication. If the question was put why this state of affairs had occurred in England, other than to hearken to notions of the innate rationality of the Englishman, the only answer would have been ‘because there was the Rule of Law.’ Dicey fires a shot in the direction of the rationality argument when he reminds all that human institutions are made what they are by human agency.

figurative person eats with a mouth but he is not eating simply because he has a mouth: he is responding to a physiological stimulus to eat which is enhanced by the palatability of the food. Our hypothesis may be seen as suggesting that there is a form or other forms of law which will be more palatable to African society than the modern legal form.

Galligan (2007) expresses, albeit in passing, concerns about the modern legal form that strike a chord with our current argument. Accepting that the success of modern legal orders rely ultimately on nothing more than collective self-restraint of officials, he wonders what it is that stops such officials 'grouped as they are in powerful organisations with the instruments of coercion at their disposal, from defying the bonds of self-restraint' (Galligan 2007:262). While such collective rebellion may seem beyond contemplation in 'stable, modern societies,' it is the normal state of affairs in most other societies. Galligan's (2007) guess is that a Machiavellian tendency among officials is the critical factor in those societies in which the Rule of Law prevails. Officials there figure that they are much more likely to get their way and perpetuate their interests by 'clothing themselves in legal weeds than in rude power' (Galligan 2007:262) Galligan (2007) provides no suggestions on why the same sentiment is not shared by officials in other societies. He however admits that even in stable societies there must be more to it than Machiavelli.

Resorting to organisational theory, Galligan (2007:262) says that self-restraint in stable societies is 'collective and institutionalized, aided and strengthened by organizational pluralism.' Where one set of officials confounds the restraints, the rest of the organization comes together to remedy the deviation. But there is no avoiding

the fact that the risks will be high and restraints weak if the restraints are steeped in ideals rather than actual social practices. The internalization of the restraints in social spheres ‘needs to be so deep-seated that negation is impossible to imagine or occur.’ Ultimately though, organizations are composed of individuals and have limited resistance to wholesale rebellion of individuals. Galligan (2007) observes that sometimes this rebellion may start in an isolated part of the organization but by contagion infect the whole system. Galligan (2007) therefore recognises that there is a human-factor issue, which while still recondite, might be the key to differences not just in organisational loyalty but in the ability of modern law to restrain societies.

5.2.5 Corruption and Coups as Consequences of Missing Link

The human-factor problem in Africa – the absence of the Rule of Law Spirit - is more specifically examined in the following sections in the context of coups and corruption. The analysis shows the operation of the Rule of Law at the two levels alluded to in the previous chapter. The part on coups produces analysis of the problem mainly on the level of the Rule of Law as a constitutional principle. Coups show the inability of doctrinal constructs, such as separation of powers and independence of the judiciary, to guarantee the Rule of Law if the rulers collectively shake off the bounds of self-restraint that Galligan (2007) refers to. Corruption shows the futility of modern law, no matter how many layers of it are added or how many times it is sought to be internally revitalised, to attract systemic fidelity just by its being ‘the law.’ The part on corruption raises the question of what to do when the citizenry as a whole is not beholden to the law.

5.3 CORRUPTION

5.3.1 Defining Corruption

Law-reform programmes have focused on fighting corruption which, by its undermining predictability, transparency and meritocracy, undermines the Rule of Law.⁹⁷ Like the Rule of Law itself, corruption is difficult to define (Blundo and Olivier de Sardan 2006, Chabal and Daloz 1999, Smith 1999, Musonda 1999, Dube 1999). It is one of those things that can be recognised when it occurs but defeats attempts at comprehensive definition.

One of the most popular definitions is the ‘abuse of public office for private gain’ favoured by the World Bank and Transparency International. Corruption being much more than a public-sector activity, the definition does not suffice except ‘public office’ is viewed very broadly to also include private sector activity in which office or responsibility is administered or held in trust. Definitional problems of corruption are compounded by that fact that the categories of corruption are not closed. There are various dimensions from bribery, which might be easily identified, to categories like nepotism, favouritism and so on which are not so clear cut. Furthermore, where corruption occurs, it is not usually publicised or made a matter of the record.

Deriving from corruption’s conceptual ambiguity and secretiveness of occurrence, it is not easy to measure corruption in any scientifically accurate way. Indexes with persuasive authority on corruption however exist and they point to unusually high incidences in Africa. Perhaps the most authoritative of such indexes is Transparency

⁹⁷ Dallmayr (1992:19-20) argues that ‘courts and lawyers cannot maintain the Rule of Law in a society ... where there is a widespread sense of corruption, unfairness and inequity’ as that defeats the ‘common sense reasonableness that is the nourishing soil of legal rule-governance.’

International's annual Corruption Perception Index ('CPI').⁹⁸ The CPI from 1998 to 2010 shows how serious the challenges of corruption and lack of transparency continue to be in Africa when compared with the rest of the world. On a scale of 10, with the higher marks indicating lower corruption, majority of the African countries surveyed over the decade have scored under three, indicating rampant corruption.⁹⁹

5.3.2 Corruption as Norm

The surfeit of analyses is of corruption as a public-sector, bureaucratic or political phenomenon, a narrow perspective that contributes in no small measure to obscuring corruption's society-wide dimensions in much of Africa.¹⁰⁰ Ocheje (2001) suggests that Nigeria's corruption is perpetuated by a dominant class which has sabotaged anti-corruption laws to further its selfish interests. The view of corruption as an elitist phenomenon provides the rationale for locating remedies in 'clean-up' exercises, ethical campaigns, and specialist legislation or, as is the current fashion, anti-corruption commissions to root out the few bad apples. Open acknowledgement that

⁹⁸ First produced in 1995, the Index ranks countries in terms of levels of public-sector corruption, as perceived by expert assessments and opinion surveys. The CPI pools information from a range of internationally credible sources including international financial institutions, country analysts and business groups.

⁹⁹ Out of the 47 African countries assessed in 2010, 32 scored below three. 12 others scored between three and five showing that corruption was a serious challenge. Botswana, the best performing African country, scored 5.8. 33 of the 47 African countries ranked outside the top 100 countries globally. Only Botswana, Mauritius, Seychelles and Cape Verde broke into the top 50 globally. Despite marginal improvements in certain countries in some years, the overall position has actually worsened over the decade that the Index has been produced. In 1998, two African countries exceeded five with Botswana scoring 6.1 and Namibia scoring 5.3. The results are available on Transparency International's website at: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results [Accessed 29 December 2010].

¹⁰⁰ Like Transparency International's CPI, Hamir (1999), Mulinge and Lesetedi (1999), Muganda (1999) and Musonda (1999) all limit their analysis of corruption to the public-sector notwithstanding acknowledgement that corruption also attends the private sector. This is probably because it is easier to discern corruption as a public-sector activity.

corruption in Africa is systemic, generalised and endemic has only started becoming common in the last decade.¹⁰¹

According to Medard (2002:379), corruption ‘is the rule rather than the exception’ and it is ‘not just limited to certain sectors, but extended to the point that it covers the whole of the political, judicial and administrative sectors.’ Chabal and Daloz (1999) identify that corruption touches all social strata in Africa, from billionaires to the lowest functionary and that it is as much a private-sector function as a public-sector affair. They emphasise that corruption is an integral part of public life, from the top to the bottom of society.¹⁰² They disparege the dichotomy between small-scale and large-scale corruption in Africa and view everything instead as part of an interconnected whole. Chabal and Daloz (1999) discountenance the view of corruption in Africa as a matter of a venal bourgeoisie. Chabal and Daloz (1999) not only criticise the presentation of corruption as the preserve of a political and economic elite but also the developmentalist tendency to minimise the extent of corruption at the top of African society as that conflicts with the projected picture of a progressive, new-breed elite.

¹⁰¹ Systemically corrupt societies are distinguished from societies with isolated incidences of corruption (Narayanasamy 2000, Blunt and Popoola 1990). In the latter case, integrity is the norm and corrupt behaviour sporadic so that the rule of law remains intact and the system remains capable of enforcing accountability. Conversely, when corruption is endemic, informal rules replace formal ones and the rule of law suffers.

¹⁰² Ocran (1978:121) remarked the ‘alarming ubiquity of demands for gifts’ at the lowest cadres of the working class and lamented the general expectation among African publics that public servants should be corrupt. Carrying out empirical research on petty public-sector corruption in Benin, Niger and Senegal, Blundo and Olivier de Sardan (2006b:69) find an ‘astonishing convergence in ... both informal administrative functioning and the various corrupt practices.’ Despite the different trajectories of national ideology and growth, the same dominant tendencies, procedures of corruption and corruption of procedure, unwarranted fees, arrangements and tricks were manifest in the three countries.

The criticism may be extended to strategies that seek to strengthen civil society to enable it combat corruption in high places. The strategies imply a cast-iron class structure in which there is a closed group of people called ‘government’ who are corrupt and another closed group, an honest one, called ‘civil society.’ Such a dichotomy appears to be more wishful thinking than fact (Gupta 1995, Ferguson and Gupta 2002).¹⁰³ Corruption in Africa, as Chabal and Daloz (1999) argue, is rarely centralised or confined; everyone tries to benefit. ‘It is a habitual part of everyday life, an expected element of nearly every social transaction’ (Chabal and Daloz 1999:99).¹⁰⁴

Moreover, especially in the context of democratic transitions, civil society yesterday has become government today and vice versa without any significant reduction in the incidence of corruption. The portrayal of corruption as a class-specific phenomenon not only flies in the face of evidence, it also suffocates realism in getting to grips with what is happening on the continent. Chabal and Daloz’s (1999) blunt approach to the magnitude of the problem is increasingly shared by a cadre of African writers who despair of political correctness and the futility of orthodoxy. Nobel-Prize winner Maathai (1995) describes corruption in Africa as a serious cancer in Africa afflicting every aspect of life and every socio-economic group. Dicklitch (2004) calls African corruption a crime against humanity. Emetulu (2003:1) warns against getting into the groove of regarding the ordinary citizen as a victim of corruption when a ‘more

¹⁰³ Gupta (1995:376) argues that the conventional distinction between state and civil society is based on ‘an imperialism of categories’ that allows the ‘specific historical experiences of Europe to be naturalized and applied universally.’

¹⁰⁴ In many African countries, ‘corruption now forms the public ethic grasped by every child from the early years of life’ (Lamba 1999:259). Nigeria is the usual example, Achebe (1983) and Osoba (1996) observing that corruption has become a way of life there which existing successive governments neither desire to, nor can, control

circumspect look would reveal that he or she is more likely an unstinting participant or a bastion of encouragement, advertently or inadvertently.’

5.3.3 Otherness of Normative Corruption

The scale of corruption in Africa is seen as a ‘marked reluctance to abide by abstract and universal norms of the legal-bureaucratic order that are the foundation of Western states’ (Chabal and Daloz 1999:99).¹⁰⁵ Chabal and Daloz (1999) argue that the legitimacy of formal rules which characterise the modern state have failed to supersede that of the informal compacts derived from ethnic, factional or nepotistic ties.¹⁰⁶ What is therefore usually understood as a peculiarly pathological African condition is ‘in reality nothing more than a specific aspect of what is utterly judicious behaviour in the circumstances’ (Chabal and Daloz, 1999:103).

Discernible in this kind of analysis is a suggestion of an African ‘Otherness,’ a subscription to a world view not entirely compatible with modern law. It is a

¹⁰⁵ Mwansa (1999) reaches a similar conclusion. He says that modern institutions in Africa have become dysfunctional because they lack the necessary supporting culture. He doubts that there is any fit between modern institutions and African ethics. ‘The lack of fit, between African ethics and modern institutions, not only creates cross-roads but also corruption’ (Mwansa 1999:128). Blundo (2006) cites Bayart (2004) as taking a nuanced view, seeing it as hybridization rather than incompatibility between African and Western logics in the construction of the modern African state.

¹⁰⁶ Like Chabal and Daloz (1999), Ocran (1978:121-122) finds corruption to be rooted in the neo-patrimonialism of African society and the primordial ‘overpowering allegiance to ... groups like the family, clan and tribe.’ Neo-patrimonialism and Bayart’s (1993) ‘politics of the belly’ have been the leading concepts in which analysis of corruption in Africa has been situated in the last two decades (Blundo 2006). Such concepts embody continuity theories of African corruption which hold corruption endogenous to African society and to reside in Africa’s traditional practices, particularly the conflation of private and public sectors, being in conflict with the logics of the modern state (Anders 2005, Hope 2000, McMullan 1961). African corruption is attributed to the traditions of ‘dash’ in indigenous African society (Ocran 1978, Price 1975) which also reflects the lack of a public-private divide. The opposing approach, of rupture, holds corruption a Western concept introduced by colonialism. Rupture theories point to the absence of an equivalent word for corruption in most African languages (Osei-Hwedie and Osei-Hwedie 2000, Gould 1980). This view has in turn been criticized as being a utopian view of traditional African society (Le Vine 1975). Blundo (2006) approves of avoiding the controversy by adopting an intermediary – syncretic - approach between continuity and rupture.

mistaken assumption that strengthening institutions such as the judiciary and the police in Africa would *ipso facto* reduce corruption. The assumption, argue Chabal and Daloz (1999), derives from a Western inability to understand the structural, social and political roots of corruption in Africa. Such institution-strengthening efforts will be ultimately futile where entire societies, including the members of society manning the institutions, are corrupt.

While recognising the futility of formal institutional reform (as Chabal and Daloz 1999 would also do subsequently), Mbaku (1994) makes the case for a public-choice approach that unhinges public-sector control over the economy. Evidence of recent transitions however challenges the wisdom of Mbaku's (1994) solution which assumes, yet again, that corruption is merely a public-sector phenomenon that is limited to the ruling class. No account is taken of the fact that corruption might pervade the entire social fabric. Chabal and Daloz (1999) note that even in African countries praised for economic liberalisation or democratic transitions, corrupt practices have merely migrated and adapted to the new economic and political climate. The problem then remains of finding solutions in law to this endemic problem.

5.3.4 Futility of Anti-corruption Orthodoxy

Corruption is always officially condemned and has always been illegal under modern legal frameworks in post-independence Africa. Yet across much of the continent, there is very little *real* censure of corruption even if there is public outcry whenever a notable case is exposed. Mbaku (1994), Chabal and Daloz (1999) and Emetulu

(2003) all lament the paradox of expressed condemnation and continued participation by all strata of society in Africa.¹⁰⁷ Anti-corruption discourse is largely rhetorical (Emetulu 2003, Chabal and Daloz 1999). Staccato purges are convenient devices for neutering political rivals or attracting foreign aid rather than rejection of corrupt practices (Blundo 2006, Blundo and Olivier de Sardan 2006a). The public glee at such purges is not a mass movement against corruption but a form of voyeurism (Emetulu 2003).¹⁰⁸ Ordinary people, enmeshed daily in corruption themselves, get a fix at the sight of ‘big men’ washing their dirty linen in public and being taken down a peg or two. Major anti-corruption campaigns have been undertaken across Africa from Kountche’s in Niger and Eyadema’s in Togo to Traore’s in Mali and Chiluba’s in Zambia (Blundo and Olivier de Sardan 2006a, Chabal and Daloz 1999). In Nigeria, every new regime has launched a major effort against corruption. Such campaigns are matched in ubiquity by their failure to result in any systemic overhaul of the countries’ politics.

Corruption defies orthodoxy in Africa but the only solutions proffered so far are the orthodox. Ocheje (2001) for instance acknowledges the failure of numerous previous laws and campaigns, many draconian, to get a handle on corruption in Nigeria. Yet he holds out hope that the country’s latest anticorruption legislation heralds a new beginning and speaks of it as a sign of popular change of attitude. Emetulu (2003) wearies of this recurrent expectation of a sudden, magical change of attitude and falls

¹⁰⁷ Blundo and Olivier de Sardan (2006a:7) similarly allude to the ‘doublespeak’ on corruption that ‘reigns supreme in contemporary Africa.’

¹⁰⁸ Kelsall (2003) and Hagbag (2002) rely upon vocal disavowals of corruption to suggest that a critical mass opposed to corruption can always be found even in societies where corruption is endemic. However, the perennial lack of congruence between word and deed on corruption in African societies grounds exasperated analyses like Chabal’s and Daloz’s (1999) and Emetulu’s (2003) which no longer place any premium on periodic purges or popular expressions of condemnation. Kamwendo (1999) lists a collection of denunciations of corruption in the popular press in Southern African countries but corruption apparently goes on unabated despite such denunciations.

just short of labelling it wishful thinking. The insistence on the potency of orthodoxy, against overwhelming evidence to the contrary, shows entrapment in a form of circular reasoning or ‘loopification.’ Where the same has failed and continues to fail, the answer is to apply still more of the same. When a society is so endemically corrupt that it requires an anti-corruption commission to police the existing anti-corruption agencies, the question is unanswered why the anti-corruption commission would itself be above board.¹⁰⁹ The following report from a Kenyan newspaper illustrates the poverty of forever hoping on the sudden materialisation of a few good men or women:

‘The Government has this morning formed an anti-corruption squad to look into the conduct of the anti-corruption commission, which has been overseeing the anti-corruption task-force, which was earlier set up to investigate the affairs of a Government *ad hoc* committee appointed earlier this year to look into the issue of high-level corruption among Government officers.’¹¹⁰

5.3.5 Need for New Type of Law

Ours is neither an apologist argument for corruption nor a case for legalising or ignoring it. Rather it is to assert that the intractability of corruption in Africa demonstrates again the futility of attempting to achieve the Rule of Law in the continent simply by the accepted form, structures and processes of modern law as we know it. Perhaps then the answer lies outside the ambit of modern law, in a parallel universe, where for instance the public-private divide is reconfigured or even done away with. Mbaku (1994) is one of those who come closest to conceptualising the possibility of another legal form in order to deal with the problem of corruption in

¹⁰⁹ Ocran’s (1978:116-148) analysis shows that anti-corruption laws have always been the norm in Africa and the setting up of anti-corruption commissions have been exercises in futility. Muganda (1999:44) finds that ‘law has not been known to provide an effective solution to corruption’ in Africa. Yet, he goes on to recommend the usual suspects of anti-corruption remedies, including anti-corruption institutions, codes of ethics and blacklisting of companies found to engage in corruption.

¹¹⁰ Report culled from the *Daily Nation*, 28 October 1997 and cited in Kaufmann (1998:64).

Africa. Mbaku (1994) talks about the futility of efforts situated within the current regime of rules to deal with corruption. He says that the approaches wrongly assume the existence of efficient counteracting institutions and merely try to manipulate outcomes within existing rules. Effective clean up, he says, should involve the selection and adoption of a new regime of rules that can generate the outcomes desired.

Mbaku (1994) does not elaborate the type of new rules required but he is clearly dissatisfied with operating within the bounds of orthodoxy. He has already called existing rules 'inefficient and non-viable' and has lamented that despite many attempts at post-independence rules reform, 'most African countries have not succeeded in designing appropriate laws and institutions.' While he does not then go on to explicitly broach the subject of another legal form (but merely argues for an approach grounded in public-choice theory), it would not be far-fetched to extend the argument in that direction.

Mbaku (1994) recognises the need for a rule-regime change but, seeming wary of completely breaching the known, ends up explicating public-choice theory. A narrow interpretation of Mbaku (1994) might have his remedy mean the sort of neoliberal reform undertaken under structural adjustment. Chabal and Daloz (1999) have written off that kind of reform as evidently not working in reducing corruption. The problem might be that structural adjustment was operated within the fixed framework of modern law. If we countenance, theoretically at least, a public-choice approach that does not take for granted the centrality or fixity of certain legal forms and

structures, or the inevitability of law in a particular form, then deeper meaning and greater possibilities might start to flow from Mbaku's (1994) thesis.

The transition from public-choice theory to anarchy is but a short one. A well-developed body of anarchist theory advances anarchy not as disorder or the complete absence of rules but the absence of rules in the nature of the modern legal form and the modern state (Sheehan 2003, Marshall 1991). Anarchists argue that this form of societal organisation will produce more efficiency than organisation by the modern legal form. The rationalisation of an alternative to the modern legal form is the main utility of anarchist theory for our purpose and this is dealt with in greater detail in Chapter 8. Suffice it to argue for the time being that the unyielding corruption in Africa is evidence of the impotence of the modern legal form.¹¹¹ Corroboration on the point is provided by the incidence of coups in Africa.

5.4 COUPS

5.4.1 Jurisprudence of Coups

Between 1956 and 2001, there were 80 successful military coups in Africa, 108 failed attempts and 139 reported plots (Collier 2004, McGowan 2003). Between 2001 and 2004, even with the celebration of democratisation on the sub-continent, there have been over 11 attempted or successful military coups (Collier 2004, McGowan 2003).

The continuing susceptibility to coups, despite near-eradication in other regions, is

¹¹¹ Ocran (1978) betrays belief in unilinear social evolution when, referring to the decline of corruption in Britain from the 19th century, he says that only in time, with the (eventual) inevitable growth in wealth, education and loyalty to the state, will corruption be cured in Africa. The limited contention that corruption may be beneficial at an early stage of growth (Leff 1964, Nye 1967, Huntington 1968) seems to also be grounded in unilinear social evolution. Empirical studies (Mauro 1995, Tanzi and Davoodi 1997, Tanzi 1998, Meon and Sekkat 2005, Swaleheen 2005) have however challenged that contention. Rose-Ackerman (1999) in particular argues that if there has been any developmental success in a milieu of corruption, then that success has been *despite* corruption, not because of it.

prima facie evidence of the continuing problems of the Rule of Law in Africa.¹¹²

Coups have produced their own jurisprudence, the expounding of which usually centres on the ‘technical’ legal principles flowing from judicial pronouncements on the legality of coups. There are other equally important, if less examined, questions regarding the inability of modern law’s rules and institutions, no matter how carefully constructed, to deter coups. While these latter questions are most significant for our thesis, the starting point must be the principles of effectiveness and necessity by which coups have been legitimised.

5.4.2 Principle of Effectiveness

In *Uganda v Commissioner of Prisons, ex parte Matovu*,¹¹³ the Chief Justice of Uganda, Justice Udo Udoma, decided that a revolution had occurred in Uganda when Milton Obote, the Prime Minister, issued a proclamation annulling the Constitution, sacking Parliament and declaring martial law. Such a revolution, Justice Udoma held, was a new law-creating fact. Laws which derived from the ‘old order’ remained valid only to the extent permitted under the ‘new order.’ Udoma expressly referred to and approved of Kelsen’s theory concerning the effect of a successful revolution on the legal order.¹¹⁴ Kelsen (1934) had argued that a revolution occurred whenever the legal order of a community was nullified and replaced by a new one in a way not prescribed by the legal order itself. In such a case, it was irrelevant whether the

¹¹² McGowan (2003) says that the military coup is almost an exclusively African phenomenon today.

¹¹³ (1966) EALR 514.

¹¹⁴ Udoma cited with approval the reasoning of Munir CJ in the Pakistani case of *State v Dosso* [1958] 1 PLD 533 (SCT), at pp.539-539: ‘If a revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law creating fact because thereafter its own legality is not judged by reference to the annulled constitution but by reference to its own success.’ *Dosso* has been called a ‘carte blanche for treasonable conduct’ by Hassan (1984:217) and Hatchard and Ogowewo (2003:18).

replacement resulted from a violent uprising, was driven by a mass movement or was carried out by government officials. The decisive criterion was the revolution's effectiveness: that the order in force had, as a matter of fact, been overthrown and replaced by a new order.¹¹⁵

Kelsen's reasoning was also applied in *Madzimbamuto v Lardner-Burke*¹¹⁶ which concerned the validity of a detention order made by the usurper government of Ian Smith in Rhodesia. The Privy Council held that the essential condition for validity of a new constitution introduced by revolution was the efficacy of the new regime.¹¹⁷ In *R v Muzeza*¹¹⁸ the Rhodesian High Court held that the usurper government having established *de facto* control, it would be absurd and result in a complete breakdown of law and order not to grant recognition. *R v Ndhlovu*¹¹⁹ too held that Smith's usurper government, having established *de facto* control, had become the *de jure* government of Rhodesia. The Lesotho case of *Mokotso v HM King Moshoeshow II*¹²⁰ incorporated the *raison d'être* of *Madzimbamuto* into the principle of effectiveness. Cullinan CJ of the Lesotho High Court held that a court may hold a revolutionary government to be 'lawful and its acts to have been legitimated *ab initio*,' if (a) the government is firmly established, there being no other government in opposition

¹¹⁵ Kelsen (1934) situated his analysis of revolutions within his theory of norms. The legal order was made up of an inverted pyramid of norms, at the base of which was the *grundnorm*, the basic norm. The basic norm was a 'first constitution,' the validity of which was presupposed. All other norms ultimately derived their validity from the basic norm. A revolution changed this basic norm so that all norms which were valid under the old order remained valid only to the extent permitted by the new order.

¹¹⁶ [1968] 3 All ER 561; (1969) 1 AC 645.

¹¹⁷ The Privy Council went on to hold that as the legitimate (*de jure*) government was still trying to regain control, the usurping (*de facto*) government was not lawful and would not be recognised by the courts. *Madzimbamuto* has often been celebrated as a rejection of the effectiveness principle. A better interpretation appears to be that it is ultimately an acknowledgement of the principle. The Privy Council merely made a finding of fact that effectiveness had not been established in the circumstances because the previous government was still trying to regain control.

¹¹⁸ (1968) 4 SA 206.

¹¹⁹ (1965) 4 SA 692.

¹²⁰ [1989] LRC (Const) 24.

thereto; and (b) the government's administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.¹²¹

5.4.3 Principle of Necessity

While effectiveness is a supra-constitutional concept, in that it gives validity outside pre-existing constitutional arrangements, the principle of necessity is situated within the constitution. Necessity allows for declarations of a state of emergency and suspension of certain provisions of the constitution when exigencies arise which were not contemplated by the constitution. In the Nigerian case of *Lakanmi v Attorney General (West) & Ors*¹²² the Nigerian Supreme Court held that since it was a voluntary handover by the civilian government to the armed forces that had brought the military into power, a revolution could not be said to have occurred.¹²³ Accordingly, the legal order defined by the pre-existing 1963 Constitution remained in force and the decrees of the military government were constrained by the provisions of that Constitution. The military could only derogate from that

¹²¹ [1989] LRC (Const) 24 at 133. Kelsen's theory had been in issue again in the Ghanaian case of *Sallah v Attorney General* [1970] 2 G & G 493 where the question was whether a statutory office in existence before a coup could be said to have been 'established' by the regime resulting from the coup. The court took this as a straightforward issue of statutory interpretation and held that the office had not been established by the regime. However, the case is more memorable for the sideswipes taken at Kelsen's theory of norms, Archer and Appaloo JJ describing it as mere fiction. It is important to note that for all the derisive language directed at the basic-norm theory, the court did not actually go on to repudiate the fact of effectiveness of the regime or declare the regime illegitimate but construed and gave effect to a Constitution promulgated under the auspices of the regime.

¹²² (1970) 1 NSCC 143; 1971 UILR 201.

¹²³ In January 1966 an attempted coup had seen the killing of the Nigerian Prime Minister and some leading government figures. The coup was quelled by loyal soldiers but the situation was still tense. On the advice of some of the surviving ministers, the Senate President then invited the military to take over the reins of government (Siollun 2009, Luckham 1975). Such a procedure was not provided for in the 1963 Constitution which had been in force up to that time. The Nigerian Supreme Court's judgement in *Lakanmi* implied that a revolution would be said to have occurred only if the military government had come to power through a forcible takeover.

Constitution under ‘the doctrine of necessity.’¹²⁴ In recent years, with the Rule-of-Law movement pre-eminent, judicial pronouncements have sought to establish necessity as the only principle that should be used in sanctioning usurpation of regular constitutional powers.¹²⁵

One thing apparent from the principles of effectiveness and necessity is a struggle by courts to come to terms with the successful upturning of legal orders by extra-legal means. On the face of it, such extra-legal upturning is in breach of the Rule of Law which requires the faithful application of pre-existing law so that even where a legal order is found wanting, changes should be effected only by the prescribed legal procedure. Yet much juristic and scholastic ink has been (and continues to be) expended in the aftermath of successful coups and revolutions to squeeze out legitimacy within existing doctrine on legality. A more honest approach might be to admit the expectations made of modern law are exaggerated and that the Rule of Law where it exists has more to do with an attitude towards law than with the framework of modern law.

5.4.4 Irrelevance of Separation of Powers

The jurisprudence of coups is testament to the limits of the institutions of modern law impleaded as guarantors of the Rule of Law. The principles of separation of powers,

¹²⁴ In response, the military government passed the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 which asserted the supremacy of military decrees and forbade challenge of their legality in court.

¹²⁵ Williams (2003:13) says that where applied, necessity is ‘the preferable approach as it is most consistent with the Rule of Law.’ The attempt to establish necessity as the sole ground for permitting a revolution is self-contradictory. On the one hand, it attempts to establish the sanctity of black-letter law as contained in the constitution by allowing derogation only in accordance with the constitution; on the other hand it accepts that there are situations that a constitution, no matter how finely drafted, cannot envisage or deal with. As a statement of intent, the accord of exclusivity to the principle of necessity serves to assuage an exclusively formalist conception of the Rule of Law.

and especially, of the independence of the judiciary, have now been so endorsed as bulwarks against coups and similar infractions of the Rule of Law that the theoretical premises are accepted as beyond reproach. The checks-and-balances premise suggests, for instance, that if there is an infraction such as an unconstitutional overthrow of government, an independent judiciary will reject such an overthrow. This assumption is built however on a matrix of *a priori* suppositions about human nature, the inevitability of a judiciary in a social order, autonomy of law, the ability of a judiciary to isolate itself from the realities of its host polity and so on.

The concept of judicial independence and the suppositions on which it is built do not seem to allow for the possibility that even a completely 'independent' judiciary might interpret law in favour of usurpation of power or side with tyranny.¹²⁶ Thus it is easily to be asserted that the judiciary in countries in which coups occur is not sufficiently independent or else the legal order resulting from the coup would not have been judicially validated. The evidence for asserting a lack of independence is in the decisions themselves. If a judiciary validates a coup, that is conclusive evidence, without more, that the judiciary is not independent. This is an example of doctrinally constrained rationalisation. When results are produced that depart from the promise of dogma (such as that of independence of the judiciary), then it must be because the doctrine is not in effect and not that it has failed to live up to expectations. Yet, reading between the lines in the Privy Council's decision in *Madzimbamuto*, that court, far-removed in England from the hostilities of Rhodesia, provided patently

¹²⁶ Lord Denning bears out these suppositions, in an almost hubristic manner, when he asks what would happen if a future British Prime Minister chose to pack the Bench with his political affiliates: 'Would they be tools of his hand? No. Every judge in his appointment discards politics and prejudices' (Denning 1982:330). Why this should necessarily be so in Britain, talk less of other jurisdictions and cultures is never quite explained.

‘independent’ reasoning to the effect that a usurper regime would be upheld if there were no evidence that the *de jure* regime was still trying to regain power.

If the Rule of Law, as a principle of constitutionalism, requires that a constitution not be overturned except in accordance with its terms, then an independent judiciary may be but *is not necessarily* a guarantor of the Rule of Law. This is not to say that an independent judiciary might not facilitate the Rule of Law. It is rather to argue that independence, in law and in fact, of a judiciary does not, *per se*, provide any fool-proof guarantee that it will act in accordance with the conventional expectations of a constitution-protecting Rule-of-Law judiciary.¹²⁷

For the avoidance of doubt, no attempt is being made here to discount the many clear cases of interference with and harassment of the judiciary in Africa, especially in post-coup situations. Rather the argument is to highlight the other side of coin, to wit, that a complete absence of interference with a judiciary is not sufficient to guarantee that the judiciary will not, in all good conscience, go along with ‘self-evident’ unconstitutionality. It will usually be the case that the effectiveness of coups and their emanating legal orders is dismissed, in terms borrowed from Hart (1961:6), as the ‘gunman writ large.’¹²⁸ This is one reason why it is usually assumed that a judiciary finding in favour of the coup does not have decisional independence, even if it might be structurally autonomous.¹²⁹ While the gunman metaphor conjures

¹²⁷ As Heller (1987:183) puts it, ‘structure is neither irrelevant to, nor determinative of, the production of practice.’ She also says that ‘the specific nature of the relationship will differ in local subsystems.’

¹²⁸ Hatchard and Ogowewo (2003) also introduce the ‘implicit bargain’ theory which holds that even if judges are not put under physical duress, economic duress is still implicit as judges find themselves having to go along with the new regime for fear of losing their jobs otherwise.

¹²⁹ The concept of judicial independence traditionally comprises decisional independence and institutional independence. Decisional independence refers to the ability of individual judges to decide cases subject only to considerations of law and free from influence or bias. Institutional independence is the ability of the judiciary to operate as an autonomous arm of government (Finn 2004).

appealing imagery of cowering judges staring down gun barrels, many of the unconstitutional overthrows of government in Africa have been essentially by civilians. Smith's usurpation of power in Rhodesia, Obote's sacking of Parliament in Uganda and Nigeria's 1966 voluntary hand-over by a civilian government to the military are but examples. Many more are a gradual process like Boigny's incremental accretion of powers, with the acquiescence of Parliament and the Judiciary, in Ivory Coast.¹³⁰

5.4.5 Impotence of Modern Law

That a judiciary (or parliament) goes along with an unconstitutional overthrow of government is not to be assumed to be from lack of judicial independence or insufficiency of separation of powers. It could be an inability of independence of the judiciary, per se, to guarantee the Rule of Law. Worse still, it could be a failure of the entire modern construct of 'law,' by itself and despite the existence of the alleged prerequisites of formal legality (separation of powers, generality of application of rules, 'good' legal rules and procedures, etc), to produce the Rule of Law. This is a failure the possibility of which the likes of Fuller (1964) and Finnis (1980) refuse to countenance.

Fuller (1964) set out eight prerequisites (or 'desiderata,' as he called them) for a legal system to qualify as such. These include that all law is sufficiently general, publicly

¹³⁰ Ghai (1987:259-260) narrates how in Uganda, Tanzania and Kenya, the constitutions were amended, within the bounds of legality, a year after independence to concentrate power in the President. This gave the President a 'unique purchase on the political and constitutional system' reversing Weber's movement from charisma to formal rationality. Instructively, Gower (1967:81), on the same events, writes about how Uganda promulgated a new constitution which 'even if it complied with the letter of the law was hardly in accordance with *the spirit*' (emphasis added).

promulgated, prospective, clear and intelligible, free of contradiction, sufficiently constant to enable people order their relations, not impossible to obey, and administered in a way sufficiently congruent with the wording of its written rules to enable obedience. The desiderata appear to double as a formalist conception of the Rule of Law.

Fuller (1964) goes on to assert and Finnis (1980) supports him that it is impossible for tyranny to operate exclusively within the bounds of legality. Fuller's (1964) rationalisation is understandable. If he accepts otherwise, it exposes his 'internal morality of law,' as he calls his eight desiderata, as inadequate, or holding out no particular guarantees, for establishing the Rule of Law. This is of course the criticism we encountered, in Chapter 4 (section 4.4.3), of the formal conception of the Rule of Law – that it is unimpeachable as a primary rule of social organisation but incomplete for purposes of conceptualising the Rule of Law. The best that Finnis (1980) can come up with in rebuttal is that the eighth requirement, of conformity with pre-existing law, reduces the scope for excess by tyranny.

On the contrary, Ojwang and Kuria (1977) approach our perspective on the paucity of the guarantee held out by doctrinal constructs such as the 'internal morality of law.' Regarding the ultimate relevance of separation of powers and so on for the Rule of Law, Ojwang and Kuria (1977) ponder the implications of a fusion of executive and legislative powers under a Kenyan constitution and the lack of clear reservation, in the same document, of judicial powers in the Judiciary exclusively. They dismiss the relevance, for the Rule of Law, of this constitutional 'shortcoming' saying that the mere layout of public powers will not lead to any particular result. 'It would not spell

any particular implication for the Rule of Law [the] form of power allocation [that] is set down in the Constitution' (Ojwang and Kuria 1977:118). They go on to say that the true test must be the 'general restraint spirit which prevails in society and the commitment of society to the restraint ethos' (Ojwang and Kuria 1977:118).¹³¹

5.4.6 Subversive Culture of Compromise

The separation of powers and, in particular, the utility of the independence of the judiciary in producing the Rule of Law is based on the idea of checks and balances. One arm of government, being sufficiently independent of the others, will act against the infringement of constitutional powers by the others. This is a species of conflict theory. It presupposes healthy competition - an adversarial, yet constructive, relationship - between the separated arms of government which results in the law being ultimately upheld.

The likes of Menski (2006), Chabal and Daloz (1999), Chanock (1978), Davidson (1973) and Nekam (1966) have written on the culture of compromise that attends traditional African governance and appears to permeate modern government at all levels. This culture is one that does not promote an emphasis on formality and compliance with formal procedures. It is a culture that results not necessarily in the

¹³¹ The sudden disappearance of military coups in Ghana and Nigeria, formerly two of West Africa's most coup-prone countries, may be attributable to experience rather than to any re-invigoration of legal rules or movement towards better separation of powers. The collective experience of the futility of military rule in the resolution of social problems seems to be the compelling reason for Ghana seeing its first coup-free decade since independence. In the case of Nigeria, after 16 years of military rule from 1983, a 'failed' 1979 constitution was resuscitated with cosmetic amendments as a 1999 constitution. Despite harsh criticism of the constitution (for example by Ogowewo [2000] who saw it as a threat to the new democracy), it has been the first constitution in post-independence Nigeria to survive the election of consecutive civilian regimes and not see any degeneration into national crises after the second election.

type of adversarial relationship that guarantees that an independent judiciary will strike down an infringement of the constitution or that a freely elected legislature will strike down an executive bill to vest supreme powers in the President.¹³²

There are several theories, all possibly interrelated, for this culture of compromise. The first is a lingering feudal mentality, a carryover of the pre-colonial social order, in which the *de facto* possessor of the equivalent of executive power is guaranteed obsequiousness by the other institutions in society.¹³³ This possessor of power could be an ambiguous body of elders in acephalous societies like the Igbo of Eastern Nigeria or the powerful potentate of a pre-colonial kingdom like the Oba of Benin.

Another theory is of an intra-class conspiracy to oppress the proletariat and is one which neo-Marxist thought will be familiar with. Colonialism foisted a sharp new social division in which an educated ruling class – a petty bourgeois - could easily demarcate itself from the rest of society (Worger *et al* 2010, Mamdani 1996). An independent judiciary belonging to the ruling class could easily find justification, cloaked in legal doctrine, for upholding an unconstitutional overthrow of government by some members of its own class. Simply put, the judiciary closes ranks with its own class against the rest of society. In that event, the judicial upholding of coups was less grounded in a lack of judicial independence than in the indeterminacy of law, a concept examined in the following section 5.5 of this Chapter 5.

¹³² Ghai (1987:258) says that the separation of powers and formalism implicit in theories of the Rule of Law, 'are alien to systems of governance in traditional African societies so that their disregard by the government is unlikely to lead to loss of legitimacy.'

¹³³ Anthropologists and historians like Rattray (1929), Chilver (1960), Loeb (1962), Cohen (1966), Hosea (1985) and Mukherjee (1985) have used 'feudalism' to describe the structure of many pre-colonial African societies. Goody (1963) allows for the analogy between feudalism in Europe and the vassalage and fiefdom of pre-colonial Africa. However, he prefers that analysis of pre-colonial African society be devoid of the concept to make the analysis simpler, free of Western bias and free of the assumption that because vassalage existed in Africa, the other institutions of European feudalism also did.

A third theory, which takes in aspects of the other two on the culture of compromise, is what legal anthropologists like Ebo (1979), Allott (1968), Elias (1956) and Holleman (1949) have identified as the overriding need to maintain equilibrium in traditional African society. Davidson (1973) says that the governing principle of traditional African law lay in the duty to conserve the ideal equilibrium. Nekam (1966) says that the African law was a system of keeping the balance. It was not geared towards imposed decisions but to consensual solutions. Chanock (1978) also refers to the widely-held view that compromise was the key word in Africanity so that personal disputes were settled by seeking a solution acceptable to both parties rather than a winner-takes-all determination.¹³⁴ The antithesis of such compromise was resolution by reference to abstract principles as prevail in the modern legal form (Ebo 1979, Holleman 1949).

Whatever the explanation for its existence, a strong culture of compromise in social relations increases the likelihood of a judiciary finding in favour of effectiveness or necessity when confronted with a *de facto* regime that has come to power by unconstitutional means. Such a finding could come from a judiciary that has both decisional and institutional independence. The likelihood is increased by the indeterminacy of law.

¹³⁴ Chanock (1978) calls this a 'Garden-of-Eden' view of traditional African law and society. He concedes that it is the current anthropological orthodoxy but suggests that a contrary and influential school of thought exists. Using anthropology of Malawian tribes as his basis, Chanock (1978) narrates accounts of harsh retributive justice in traditional criminal law. Chanock (1978:83) concludes that the conciliatory discussion, 'the award based upon a mutual perception of equity, could never have been more than a partial aspect.' Menski (2006:469) opposes Chanock's views, saying that there is 'clearly enough substantial, not just speculative evidence' of the 'idealistic balancing systems of traditional African cultures.'

As legal realists and critical legal scholars have long advocated and others outside that firmament have gradually acknowledged, there is often a wide ambit, within the bounds of legality, available to judicial interpretation. Indeed, it is arguable that the existence of the principles of effectiveness and necessity are but examples of the indeterminacy of law.¹³⁵ Even more so is the asserting of the ‘glorious revolution’ as a credible and legitimate exception to the upholding of the letter of a constitution. The glorious revolution is a coup against a tyrant, even if he has come to power under the constitution and has not legally subverted it.¹³⁶ The acknowledgement of the glorious revolution as consistent with the Rule of Law, even by otherwise vociferous defenders of the sanctity of constitutions and legality such as Hatchard and Ogowewo (2003) and Williams (2003), is an index of how indeterminate legal doctrine can be.¹³⁷

¹³⁵ Critical legal scholarship which has always made a strong case for recognition of this indeterminacy has been opposed, as Solum (1987) demonstrates, by the example of the ‘easy case’ where the provisions of black-letter law can be capable of only one reasonable interpretation. It is doubtful however whether the case for indeterminacy has ever been that legal provisions are capable of *any* interpretation; the argument seems rather to be that legal provisions are often not capable of only one interpretation.

¹³⁶ Williams (2003) sets out the rationale for upholding a glorious revolution as legitimate and in keeping with the Rule of Law. In *Mokotso v HM King Moshoesho II* at [1989] LRC (Const) 24, at 167, Cullinan J, in upholding the new regime, cited the overthrown regime as being characterised by corruption, bloodshed and murder. The acceptance of the glorious revolution as compatible with the Rule of Law is steeped in the rationale of equity. In a way, the evolution and entrenchment of equity as a parallel influence in the development of the common law strengthens the argument for indeterminacy.¹³⁷ This is indeterminacy on two planes. The first plane is indeterminacy in terms of the fact that legal doctrine can always create an exception to a seemingly water-tight rule, in this case the basic rule being that it is a requirement of the Rule of Law that a regime not be overthrown except by working within the framework of the existing legal order. The second plane is indeterminacy in terms of an inherent admission, in the acceptance of the need for a glorious revolution, that ‘law’ itself, no matter how well-intended it is or its institutions are, can sometimes prove incapable of preventing tyranny. In that case, extra-legal means are called for to restore the ‘Rule of Law.’ This begins to lead us to the realisation that the Rule of Law implies a certain ideological functionalism, with greater flexibility than the fixity implied by conceptualising it merely as the rule of pre-determined legal rules.

5.5 INDETERMINACY OF LAW

5.5.1 Anything is Possible in Law

The argument for indeterminacy of law usually refers to rule indeterminacy and is one of the defining features of Critical Legal Scholarship (Solum 1987). Rule indeterminacy suggests that for every legal rule there is an opposing counter-rule so that there is no inherent determinacy in the totality of legal doctrine. Legal rules also are often ‘open-textured,’ allowing a judge scope to engage in discretionary balancing of several factors. Furthermore, doctrinal distinctions are often based on circular reasoning or ‘loopification’ so that the justification for the distinction is the distinction itself. Given indeterminacy, any shrewd adjudicator can ‘square’ a decision in favour of either side based on existing legal doctrine. Like much of orthodox legal scholarship, the focus is on specific judicial decisions.

The argument that legal doctrine is indeterminate has been opposed by pointing out that the application of legal doctrine does in fact consistently produce determinate results in legal systems of the Rule of Law variety.¹³⁸ Yet, even if we take this opposition at face value, there is utility still in the indeterminacy thesis. That thesis demonstrates that even if determinate results are produced by a legal system, there are several other logical outcomes that might be justified by the same mix of legal doctrine. In other words, there is nothing inherent in legal doctrine that guarantees a

¹³⁸ This appears to be the sum-total of Solum’s (1987) critique of critical dogma. Solum (1987) argues for instance that while there might be many logical possibilities (giving rise to notions of indeterminacy), practical possibility is much more limited. He argues that an infinite number of logical possibilities ‘holds no terror in our daily lives.’ Solum (1987) goes on to place a premium on the fact that outcomes of judicial decisions have been predictable. He does not appear to factor in the possibility that this might be because the overall social setting and broad cultural direction in which this predictability exists is the same. A cross-cultural analysis that compares the application of the same mix of doctrine, say as between the developed West and tropical Africa, might show marked differences in outcome, as we have suggested with coups. This difference is what Trubek and Galanter (1974) seem to have noticed out when they say that it is an ethnocentric mistake to assume that modern law works or is perceived in much of the developing world in the same way as it is in the West.

determinate outcome even if in fact determinate results are produced when the doctrine is applied.¹³⁹

The argument is encapsulated in the slogan of Critical Legal Scholarship that ‘law is politics.’ By ‘politics,’ critical legal scholars (‘crits’) did not mean partisan politics but a complex interplay of social and cultural factors that shepherded consensus in a particular direction. According to the critical legal scholars, law ‘provides only a wide and conflicting variety of stylised rationalisations from which courts pick and choose’ (Kairys 1982:3). What provides predictability (and thereby the Rule of Law) may not be the legal doctrine itself but the social and political context which dictates the favoured rationalisations.

One extrapolation that can be made from this view is that determinacy in any legal system is grounded not quite by law itself but by social and political judgements which incorporate a variety of factors. The extrapolation is usually categorised as the weak version of the indeterminacy thesis.¹⁴⁰ It amounts to an acceptance that well functioning legal systems do produce predictable results but with a caveat that this does not mean that legal doctrine is itself determinate. A stronger version of the argument is usually associated with Critical Legal Scholarship but Gordon (1984:125) suggests that that arises from a misunderstanding of what critical legal scholars mean. He says that critical legal scholars do not mean that there are never any predictable causal relations between legal forms and anything else. Rather, the ‘critical claim of indeterminacy is simply that none of these regularities are the necessary consequences of the adoption of a given regime of rules’ (Gordon 1984:125).

¹³⁹ In other words, given a different social setting the same mix of legal doctrine could produce a different result: Singer (1984:20-21) and Kairys (1984:247).

¹⁴⁰ Solum (1987:487-495), for instance, makes such a characterisation.

5.5.2 Rule of Law is Possible

As Solum (1987) points out, frequently the claim that legal rules are indeterminate is the starting point for the denial of the existence of the Rule of Law. Critical Legal Scholarship inculcates opposition to the liberal claim that modern western society is characterised by the Rule of Law. Such a denial might be valid if we defined the Rule of Law only in terms of the autonomous rulership of pre-fixed legal rules. In other words, the state of affairs in the West is not the result of the autonomous rule of legal rules because if legal rules are indeterminate, then the rule of legal rules alone is the rule of indeterminacy.

As we have seen, in contemporary usage, the Rule of Law is synonymous with a certain functionalism. It goes beyond the mere fact of social organisation by a form or layout of legal rules to include certain conventions, attitudes and understandings which direct the rules towards determinate outcomes. As a compound term of art therefore, the Rule of Law indeed incorporates the behavioural patterns that make those specific objectives and outcomes possible. We must therefore pause again to demarcate meaning here.

When Critical Legal Scholarship challenges the existence of the Rule of Law in Western society, it is not apparent that they doubt that the functionalism, at least in terms of predictability of outcomes which is characterised as the Rule of Law, exists. Rather what they dispute is whether that functionalism can be attributed, as often seems to be the case in mainstream legal theory, to the autonomous working of a

particular regime of legal rules.¹⁴¹ The suggestion is that the predictability does not necessarily result from the nature and content of the legal rules themselves but from a complex interplay of factors, including the relationship of society with its law, which is called ‘politics.’¹⁴²

In terms of the indeterminacy of legal rules and the politics in judicial outcomes, it is doubtful if the view of critical legal scholarship was ever novel theory. Hart (1961) had after all expressed such sentiments by likening rule-optimism and rule-scepticism to Scylla and Charybdis. He purports reality as a middle ground of ‘under-determinacy’ of legal rules in judicial decisions. Dworkin (1968) criticised Hart for conceiving of law only as a system of rules and argued that law also included ‘principles,’ etc which determined how the rules were operated. Dworkin’s (1968) ‘principles’ seems remarkably similar to the ‘politics’ which critical legal scholars emphasized as determining how legal rules were applied.

Hart’s (1961) and Dworkin’s (1968) views may therefore be seen to in that regard as two sides of the same coin, with Dworkin’s allusion to principles rationalising the under-determinacy of legal rules that Hart found. The major contribution of critical legal scholarship was therefore not that it said anything new but that it forced general

¹⁴¹ The representation of indeterminacy of legal rules as proving the lack of Rule of Law may be seen to also stem from a narrow *in specie* meaning assigned to the Rule of Law in American legal usage. Legal parlance in America usually takes the Rule of Law as synonymous with the egalitarianism and determinacy of judicial process. This is a reductionist conception of the Rule of Law that draws heavily on the Realist School of jurisprudence, originating in America, which holds the law to be what judges say it is and nothing more. Thus if doctrine on which judicial decisions are reached is indeterminate, there is no Rule of Law but something else that is occurring. Again this is the Rule of Law perceived not in terms of functionalism we have described but merely as legal rules producing determinate judicial decision-making.

¹⁴² Critical Legal Scholarship does not seem to question the relative systemic fidelity in the West to the phenomenon called ‘law.’ Rather it appears to query whether the law has not been mystified and reified, by liberalism, in order to obtain this fidelity. There is no doubting that the systemic commitment exists; what is doubted is whether the anti-anarchical premise (of determinacy) on which this commitment and submission (and thereby legitimation) has been obtained is really true.

acknowledgement of something which had hitherto been suppressed regarding legal rules and the autonomy of the modern legal form. In eliciting grudging admission that there was more to determinacy of law (and therefore Rule of Law) than just the legal rules or the legal form, the critical legal scholars provide a basis for critique of the assumptions underlying Rule of Law practice that even they do not realize.

5.5.3 (Rule of) Law is Politics

For purposes of illustration only, our argument can be reduced into algebra:

$$\text{Rule of Law (9)} = \text{legal form (4)} + \text{politics (5)}.$$

If the legal form (4) is present, then you need to add the right mix of politics (5) and you will have the Rule of Law (9). However, suppose there exists for whatever reason a different politics with a value of (6). Mixing it with the legal form will not produce the Rule of Law (9). Rather, the legal form (4) becomes a problem and has to be changed to (3) in order to produce the same value (9). This is the argument. If the politics is not the same, then either the legal form or the politics must change.

The question therefore is whether there is another legal form that can be used or the only option is to change the politics. The latter assumption seems to drive current development practice. Yet if we accept that the legal form is indeterminate or under-determinate, then it means that we can also change it. Perhaps it is indeed an outcome-neutral form of law and it is the ‘right’ politics that makes it determinate, in which case its dispensability increases. If it is the politics – the innate social understandings, compacts, cultures and values – contingent on particular historical

experiences or even shared myths that determines how the form is employed, then the right politics must always be sought. Without the right politics or given different politics, the same legal form can be used for other purposes or to a different effect. There is nothing intrinsic in the legal form that means that it will achieve that singular object.

Max Weber has of course argued for inherent rationality of the modern legal form and alluded to the Protestant ethic as part of the politics that not only led to its rise in the West but explains the success of its use (Weber 1954, 1958 and 1978, Trubek 1972a). Let us assume for the purposes of argument that Weber is right on the influence of scriptural understandings in the growth of the modern (capitalist) legal form in Europe. Gellner (1970) thinks that if we interpret the text of Bible, it seems tenuous to hold that the text encourages capitalism because it seems to do rather the contrary. Yet, in making a historical analysis of the effect the Bible on Western Europe, it is not for us to give the Bible the interpretation we think it should have but to look at its meaning for the people influenced by it, in the light of what they actually did. Even if it seems irrational to us that Bible could produce a capitalist ethic, to those who acted out the rise of capitalism in Europe, that was what the Bible meant for them. By the same token, even if it seemed rational to Weber, and to Enlightenment Europe before him, that the modern legal form ('formal legal rationality') should be used to promote liberalism etc, the legal form could have meant something else or been related with differently by another set of people in another time, facing different circumstances, contingencies and needs.

Gellner (1970) frames his argument in terms of whether rationality differs between different peoples or even the same people at different times. The question of different rationalities is a tricky one given that 'rationality' has been taken to denote the essence of all humanity and therefore of racial equality. Instead of 'rationality' therefore, other terms with less potential for racist innuendo must be called into play (even if in the end they direct us towards the question of whether different rationalities do in fact exist). This brings us back to Ojwang's and Kuria's 'Rule-of-Law spirit,' Dworkin's 'principles,' critical legal scholars' 'politics,' and even Foucault's 'power.' The terminologies share the common feature of trying to describe the phenomenon that shepherds consensus on meaning and cognition in a particular direction and not towards others. It might never be possible to elucidate fully the constituents of this phenomenon as it is a complex and ever-changing interplay of varying forces rather than a static, predictable mix that is involved. Euphemisms such as 'principles' and 'politics' might therefore have to suffice as open-ended terms capable of accommodating the fluid variables that shape meaning in a particular manner. These mixes probably vary from organisation to organisation in the same way that they vary from society to society.

We have seen Galligan (2007) delve into organisational theory to try to explain why the officials in stable societies agree to abide by certain rules when they could easily collectively decide not to. Galligan (2007) cannot explain why similar consensus is absent from unstable societies, a void that Clague (1993) encounters when he attempts to study the correlation between rule obedience, organisational loyalty and economic development. Like Galligan (2007), Clague (1993) finds that more empirical research is needed into the sources of difference in rule obedience between different societies.

He says that such research might lead to ‘greater insight into the strategies that governments might follow to promote more favourable evolution of institutions’ (1993:23).

Berkowitz *et al* (2000) have conducted the type of study that Clague (1993) envisages by examining the determinants of ‘legality,’ a term that they use to denote the effectiveness of national legal systems. Using data on nearly fifty countries, they find that the genesis of a country’s legal system is a more important determinant of legality than the substance of the laws. Countries that developed their own legal systems measured higher on legality indicators than those in which the legal system was a relatively recent import and whose prior legal systems were not similar to the import. The Berkowitz *et al* (2000) report may be interpreted to mean that familiarity with the passage of time will breed legitimacy of the imported legal system so that legality should eventually come with time. However, this is a supposition. It is possible that familiarity will not come at all. The relevant ‘politics’ is after all still a hazy concept.

Suppose that the politics in a particular society remains antithetical to deploying the modern legal form towards the Rule of Law.¹⁴³ Trubek and Galanter (1974) and

¹⁴³ This argument seems to run against the comparative-law perspective that all legal systems are made up of borrowed elements. Watson (1993) is at the forefront of the view that transplantation of legal rules is easy and is the norm rather than exception. A close look at Watson’s analysis however reveals that he is concerned with the fact of transplantation of black-letter law rather than with transplantation replicating the legal conditions in the originating legal system. On Watson’s level of analysis, of transplantation of rules *qua* rules, transplantation is easy even in Africa. What is difficult is the replication of social dynamics such as attitudes to law, the legal culture, the spirit of the law, etc. It is here that we reconcile Watson with the likes of Kahn-Freund, Legrand and Seidman. Kahn-Freund (1974:13) says that transferability depends on how closely the legal rule is linked with the foreign power structure. Legrand (1997) says that transplants are impossible. Seidman (1978a), studying Africa, says that legal transplants never work. Seidman’s ‘law of non-transferability of law’ says that while the rules may be taken across, the same effect can never be replicated. Teubner (1998:14) puts it best. He says that convergences are observable on the level of legal rules but ‘the deep structures of law, legal culture, legal mentalities, legal epistemologies and the unconsciousness of law as expressed in legal mythologies,’ remain historically unique and cannot be bridged. This argument is buttressed if the modern legal form is regarded as a product of a particular socio-historical contingency rather than

Trubek (1972b) have long argued that the modern legal form is not related to or perceived in most developing societies in the same way as it is in the developed West. In other words, the politics of those developing societies is different from that in the West. If we hold this politics constant then perhaps we should be looking for, or at least enabling the possibility of, other legal forms that achieve the same or better outcomes with that politics as the different politics of the Protestant ethic has enabled with the modern legal form in the West. Even if we admitted to the first interpretation of Berkowitz *et al* (2000) aforesaid, that time will eventually breed legitimization of the modern legal form in societies where it is still a recent import, it is still possible to simultaneously maintain the other argument that faster progress on outcomes will be achieved using other legal forms.

5.5.4 Change the Law not the Politics

It comes down to a question of what to emphasise in the strategy for pursuing the desired outcomes. Do we emphasize changing the politics so as to reproduce politics similar to that of the West or do we emphasize changing the legal form to work with existing politics? At the moment, as indicated by Galligan (2007) and Clague (1993), there is still too little empirical information in either direction to convince that one strategy is to be preferred over the other. That being the case, the privileging of ‘change-the-politics’ by orthodox development theory is no more grounded than the hypothesis that a ‘change-the-legal-form’ approach is the way to go.

inevitability. The opposition to this view of modern law is that the view is either irrational or raises possibilities that are capable of conceptualisation but not practical. Underlying the opposition is a barely concealed apprehension of chaos, intellectual and literal, if the argument is given vent that modern law is a false necessity.

Favouring a change of legal form implies that the legal form is itself an incentive or disincentive to actuating the spirit of the Rule of Law, depending on the politics of the society. There is of course the possibility that that the problem is entirely attitudinal – the existence of a general spirit antithetical to the Rule of Law – so that whatever legal form is put forth, there will still be a lack of Rule of Law. Clague (1993) has called it an interesting but essentially unresearchable question whether societal differences in rule obedience are due to differences in incentives rather than attitudes. His guess is that incentives and attitudes reinforce each other in a cumulative fashion so that disentangling the separate effects of each is impossible.

Focusing on changing the legal form, as our dissertation does, deemphasizes the attitudinal but that is because our argument so far has been that orthodox development theory assumes that it is attitudes that must change (and not the legal form). The failure of the orthodox approach provides leeway for arguing an alternative approach that highlights the incentive aspect. If the nature of the legal form incentivises or disincentivises the collective spirit that produces the outcomes known as the Rule of Law, then achieving the Rule of Law in much of Africa will involve the replacement of the modern legal form. This is not entirely inconsistent with Clague's (1993) putative model in so far as it holds that in order to achieve uniform outcomes, a different type of incentive will be required where attitudes are different.

Comparison of the outcomes of the modern legal form in the West with the outcomes (so far) of the same legal form in developing societies in Africa was perhaps the intellectual trick that critical legal scholarship missed. Perhaps this would have strengthened their case on absolute indeterminacy of modern legal rules and

responded to Solum's (1987:478) critique that although an infinite number of logical possibilities arise from legal rules in modern society, the situation 'holds no terror in our daily lives.' Solum (1987) was arguing that despite the many differing possibilities that legal rules could give rise to, for whatever reason it was only one set of possibilities that were consistently reached in the modern (liberal) legal order. Critical legal scholarship might have missed the capital that they would have derived from a cross-regional comparative approach either because of lack of information on conditions in developing society or simply a lack of interest.

The assumption in any event, shared by Law and Development Scholarship which crossed paths with Critical Legal Scholarship in the 1970s, was that the conditions in developing society had not evolved to where a comparison with modern Western society was meaningful. The modern legal form was a given and developing society had not fully developed it yet or understood how to use it; in the West, the modern legal form was fully developed and had once been close to its ideals but had since deviated so that attention had to be drawn to the deviation. For all its radical posturing therefore, Critical Legal Scholarship was really mainly an 'internal' critique – a heresy rather than an apocrypha in Manderson's (2001) terms. It does not question the inevitability of law in its modern form but engages merely in 'deconstructing' and 'trashing' the assumptions about how this law operates.¹⁴⁴ In arguing the indeterminacy of law for instance, Critical Legal Scholarship focused on (the assumptions about) how the judiciary achieves purpose, but they rarely

¹⁴⁴ This is, of course, a sweeping generalisation as critical legal scholarship was nothing if not eclectic. Heller (1984) for instance comes as close as possible to questioning the entire legal form when he applies a post-structuralist critique to law and speaks of the 'Other.' At times however, he seems merely to be arguing for the acknowledgement of contradictory discourses within the law rather than for the possibility of an alternative legal form. If, for the purposes of simplification, we take the recognition of the possibility of an Other as the distinction between critical scholars and apocrypha, then Heller overall would be more of apocrypha than a critical scholar.

questioned whether a judiciary should have been or was an inescapable creature of ‘law.’¹⁴⁵ As Ojwang and Kuria (1977) demonstrate, anyone seeking not to take for granted the inevitability or perfection of modern law can call into question the centrality of the whole judicial project which runs through orthodox legal theory.

Davies (2008) notes that a regular critique of the Critical Legal Scholarship is that it failed to propose any alternative world view. Davies (2008) says however that that misses the point. The true legacy of critical legal scholars is that they might have played a useful role in establishing the conditions for challenging and eventually destabilising established modes of legal thought. The possibilities that they elicit can be used from outside the law itself against law or, at least, the modern legal form.

Critical Legal Scholarship repudiates ‘false necessity’ – the limiting belief that the modern world and modern institutions could not have been different from what they are today. False necessity leads to complacent acceptance of the things that are familiar – such as modern law. The legacy of critical legal scholarship is to open up the possibility that a multitude of alternatives to the status quo not only exist but can also be actualized. Critical Legal Scholarship therefore provides a springboard for questioning legal orthodoxy which in turn raises doubts about the inviolability of the modern legal form and therefore, supports the possibility of an alternative. This is the direction in which what we shall term an ‘Afrocentric’ critique heads. The Afrocentric critique queries whether modern law, as we know it, is the only form of ‘law’ by which the state of affairs known as the Rule of Law may be achieved. It is the subject of the next chapter.

¹⁴⁵ The concentration on the judiciary is archetypal of American legal scholarship but also runs through the gamut of Western legal philosophy.

5.6 SUMMARY

How to motivate systemic fidelity to law is still a recondite part of knowledge on the Rule of Law. British constitutionalism provides corroboration that the Rule of Law depends more on the human factor – a group commitment towards producing the social conditions characterised as the Rule of Law – than on the substance of laws and the form or layout of legal institutions. This human-factor problem is what some African writers have called the ‘spirit’ of the Rule of Law. Those writers go on to lament an ‘irreducible confidence’ in mere forms and structures, in much of Western-oriented legal philosophy, as the basis of the Rule of Law.

Endemic corruption in Africa shows the futility of modern law, no matter how many layers of it are added or how many times it is sought to be internally revitalised, to attract systemic fidelity just by its being ‘the law.’ Coups in Africa show the inability of doctrinal constructs, such as separation of powers and independence of the judiciary, to guarantee the Rule of Law. Judicial legitimisation of successful coups (on the basis of ‘effectiveness’ or ‘necessity’) bears out the indeterminacy of law.

The argument for indeterminacy of law is encapsulated in the slogan popularised by Critical Legal Scholarship that ‘law is politics.’ ‘Politics’ here does not mean partisan politics but a complex interplay of social and cultural factors that shepherd consensus in a particular direction. The extrapolation from this view is that determinacy in any legal system is down not to law itself but to socio-cultural consensus – ‘politics’-incorporating many factors.

A society without the Rule of Law can aspire to mimic the politics and use the legal form of the society with the Rule of Law. If the politics of the deficient society cannot change for whatever reason, then the combining that politics with the legal form of the successful society is likely to produce an anomaly. The assumption that seems to drive current development practice however is that modern Western law must always be used so that it is always the politics of deficient societies that must change if the Rule of Law is still lacking. Yet if we accept that the law is indeterminate or under-determinate, then it means that we can also change it. Perhaps modern law is indeed an outcome-neutral form of law and it is the 'right' politics that makes it determinate, in which case its dispensability increases. That being the case, the privileging of 'change-the-politics' by the Orthodoxy is no more grounded than the hypothesis in this dissertation that a 'change-the-legal-form' approach might be the way to go.

Once doubts have been raised about the inviolability of the modern legal form in the Rule of Law, leeway is provided for arguing the possibility of an alternative to go with the politics of Africa. This is the direction in which an 'Afrocentric' critique, the subject of the next chapter, heads. The Afrocentric critique proceeds from an Africa-centred standpoint to query the settlement on modern law as the only form of 'law' by which the state of affairs known as the Rule of Law may be achieved.

CHAPTER 6 – AN AFROCENTRIC CRITIQUE OF MODERN LAW

‘The idea that Africa can make a choice about whether it wants to embrace the West ... is a displaced metaphor. The point is that Africa is already locked in embrace with the West; the challenge is how to extricate ourselves and how much. It is a fundamental problem because without this loosening we continue to mistake the West for self and therefore see ourselves as the Other’ (Oyewumi 1997:25).

6.1 INTRODUCTION

Chapter 4 argued that the ‘law’ in the Rule of Law does not necessarily mean modern law. Chapter 5 then argued that prevalent African attitudes towards law have been antithetical to using modern law to build the Rule of Law. Another form of law should therefore be sought which can be combined with those attitudes to build the Rule of Law. This chapter consolidates the argument by challenging the hegemony of modern law over the word ‘law.’

The chapter first constructs an Afrocentric critique of law which offers the view that modern law is not universal rationality but Western customary law. Recourse is had to existing critical theory, including critical legal studies, feminism, postmodernism and postcolonialism, to corroborate the anti-foundational treatment of modern law by the Afrocentric critique. The chapter then makes the argument that Other forms of law are not only possible but would also be more legitimate in Africa. The argument for Other forms of law is distinguished from the concept of legal pluralism before the chapter is ended with a summary.

6.2 AFROCENTRIC CRITIQUE

6.2.1 Afrocentrism

‘Afrocentrism’ denotes an Africa-centred way of looking at things.¹⁴⁶ The Afrocentric critique therefore looks at modern law with ‘African eyes,’ constituting Africa both vantage and starting point from which to analyse and critique modern law.¹⁴⁷ From this African viewpoint, the critique queries the hegemony of modern law over ‘law.’ The critique takes to task the settlement on modern law with its subscription to abstract principles and legal fictions, its formality and its institutional categorisations between executive, legislature and judiciary. The formidable body of orthodox jurisprudence has contrived to present this as the best form of law there so far is and the only legal form within which the Rule of Law can be (best) produced. It is the modern form of law, the ultimate legal wisdom and possibly the end of legal history. But what precisely is this form?

6.2.2 Specifying Modern Law

The usual method of giving specificity to the modern legal form is by setting it off against the legal form of ‘traditional’ society. It is the legal form which is ‘distinct

¹⁴⁶ Afrocentrism has attracted denigration as a school of thought because of controversial claims by Afrocentrists like Bernal (2001 and 1987), Van Sertima (1993) and Diop (1974) that ancient Egyptian and Greek civilisations (and even some Oriental civilisations) were created by Negroid peoples and rooted in black Africa. Such claims have been criticised as ‘pseudo-history,’ the propagation of myth as history (Lefkowitz 2008 and 1997, Slack 2006, Carroll 2003, Walker 2001). They have been falsified in part by showing that the diachronic bases are flawed (Lefkowitz 1997). Alkebulan (2007) however laments the discrediting of Afrocentrism as a whole just because some Afrocentrists make disputed historical claims. Glazer (1997) points out that Afrocentrism is far bigger than a few dubious theories: it is an eclectic school containing much credible and relevant scholarship. Asante (1988 and 1987), for instance, has championed the seeking out of African ways of life and cosmological views, in order to emancipate and legitimise them against Eurocentric scholarship. Afrocentrism in that vein inculcates a methodology for critiquing knowledge from an African point of view or as Asante (2000:1) says, ‘... Afrocentric analysis is a critique of domination [hegemony].’

¹⁴⁷ Support may be drawn from Mudimbe (1988) who announces the ‘good news’ that the African now has the freedom of thinking of himself or herself as the starting point of an absolute discourse.

and different, not only from traditional societies based on custom, but also from those that are quite developed but lack the same characteristics' (Galligan 2007:243). Trubek (1972b:5) also says that the nature of modern law can be 'seen most clearly when contrasted with the processes of social ordering in traditional societies.' Modern law, continues Trubek (1972b:5) consists of 'general rules applied by specialized agencies and uniformly to all regions and to all social strata' and is 'relatively autonomous from other sources of normative order.' This type of law must also have behind it the organised force of the state:

'The state creates the system of rules and the courts and other institutions which make, apply and enforce the law; the rise of modern law supplants local, particularistic and traditional forces, and is thus the vehicle through which the state replaces communal or traditional authority' (Trubek 1972b:6).

Davies (2008:38) finds that this concept of modern law is enshrined in certain institutions that are manifest in the West and which are now assumed to be the universal repositories or sources of what can be 'law.' This is notwithstanding the fact that certain other concepts of law exist among other cultures which have no place in the dominant Western theories of law. These non-Western ideas of law are normally classified as deficient but it can be argued that such classifications are merely an attempt to subordinate every legal form which 'does not look like [the Western modern version] to an ideological supremacy of so-called "developed" law' (Davies 2008:38). It is 'philosophical imperialism,' continues Davies (2008), to attempt to capture the world's diverse meanings within the dominant Western mode.¹⁴⁸ It is not just that different systems have different doctrines and principles or even totally different ways of classifying substantive law; it is that there are ways of

¹⁴⁸ On that basis, Davies (2008) refuses to analyse Aboriginal concepts of law to avoid forcing them within Western legal theories with which she is familiar.

understanding law which cannot simply be explained in terms of Western legal theory.

Conflating the concept of law with the characteristics of modern Western law is so rampant in mainstream legal theory that it is routinely taken for granted; it is rarely questioned whether this is right or why it should be so. The conflation reaches back to retrospectively qualify or disqualify its own ancestral lineage. Baker's (2002) *Introduction to English Legal History* holds that because there was a lack of distinction in pre-Conquest English law between administrative, adjudicative and legislative functions, such a system was not 'quite the same as law.'¹⁴⁹ Similarly, Hart (1961), having conceptualized law as a union of primary rules (of substantive law) and secondary rules (that determine how primary rules may be introduced, ascertained, interpreted, amended or repealed), pronounces 'primitive' systems as devoid of law for the lack of secondary rules.¹⁵⁰ Hart's (1961) referent for his concept of law was of course the Western 'modern' legal form. It is a measure of his confidence in the supreme wisdom of that referent, as far as law is concerned, that the characteristics of the referent then become the universal parameters for what can be included and what must be excluded. The problem is that by defining something only by reference to the model one is familiar with, anything outside that model automatically becomes deficient.

¹⁴⁹ Similarly, Maine (1861) excluded ancient codes such as Hammurabi's 12 tablets from 'law' properly so-called because they were not the work of legislators and at the time of their compilation, there was no conception of law distinct from philosophy and religion.

¹⁵⁰ Like Baker (2002), Hart (1961:14) excluded laws of antiquity, 'including those out of which some contemporary legal systems may have gradually evolved,' from certain classification as law on the ground that they did not possess the features of modern law.

Thus 'law' is delineated by reference to the observed features of the modern Western legal form. Hart's (1961) thesis for instance, breaks social regulation down into primary and secondary rules, the first being available to all societies and the second, the defining characteristic of the modern legal form, being available only to societies with 'law.'¹⁵¹ In this way, traditional modes of African social regulation were for a long time not held to be 'law' for the absence of organs seen to approximate with a judiciary and a legislature which were the obligatory crucibles for secondary rules. Driberg (1934:237-238) would say that in Africa, 'generally speaking, symbols of legal authority are completely absent, and in the circumstances would be otiose.' Smith (1965:24) would similarly explain that 'under various accepted definitions of law, indigenous African societies may be said to have lacked law.' Continuing, Smith (1965:24) explained that on 'such views, before the ... Europeans overran tribal Africa, its peoples knew only custom instead of law.'¹⁵²

Even legal anthropologists sympathetic to the existence of 'law' in pre-colonial Africa often merely sought to validate that law not on its own terms but by seeking to prove the existence, in it, of the equivalents of Western concepts.¹⁵³ It is to this end of course that Gluckman (1955) distilled the fiction of the reasonable man among the Barotse of Northern Rhodesia (now Zambia). This approach has been variously deprecated as being Eurocentric, (and by Menski 2006 as 'legocentric),' proceeding from within the familiar to analyse and include or exclude the unfamiliar. Sparking

¹⁵¹ Hart (1961) says clearly that he does not claim that wherever the word 'law' is 'properly' used this combination of primary and secondary rules is to be found. He does not illuminate the point further. Rather, he goes on to make what has been received as an influential argument for 'law' as the union of primary and secondary rules.

¹⁵² Gulliver (1969a:12) calls 'law' a 'Western term and concept.'

¹⁵³ Thus, Gluckman (1974:6) says that applying knowledge of Western law to the study of traditional African law and morality would reveal 'quite startlingly the presence of similar principles of law and ethics and similar modes of reason.'

the famous Gluckman-Bohannan debate on analytical methodology, Bohannan (1957 and 1969) criticised what he perceived as the tendency to use concepts of Western jurisprudence to analyse traditional law. He contended that analysis must proceed from within the natives' own thought systems and for that purpose, it would be necessary to use the native terms for their legal concepts as there were frequently no conceptual or linguistic equivalents in Western jurisprudence.¹⁵⁴

Despite insights such as Bohannan's (1957 and 1969) and Menski's (2006), little allowance is still made for the possibility of an alternative legal form that might achieve the objectives, or indeed state, of the Rule of Law but, for instance, not have a judiciary or even a legislature.¹⁵⁵ The accepted form of law is 'modern' so that anything else is not seen as a parallel 'other' but merely as being lower down the evolutionary ladder. The modern legal form is civilisation, nearer in progression to Truth than a system where there was no separation of custom and law.¹⁵⁶ This progression is assumed as being universal to all societies so that ultimately the same types of institutions and legal configurations known to modern law will be arrived at by societies who do not already have them. Orthodox jurisprudence is replete with narrative that consolidates this linear-progression theory. Such, narrative ranges from Maine's (1861) treatise on the movement of all progressive societies from status to

¹⁵⁴ Gluckman (1969) replied that his reference to 'reasonable man' was merely by way of analogy and that it was inescapable anyway, as Bohannan had ended up doing, to use English (even with native terms interspersed) to write up the anthropology of tribal law. For all Bohannan's partiality to the native cosmos, he seems to be unconscious of the fact that his analysis proceeds from the base of a Western conception of law. Structurally, he is quite happy for instance to locate a 'judiciary' among the Tiv whereas his narrative reveals that the process might be more akin to mediation by peers and later by chiefs rather than adjudication by a specialised, central institution.

¹⁵⁵ This is the crux of Bohannan's argument – the possibility of the existence of an Other not within the compass of familiar Western concepts. Gluckman (1974:10) acknowledges the distinctive positions. He says that while Bohannan insists on uniqueness, it appears to him (Gluckman) that the central concepts of 'law' such as right, duty, guilt and innocence, tort, crime, etc are found in most legal systems.

¹⁵⁶ Vinogradoff (1925) writes on this movement from custom to law stating that custom is imposed from below; law from above.

contract, Durkheim (1893) on the movement from repressive to restitutive law and Weber's (1954 and 1978) thesis on formally rational (Western) legal systems as the epitome of legal development.¹⁵⁷

6.2.3 Modern Law as Western Customary Law

Breaking away from the strictures of orthodoxy, we can argue that the now-dominant modern legal form is actually a form of customary law. It is a customary law originating in certain civilisations, notably those now collectively described as 'Western.' Stripping away the intellectual pomp and gravity in which it has been presented and mystified, it is merely Western customary law.¹⁵⁸ If we were to suspend temporarily our acceptance of orthodoxy, it might be possible to start to imagine and canvass the possibility of an alternative legal form.¹⁵⁹ As heretical or even apocryphal as such a position might first seem, the road has already been paved by critiques of law from within orthodox jurisprudence, one of which, critical legal scholarship, we have already encountered. We next turn to such critiques and extract from them certain critical perspectives on modern law which corroborate the Afrocentric critique.

¹⁵⁷ A contemporary proponent is Diamond (1971 and 1984) who traces a unilinear evolution, in stages, up to the final arrival at law with courts.

¹⁵⁸ This is what Glenn (2004) contrives, perhaps unwittingly, when he classifies world legal systems according to different legal traditions. In contrast to Western legal traditions, 'chthonic' legal traditions are oral and informal. Indigenous African legal systems are subsumed under the chthonic.

¹⁵⁹ Chanock (1989) argues that it is now possible to discard the idea that it is more socially advanced to have rules, courts, etc of the Western legal variety than to have other modes of social ordering.

6.3 'REGULAR' CRITIQUES

6.3.1 Critical Legal Studies

Some of the key themes of Critical Legal Studies ('CLS'), as highlighted in reviews by Davies (2008), Balkin (1987), Kelman (1987), Solum (1987) and Dalton (1985), have been elaborated in Chapter 5 (section 5.5.1). Critical legal scholars ('Crits') argued that legal doctrine does not completely determine judicial decision. Instead, 'law is politics' meaning that a certain social consensus or the perceived need to maintain a certain social order determines that judicial decision is squared one way and not another. Again, legal doctrine is often inherently contradictory and based on binary oppositions. Finally, law is actually used to entrench elitist interests rather than advance the cause of social equity.

CLS is regarded as having lost vitality with many of the substantive themes assimilated (and tempered) in orthodox jurisprudence (Davies 2008, Schlegel 2006, Bauman 2002, Fischl 1993 and Tushnet 1991). The enduring legacy of CLS is however more in the method it applied and possibilities it elicited than in the substantive matters it focused on (Davies 2008, Bauman 2002).

Crits deconstructed modern legal theory to show either that it is not necessarily coherent and determinate or that it is always indeterminate and should therefore be rejected outright or reformed to cure it of indeterminacy (Davies 2008, Balkin 1987, Kelman 1987, Solum 1987, Dalton 1985). Crits also deployed Foucauldian methods to demystify modern legal doctrine by relating it to its historical and ideological context. By showing how doctrine is a response to a particular contingency arising at a particular time in a particular place, Crits sought to demonstrate that doctrine might

have evolved otherwise or not at all given other contingencies (Davies 2008, Douzinas *et al* 1994, Kelman 1987). Doctrine is therefore contingent rather than inevitable or universal rationality. The logical extension of this reasoning is that the whole scheme of modern law, its structure, form and content, is contingent rather than the epitome of rationality.

Marxists have found in the fraternity of CLS unwitting allies in the subversion of the modern legal form (Douzinas *et al* 1994). CLS has mainly been a US movement but drew on aspects of European critical theory including Marxism. Marxism had always accused the modern legal form of having been erected to enable domination of the proletariat by the bourgeois.¹⁶⁰ No attempt is made herein to belittle the wealth of Marxist jurisprudence but one does not necessarily subscribe for the reason that the class structure it is often predicated on appears mainly anachronistic. This is especially so in the developed West where the population is predominantly bourgeois and there is increasingly less of both an aristocracy to do the subjugating and a proletariat to subjugate. For our purpose, the utility of Marxist analysis lies in its opening up the possibility, in theory at least, that this legal form is neither immutable nor inevitable and is not the ultimate wisdom or universal rationality. Certain

¹⁶⁰ While Marx did not develop a full-fledged theory of the legal form, Marxist scholars have since been able to construct legal theory from his early writings on law and the state (Balbus 1977). There have been two traditions to Marxist theory on law (Lyll 1986, Jessop 1980). The first, Marxist-Leninism, viewed modern law as part of a superstructure, along with religion, morality, etc, resting on a base of economic relations. There was nothing essentially 'capitalist' or 'bourgeois' about the modern legal form (Lyll 1986); rather, the nature of law was determined by the economic base which constituted society. In capitalist society, law was used by the ruling classes to subordinate the proletariat. Under socialism however, where the proletariat had become the ruling class and eliminated capitalist relations, law would be socialist. This view of law was rejected by Pashukanis (1924) as not explaining why the ruling class relied on law rather than force. Drawing on other aspects of Marx in *Das Kapital*, Pashukanis argued that the exchange of commodities could only take place when the guardians of the commodities placed themselves in relation to one another in a way that each recognizes the other as possessor of rights. Thus when exchange of commodities begins, law appears. Law was therefore essentially capitalist in nature. There could not be 'socialist law' - the legal form was bourgeois. As bourgeois relations were progressively eliminated in the socialist state, law would necessarily be eliminated.

proponents of Marxism, including notably Pashukanis (1924), have predicted the revolutionary destruction or fading away of this legal form and its replacement by something entirely different.

6.3.2 Feminist Critiques

The anti-foundational stance of CLS goes some way towards suggesting the false necessity of modern law. False necessity, Critics argued, leads to a complacent acceptance of things that are or the way they are (Davies 2008, Kelman 1987).¹⁶¹ An anti-foundational position is also contained in feminist perspectives on modern law. Aspects of feminist legal theory seek to expose this legal form as emanating from a male-centred world view and skewed towards gender relations of male domination.

The feminist critique of law embodies several hierarchies of discourse, each interrogative of the one that preceded it. At first, feminists challenged the lack of equality with men within then-existing rights conceptions. This consisted of challenging the foundations of knowledge which held women naturally inferior to men. After having sought and obtained acceptance of the idea that women should have the same rights as men, feminists began to reflect on what type of equality had been obtained and the assumptions underlying it (Levit *et al* 2006, Lacey 1995, Scales 1993, Smith 1993, Taub and Williams 1993).

¹⁶¹ In demonstrating false necessity, Critical Legal Studies challenged the reification of modern legal doctrine and the treatment of the legal form as transcendental, inevitable and indispensable. Critical legal scholarship tried to show that a lot of modern legal doctrine survives on little more than laziness or lack of imagination to challenge the discourses from which doctrine results.

Feminists like MacKinnon (1987) and Lacey (1995) rejected the norm of equality on the ground that it was a male norm. Women had merely been assimilated to a standard set by and for men. Strands of feminism came up with the difference theory which sought the acknowledgement, as Gilligan (1982) does, that there are genuine differences between the sexes and that female constructions of reality have been suppressed in a male-dominated world. The concept of equality with men was therefore a fiction in many respects as all it had done was to turn women into 'honorary men' rather than to liberate the female perspective and place it on an equal footing with that of the male.

Radical feminists took the argument farther arguing that instead of assimilation into a male realm, women must be accepted on their own terms so that the concept of 'women' ceased to be defined by men.¹⁶² Radical feminists questioned even the basis of 'difference,' arguing that the parameters were defined by power relationships in which men had historically operated from an advantageous position. Equality and gender are nothing but the social constructs of a world determined by patriarchy. This type of thinking is especially apparent in the radical feminism of the likes of MacKinnon (1987) and Gilligan (1982).

MacKinnon (1987) canvasses what she calls 'feminism unmodified.' This feminism rejects the mere expansion of existing ideologies or concepts to accommodate women or the application of those ideologies and concepts to women as equals with men. Rather it is a feminism which sees men as possessing the power to shape reality and therefore produce, in their own interest, what counts as truth. The tendency is both

¹⁶² Eisenstein (1984) argues that the goal for feminism should not be for women to act or think like men or adopt male values and the male-dominant culture. Instead, women should re-examine and re-define concepts such as autonomy, power, authenticity, self-determination, etc.

pervasive and even necessary but is also changeable. Thus 'feminism unmodified' seeks the exposure and falsification of current truths as mere male-authored theory or perspectives. The equal application of these perspectives to women should not be the goal of feminism but the construction, discovery or liberation of female-centred truths.

Radical feminism raises the possibility of an alternate legal form that is fundamentally different from current orthodoxy. Gilligan (1982) holds up the Anglo-American vision of modern law as a male construct which rests on an adversarial notion of dispute resolution. She argues that from a young age, women view the world differently from men so that the laws and legal process are inherently alienating to their lived experience. According to Gilligan, young girls that she interviewed for her research did not see justice from an adversarial perspective. Rather they were more comfortable seeking out a middle ground by dialogue and negotiation. The girls were not beholden to the idea of objective principles which were universally applicable and demanding of compliance. Finally, rather than seeing reason as pre-eminent, the girls included emotion in their decision making and an alternative ethic centring on nurture and care was more akin to their beliefs. Gilligan's (1982) research of course carries some resonance with an argument suggesting that indigenous African legal cultures were inherently conciliatory rather than winner-take-all and that therein lay one fundamental difference between a form of law that might work in Africa and the modern legal form.

6.3.3 Utility of Regular Critiques

Critical movements like CLS and feminist jurisprudence have been criticised as being exercises in negativism which attack theory without providing any alternative construction (Fischl 1993, Schlegel 2006). Davies (2008) says that this criticism misses the point. She sees the aim of critical legal movements as clearing the path for reform by showing that assumptions underlying ‘settled’ legal theory are not natural or neutral but subjective and particularistic. Davies (2008) approves of Freeman’s (1981:1230-1231) suggestion that to ‘expose possibilities more truly expressing reality,’ it is necessary to first break out of the ‘mystified delusions embedded in our consciousness by the [dominant] legal worldview.’ Davies (2008:199-200) picks up on Freeman’s allusion to a true reality by asking whether there is actually any truer reality than that posed by our ideological constructs. She however concedes that in order to find out, orthodox preconceptions need first to be challenged.

6.4 EXTERNAL AND INTERNAL CRITIQUES

The standpoint for challenging orthodoxy may be either external or internal. Davies (2008) puts this figuratively as either standing outside the courtroom to protest the system as a whole or standing inside to canvass change within existing frameworks. A lot of the critical movements have operated from within the metaphorical courtroom. Critical scholars might speak of delegitimisation of law but not evince that there can be law of a different configuration. They draw attention to law’s distance from the theoretical ideals but fall short of confronting the possibility that this law could have an Other or Others.

The ultimate ambition of many critical scholars seems to be to bring law (in the form that the writers know and recognise it) nearer to the idealised standards of conventional legal theory by exposing this law's distance from the ideal so that reform towards the ideal can be broached. Even with all the talk of 'nihilism' and 'trashing,' the critical legal scholars cannot seem to free themselves from the bondage of accepting the concept of law, as currently framed, as a monolith to which there is no alternative except chaos.

Current understanding of 'law' forms at once the boundaries between what is law and what is not. The arena of debate between orthodox theorists and critical movements mainly takes place within mutually accepted boundaries; those boundaries constitute what Foucault (1969) called 'discursive regularities.' The current understanding of law is the inside way of seeing things and this sets the boundaries of what is arguable about law and what is not. Anything outside this way may be seen by insiders as 'distorted, mad or bad' (Davies 2008).

6.5 HERETICAL AND APOCRYPHAL CRITIQUES

6.5.1 Heretical Critiques

Manderson (2001) calls regular critical legal movements 'heresies' in order to distinguish them from 'apocryphal' critiques that would stay completely outside orthodox frames of reference.¹⁶³ Manderson (2001) finds remarkable consensus between the orthodoxy and the heretical on the nature and purpose of law and says

¹⁶³ A heresy is a disagreement within a tradition; the heresy challenges conventional answers *within* the tradition but in doing so confirms the power and relevance of its questions. In contrast, the apocrypha ask entirely different questions.

that it reflects their certainty on what counts as the appropriate question. Despite this joinder of issues that Manderson (2001) observes, critical legal scholars discovered in their early days that radicalism often results in marginalisation from mainstream academia (Davies 2008).¹⁶⁴ Perhaps it is the need to avoid such intellectual excommunication that keeps critical legal theory from straying too far from the conventional boundaries of legal theory and discourse.

In de Carmona's (1998) estimation, even the most innovative critical theorists have not gone far enough. Such thinkers, in her view, insist on assuming the theoretical constructions of modernity, with the purpose of criticising them.¹⁶⁵ De Carmona (1998) observes that critical theorists seem incapable of or unwilling to conceive solutions that require adventuring farther than the old paradigms. Tamanaha (2001) seems to exemplify the tendency that de Carmona identifies.

While serving as a law officer in Micronesia, Tamanaha discovered that the 'law' that actually governed Micronesian society was not the modern law officially in force but some traditional, unwritten and informal law incapable of reduction on the bases of orthodox legal theory. His self-confessed shock leads him to question all the jurisprudence he has learnt about what 'law' is.¹⁶⁶ Sufficiently agitated, Tamanaha

¹⁶⁴ Tushnet (1991) and Davies (2008) trace the earliest origins of critical legal scholarship to the sacking of six junior academics at the Yale Law School. The six were Abel, Albert, Griffiths, Hudec, Simon and Trubek. They would become known as the Radical Yale Law School in Exile 'Mafia' led by Trubek and would be highly instrumental in the rise of critical legal scholarship (Schlegel 1984).

¹⁶⁵ Davies (2008:214) takes a more sober view. She says that the postmodern insights into the nature of meaning indicate the impossibility of ignoring the dominant system of thought: 'We cannot simply step outside and construct a new system, because there is nothing which pre-exists the existing constructions of social meanings.' She argues that it is necessary then to work with what we have in order to change it and to try to envisage new meanings.

¹⁶⁶ Twining's engagement in law-reporting, teaching and fieldwork in Sudan and Tanzania causes him a revelation similar to Tamanaha's. Twining (1986) finds a different relationship between law and society as well as the irrelevance of much of English law, its logics and methods in the former British colonies. As a result, ideas he had taken for granted were being constantly challenged which in turn

(2001) then sets out to construct a new jurisprudence which ‘eschews completely the attempts to build a general jurisprudence upon the corpus of common legal concepts.’ Despite his avowed purpose, Tamanaha (2001) expends all his effort in analysing the usual suspects of legal theory. He critically fails to work beyond the parameters of orthodox legal theory as he initially promises to.

Tamanaha’s (2001) constraints are understandable. As Chiba (1986) observes, Western jurisprudence is undoubtedly the most advanced science of law there is. The failure of scholarship from elsewhere to put together anywhere near as formidable a body of legal theory has left the Western model with a stranglehold on jurisprudence. Bereft therefore of an alternative body of legal theory to draw on, even projects that start out proposing to step outside the box of orthodoxy, invariably remain within it. Ojwang (1992:1), for instance, complains that African legal scholarship ‘takes for granted an operational linkage with Euro-American legal tradition and juristic thinking’ without subjecting this assumption to the ‘test of original analysis’ but that is as far as he develops the analysis. Similarly, Woodman and Obilade (1995), after initially teasing out the necessity of an African legal theory, peremptorily abandon the quest and find succour within the safe recesses of settled jurisprudence.

6.5.2 Beyond Heresy

The fact that orthodox jurisprudence is the most developed does not necessarily mean that it is the universal truth or that the possibility is thereby foreclosed of a parallel jurisprudence. Much of the justification for assuming it is sacrosanct resides, says

led to his articulation, examination and critique of many basic assumptions about law. ‘Day in day out, one had to ask the question: what is the reason or the basis for this or that rule or institutions? Does it make sense here?’ (Twining 1986:21).

Chiba (1986), in pointing to what it has achieved or what has been achieved with it. This rationale clearly runs through Weber's proclamation of the modern (Western) legal form as the ultimate one. It must be the ultimate wisdom because societies that have applied its postulates are the ones that have the most successful, at least from Weber's capitalist standpoint. But this reasoning can now be turned on its head by saying 'look what has not been achieved with modern law or what it has not been capable of achieving in the developing world.'

Most of orthodox jurisprudence started out as descriptive or analytic of the legal experience within a particular geographical region but at some point, like Hart's (1961) thesis, it has mutated wittingly or unwittingly into prescriptive theory about what law ought to be. Thus orthodox jurisprudence looks at law from the particularistic point of view of the Western legal experience. It has mainly described and analysed the Western legal experience and then definitively announced the product as 'law.' Such has been the weight of intellect and propagation attending Western philosophy that that conceptual circumscription has been embedded in organised knowledge and become the universal frame of reference for 'law.'¹⁶⁷

¹⁶⁷ Acknowledging such relativism, for instance, illuminates the source of weakness of theory such as that of separation of powers. Montesquieu, the acclaimed primogenitor of the theory, could at the time only have been looking at or had real experience of Western legal and overall culture. It is perhaps enlightening that Montesquieu himself wrote about the spirit of law. He proposed to look, as Gurvitch (1953:59) describes it, behind 'the formal scarf of juridical rules for their inspiration and ... hence their connection with the variable social sub-structure of the underlying political group.' If Montesquieu did actually follow the course he set out, then we begin to suspect that his theory of separation of powers was premised on observing social behaviour that might have been specific to a particular culture. If as we have suggested earlier, this behaviour was antithetical to an alien culture leaning towards continuous compromise in social affairs and governance, then the principle of separation of powers would be of limited purport in the latter culture. In other words, even if separation of powers in ideal form were achieved, the alien social setting would render it irrelevant as a guarantee that things like an executive usurpation of powers would be challenged or resisted. This of course dovetails into the earlier suggestion we have seen mooted by Ojwang and Kuria (1977) that any particular layout of public powers is possibly irrelevant, in the African context, to the Rule of Law.

Tamanaha (2001:xii) acknowledges that there is a multitude of situations (such as Micronesia's) around the world, 'each unique in its own way, yet alike in their inconsistency with standard theories about the relationship between law and society.'¹⁶⁸ Buttressing the point are studies such as Griffiths' (1997) which, looking at village peoples' perception of law in Botswana, finds 'other' narratives, different from the narratives which derive from a formalist model of law based on legislation and judicial decision. Tamanaha (2001) avoids the temptation to dismiss such a situation as aberrant pointing out that the West constitutes a relatively small proportion of the world both geographically and demographically. The situation has all but been ignored by all existing theories about law because legal theories have been 'produced by Western theorists who see law ... through the lens provided by [their] own assumed view of law in [their] own societies' (Tamanaha 2001:xii).

6.5.3 Apocryphal Critiques

When critical movements do manage to step outside the framework of normative legal theory, they become what Manderson (2001) calls 'apocryphal jurisprudence.' The apocryphal critics are interested in the broader implications of the form and structure of law outside the shared framework of assumption of the orthodoxy and heresy. The elements of the apocrypha and their interaction represent a way of exploring law that

¹⁶⁸ Tamanaha (2001) generally confines the use of 'law' to the modern legal form. His perplexity arises when he finds that the norms and processes of 'law' are distinct from the actual norms and processes of social regulation in Micronesia. While law was based on an adversary model, Micronesian culture was consensual. Similarly societal understanding of criminal law dictated a response by the community itself even though the state insisted that it had a monopoly on the application of force.

is often ignored 'as if [normative jurisprudence] were the alpha and omega of legal theory' (Manderson 2001:111).¹⁶⁹

An apocryphal critique of law therefore lies outside the joinder of issues between the orthodoxy and the heresy. It stands apart from the normative acceptance of what law is and should or can be. This is a possible riposte to Guest's (1993) contention that critical theorists 'miss the point' and should engage with existing theories.¹⁷⁰ The apocrypha want to escape the force field of those existing theories.

The assumption is eschewed in apocryphal jurisprudence that the current theoretical frameworks are the only ones there can or must be so that analyses, for good or bad, must be contained within their boundaries. It is the logic expressed by Foucault (1969:24) when he demands a questioning of 'those ready-made syntheses, those groupings we normally accept before any examination, those links whose validity is usually recognised from the outset.' Foucault (1969:24) asks that instead of according the categorisations unqualified spontaneous value, it should be accepted, 'in the name of methodological rigour,' that in the first instance, they concern only 'a population of dispersed events.'

The essence of apocryphal jurisprudence is not to falsify the themes of orthodox jurisprudence. Rather it is to set up, validate or render relevant other discourses

¹⁶⁹ Manderson (2001) derives 'apocryphal jurisprudence' from the biblical Apocrypha which were excluded from the Bible not because they were inauthentic but because their purport was not in keeping with what became the dogma. Manderson (2001:86) says that the delegitimisation of the Apocrypha 'demonstrates the power of orthodoxy to set the terms of the debate and to exclude forever texts that proved impossible to domesticate.' The exercise of power, of bestowing relevance after the fact to one story and not another, constitutes what becomes knowledge and what thenceforth is not.

¹⁷⁰ Guest (1993) argues that 'much of critical legal theory can be criticized in ways which are sad rather than serious; it is trendy; it appeals to the less bright student who wants a quick answer ...' Guest suggests that critical theorists are criticizing bad law rather than law as a whole and argues that they should engage with literature on justice and the idea of law if they intend to criticize law itself.

outside of the dominant discourses which might have been deprived of importance or repressed by the hegemony of the dominant discourse(s) of law. The system of knowledge created by dominant discourse(s) is challenged not by direct engagement within it but by setting up other discourses that are discountenanced or not even countenanced at all by dominant discourses.¹⁷¹ Some of this methodology is inherent in a thesis that seeks to establish that a form of law other than the modern legal form is possible and might be a better solution to Africa's problems of the Rule of Law.

Formulating the argument for the alternative to the modern legal form also carries beyond the usual polarisations in orthodox jurisprudence between natural and positive law theories and between positivism and critical perspectives. It is, in Manderson's (2001) terms, an apocryphal enquiry that often stands outside the shared framework of assumption on which those oppositions rest. The 'law' which forms the basis of debate between orthodoxy and critical legal scholars has a specific cognitive form. It is the hegemony of this form over 'law' that is up for challenge here.

Yet even in seeking to establish another discourse, the dominant discourse must be countenanced. It cannot be escaped completely; it must provide the take-off point for any other discourse attempted to be set up. Even Foucault (1969:29) accepted that he had to take as his starting point 'whatever unities were already given' even if he would not place himself 'inside these dubious unities in order to study their internal configuration or their secret contradictions.' Instead, said Foucault, he would accept them long enough to subject them at once to interrogation; 'to break them up to see whether they can be legitimately reformed or whether other groupings should be

¹⁷¹ The apocryphal is 'not opposed to the canon but, far more subversively, [stays] outside of it': Manderson (2001:86).

made.’ According to Foucault, once the immediate forms of continuity were suspended, ‘an entire field is set free.’

6.6 POSTMODERN AND POSTSTRUCTURAL CRITIQUES

6.6.1 Postmodernism and Poststructuralism

Manderson (2001) has described apocryphal jurisprudence as forming a conspectus of ‘post-structural’ perspectives. Poststructuralism is the French-inspired movement which emerged in the 1960s as a challenge to ‘structuralism’ (Davies 2008). Structuralism holds that there are structural networks that determine meaning in different systems or cultures and attempts to establish those structures.¹⁷² A tendency towards universalism by structuralists has seen ‘structuralism’ used interchangeably with ‘modernism’ in the sense of the latter as a metaphor for the attempt at discovering absolute and transcendental foundations for knowledge. Given this conception of modernism and structuralism, the ‘post’ in postmodernism and poststructuralism becomes ‘anti’ rather than ‘after’ so that postmodernism and poststructuralism refer to intellectual perspectives, across academic disciplines, which oppose closure or essentialism in knowledge and meaning.¹⁷³

¹⁷² Saussure’s work on structure in linguistics at the turn of the 20th century, particularly the posthumously published *Course in General Linguistics* (1916), is considered the beginning of structuralism. The word ‘structuralism’ did not appear in *General Linguistics* but was used subsequently in anthropology by Levi-Strauss, resulting in the rise of the French structuralist movement. Structuralism was then developed and applied across other fields including psychoanalysis (notably by Lacan), architecture and literature (Milovanovic 1992, Sturrock 2003).

¹⁷³ Ireland and Laleng (1997:5) describe modernity and the ‘Enlightenment project’ as ‘a belief in universal truths and values, in progress and in reason.’ In contrast, they say, the postmodern view denies the possibility of ‘totalising knowledges.’ Douzinas *et al* (1991:15) similarly find that postmodernism, ‘defies the system, suspects all totalising thought and homogeneity and opens the space for the marginal, the different and the “other” ... [and celebrates] flux, dispersal, plurality and localism.’ In *The Postmodern Condition: A Report on Knowledge* Lyotard (1979:xxiv) introduced the term, previously used mainly in the arts, into philosophy thus: ‘Simplifying to the extreme ... postmodern [is] incredulity to metanarratives.’ According to Milovanovic (1992:14), postmodernism, ‘as an interpretive analysis, sees the modern age as an iron cage (Weber), trapped in bureaucratic rationality, manipulative cultural industries, and the disciplinary mechanisms of power and

While modernism is regarded to have started at some point in European history, usually from the Enlightenment, once it is perceived of as a philosophy it becomes timeless as does postmodernism in opposition. Both terms then become easier to conceptualise and apply.¹⁷⁴ Specifically, our ‘modern’ law, while referring to a legal form that traces its origins and characteristics from Europe, becomes not only periodic or even geographic but a metaphor for ideational closure on ‘law’ by reference to any particular form. A postmodernist treatment of ‘law’ opens up the terrain to other forms that might compete with the modern legal form upon which there has been virtual closure on cognition of ‘law.’¹⁷⁵

Definitions of ‘law’ in mainstream (‘modernist’) legal discourse, contested and even oppositional as they may be to one another, ultimately revolve around the perceived characteristics or manifestations of a particular legal form. Thus for instance, Holmes (1897:461) could famously say that ‘the prophecies of what the courts will do in fact, and nothing more pretentious, are what [is meant] by law.’ Cardozo (1924:52) similarly defined law as ‘a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced in the courts if its authority is so challenged.’ One feature that comes across in these definitions from the Realist school of jurisprudence is the centrality of courts in the identification of

knowledge.’ In current usage, postmodernism subsumes post-structuralism (Milovanovic 1992, Davies 2008)

¹⁷⁴ While it is fairly easy to describe the general purport of postmodernism when paired off against modernism, there is no denying that each term inculcates a complex range of notions and perspectives. ‘Ambiguity’ is frequently applied to both (Giddens 1991, Milovanovic 1992).

¹⁷⁵ Milovanovic (1992:6) explains that the postmodern view of discourse ... ‘promises to deconstruct hegemonic constructs in ideology and law and to provide vistas for the development of a new replacement discourse rooted within an alternative order.’

what law is and, therefore, what it is not. Without courts there cannot be law; law qualifies as such because it proceeds from courts.

The conception of law as something intertwined with courts and adjudication, carries beyond the Realist school and so permeates mainstream legal theory that it is, in terms borrowed from Hart (1983), ‘the core of jurisprudence.’¹⁷⁶ Accordingly, any debate about law reform cannot even begin to countenance reform that does away with courts in their totality. The boundaries of the debate have been set in advance by knowledge of what law is or should be. If the ‘Law’ in Rule of Law is no more than our ‘law’ as so defined by reference to courts, then Rule of Law Orthodoxy is also prohibited from the onset from exploring the jettisoning of courts. If however, we applied a postmodernist critique to this attempted closure on ‘law,’ we would begin to question the assumptions behind our automatic inclusion of courts in what ‘law’ must be, manifest or emanate from in order to qualify as ‘law.’ This also creates the space for questioning whether the Rule of Law (as a state of functionalism) must be predicated on ‘law’ so constituted.

6.6.2 Other Law by Postmodernism

The question of course is whether it is possible to have the Rule of Law without the modern legal form which legal form, at least according to the Realists, is synonymous with having courts. Exploring the question brings us back to Africa where the emphasis by jurists upon courts led to conclusions into the 20th century that since pre-colonial societies of Africa had no courts, they had no law. Anthropologists

¹⁷⁶ ‘The determinacy [orthodoxy]/indeterminacy [heresy] debate assumes that this is the right place to look in order to understand what is central to the function of, and thinking about law’ (Manderson 2001:92).

subsequently revised this position after realising that far from being in a state of anarchy, many of the societies were not only ordered but had well-developed systems of social control. These systems of social control were eventually termed ‘customary law’ to distinguish them from ‘real’ law.

If the anthropologists’ findings on the customary ‘law’ of Africa are taken as suggesting a state of affairs akin to Rule of Law, then perhaps it is still possible to have the Rule of Law without courts. A sufficient discursive opening might then have been created for exploring whether what Africa really needs (and yearns for) is a ‘law’ that is outside the boundaries of all that ‘modern law’ conventionally signifies but is still ‘law.’ Recourse to Foucault helps the argument along further.

Foucault (1969:24) has queried the acceptance of the distinction between ‘such forms or genres as science, literature, philosophy, religions, history, fiction, etc, which ... when first formulated, were distributed, divided and characterised in quite a different way.’ After all, he says, categories like ‘literature’ and ‘politics’ (and if we may add, after reading Hart and Baker, ‘law’) are recent categories which are different today from how they were characterised when first formulated. Accordingly, the current characterisations are only applicable to previous eras by retrospective hypothesis, by analogy and on the basis of semantic resemblance. None of the categorisations has articulated the field of discourse in the same way through different eras.

Synchronically, Foucault (1966) has also challenged the universality of classifying things by citing Borges’ (1942) fictional Chinese encyclopaedia that divides animals into (a) the Emperor’s (b) embalmed (c) tame (d) suckling pigs (e) sirens (f) fabulous

(g) stray dogs (h) included in the present classification (i) frenzied and so forth. Foucault says that if this characterisation is ‘illogical’ according to a system of thought, then that system of thought is shown to be limited by its inability to perceive any logic in the characterisation. That system of thought finds it impossible to think *that*. Foucault (1966) used this to buttress his arguments that understanding was structured by history, language, culture, class, etc and the structures produced by those with power to do so. On that basis Foucault (1966) warns, we must recognise that those characterisations with which we have become familiar (presumably, including ‘law’) are not intrinsic, autochthonous or universally valid.

6.6.3 Signifying an Other Law

Saussure’s theory on the arbitrary nature of ‘signs,’ is also useful here. Saussure was one of the linguists whose explorations of structure and meaning in linguistics sparked structuralism, and, eventually, the intellectual currents that came to be demarcated as poststructuralism and postmodernism. Saussure’s (1916) ‘signs,’ on which Derrida built, were made up of two components, the ‘signifier’ and the ‘signified.’ The ‘signifier’ is just the spoken or written word. The ‘signified’ on the other hand is not the object suggested by the word; it is the idea or meaning conveyed by the word. Saussure’s thesis was that the signified was arbitrary in nature.¹⁷⁷ The signifier divided up reality in an arbitrary way. Thus for example, when we say ‘red,’ it is not that there is already a signified ‘redness’ awaiting the word ‘red’ to signify it. Instead, in learning the sign, we learn to classify as ‘red’ (or exclude as not ‘red’)

¹⁷⁷ Derrida criticised Saussure on the privileging of either the signifier or the signified. Derrida saw every signified as serving as a signifier for another signified. There was no anchoring point, with the result that subjectivity too disappeared. ‘Thus for Derrida,’ says Milovanovic (1992:23), ‘the essential nature of the signified is its infinite commutability It resists grounding ... [and there] exist no foundational truths.’

things which might have been classified in otherwise by other cultures or in other epochs.

Applied to 'law,' Saussure's thesis challenges the hegemony which the modern legal form enjoys over the signified 'law.' There is no ready-made signification which already qualifies as 'law' before it is so classified. Rather the signified 'law' is contingent. The referent for that formation or set of formations which is currently granted cognition as 'law' is of particular geographic, epochal and cultural origins.

'Law' in pre-colonial Africa was not 'law' in the understanding of European jurists of the time; there is similarly evidence that what those jurists classified as 'law' challenged the understanding of Africans on first contact with it. It is the European understanding that has prevailed and the 'modern' form that the Europeans took to signify 'law' has now been established universally as 'law' signified. Yet, Saussure's thesis opens up the possibility that this modernist closure on law's 'reality' is arbitrary or even illusory. Perhaps there are other forms out there that can contend with modern law for that reality. After all, if courts were not around in a great European civilization of merely two thousand years ago, there is really nothing to say that they will be around in the next two thousand.

With advances in information technology, it is not difficult to imagine a world of the future in which the prevalent legal form is devoid of a 'judiciary' and by extension, even law as we know it. If that is so, then perhaps the legal form the characteristics of which we currently use to identify and demarcate 'law' is neither ultimate rationality nor the end of history. If the modern legal form is not transcendental in the *longue*

duree, then nothing forecloses other possibilities even in the present. In the event, we should feel liberated enough to countenance an alternative in the here and now. It might not be possible to immediately provide a concrete end-product in terms of describing what exactly the alternative legal form (or forms) look like but that is not the essence. The essence is to prise open discursiveness to permit the contemplation of an alternative. Coming to terms with the possibility or existence of an alternative is an important first step in the elaboration of that alternative.

6.7 POSTCOLONIAL CRITIQUES

6.7.1 Definitions of the Postcolonial

Contradicting familiar Western categorisations has been a defining object of postcolonialism. Like post structuralism and postmodernism, postcolonialism is neither a single theory nor homogenous body of thought. It is a set of perspectives and problematisations that work in different ways, sometimes in contradiction of or disconnectedness from one another, with or in emancipation of epistemes repressed and marginalised by dominant discourses (Abrahamsen 2003, McLeod 2000). In the case of postcolonialism, the dominant discourses are those emanating in the power-knowledge structures of Western Imperialism.

Postcolonialism deploys much of the same critical methodologies, and indeed terminology, as poststructuralism and postmodernism. It ‘deconstructs’ and ‘decentres’, contextualises knowledge and meaning, examines text and unravels discourses, gives voice to the subaltern, and rejects metanarratives and *a priori* concepts of the human subject. Like postmodernism, postcolonialism is not just periodic in the sense of an era that succeeds another; the ‘post’ also speaks of a

contemporaneous ‘against.’¹⁷⁸ What is arguably a narrower antonym might however distinguish postcolonialism from postmodernism and poststructuralism.

At the risk of simplification, postcolonialism encompasses perspectives that are ranged against the colonial episteme.¹⁷⁹ Even if this colonial episteme can be situated within modernism and structuralism, it possesses a spatial specificity that makes it capable of being accorded autonomy. Postcolonialism is *against* colonialism not just in the sense of a direct confrontation.¹⁸⁰ Merely by its being, even where it does not engage oppositionally with (or is even without reference to) colonialism, it exists in a relationship akin to Derrida’s *differance* from the truth structures of the colonizer.¹⁸¹

Like poststructuralism and postmodernism, postcolonialism has been criticised as being pure ‘theory’ without practical relevance.¹⁸² It is also said to be self-referential, to focus on textual interpretation rather than empirical exploration and to be mired in difficult language.¹⁸³ This criticism is of course directed mainly at the *reflective* part

¹⁷⁸ McLeod (2000:5) distinguishes between ‘post-colonialism’ as a historical period after colonialism and ‘postcolonialism’ (without the hyphen) ‘not just in terms of strict historical periodisation but as referring to disparate forms of representation, reading of practices and values.’ For Loomba (2005:16), postcolonialism is better conceived of as contestation of colonial domination and the legacies of colonialism than as something which succeeds colonialism.

¹⁷⁹ This distinction might be artificial given that the colonial episteme may be indistinguishable from Western episteme as a whole.

¹⁸⁰ Ashcroft *et al* (2002:195) describe the postcolonial as referring to ‘all that cultural production which engages, in one way or another, with the enduring reality of colonial power (including its newer manifestations).’

¹⁸¹ Derrida’s *differance* is discussed in Chapter 3 (Section 3.5.3). At its simplest, the neologism, formed from combining the French ‘*différer*’ (to differ) and ‘*déferer*’ (to defer), alludes to the continuous difference and deferral of meaning constituted between signifiers.

¹⁸² Jacoby (1995:36) alleges that most postcolonial theorists ‘cannot write sentences’ and that they provide ‘few political insights or conclusions.’

¹⁸³ This particular criticism arises from the tendency of postcolonial theorists like Bhabha to use obtuse language, in a fashion championed by poststructuralists such as Foucault and Derrida. Dirlik (1994:333) accuses Bhabha of being ‘the master of political mystification and theoretical obfuscation.’ Williams (1997:830) credits postcolonial theorists with ‘aimless linguistic virtuosity.’ Duncan (2002:327) who is sympathetic to the postcolonial cause, agrees that postcolonial writers ‘choose to write in a manner less than clearly understandable’ even if that forms ‘part of their subversion of the colonizing language.’

of postcolonial literature – postcolonial theory – which analyses what postcolonialism does and how it does it, rather than actually doing it.¹⁸⁴

6.7.2 TWAIL and the Eurocentricity Critique

‘Postcolonialism is now the main mode in which the West’s relation to its “Other” is critically explored’ (Fitzpatrick and Darian-Smith 1999:4). Law has been a crucial factor in this relationship yet there has only been limited engagement between law and postcolonial theory (Menski 2006, Kumar 2003, Fitzpatrick and Darian-Smith 1999). International law is the perhaps the only area of modern legal discourse in which there is a developed postcolonial critique. This critique is fomented by an eclectic school of thought called Third World Approaches to International Law (TWAIL) (Mutua 2000b, Okafor 2005, Chimni 2006). TWAIL scholars (or TWAILers) are united by ‘a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench [the Eurocentricity of] the international legal system’ that TWAILers believe subjugate the Third World (Okafor 2005:177).

The basic, TWAILer perspective is typified by Anghie’s (2007) identification of an entrenched regime of ‘Othering’ and colonisation in international law. Anghie (2007) argues that colonialism results from the West’s need to civilise the ‘Other.’ The civilising mission is premised on a ‘dynamic of difference’ whereby certain cultures are adjudged ‘civilised’ and the others ‘uncivilised.’ Techniques are then to be developed to bridge the difference by civilising the uncivilised. Anghie (2007:311)

¹⁸⁴ Achebe’s (1977) interrogation of the images of Africa in Conrad’s (1899) *Heart of Darkness* is an exercise in postcolonial theory; his (1958) *Things Fall Apart* is an example of doing postcolonialism rather than reflecting on it.

argues further that the dynamic of difference is present ‘at the very beginnings of the modern discipline of international law.’ Western nations created international law in their own image and established a distinction between advanced (Western) and backward (non-Western) legal systems. Societies with backward systems could only achieve sovereignty and legitimacy in the international legal order by becoming like societies with advanced legal systems.

Anghie (2007) observes that despite its disavowal by contemporary jurists, the rhetoric of the civilising mission persists in contemporary international law discourse through categories such as ‘developed’ and ‘undeveloped.’ International governance initiatives then impose Western notions of good governance on developing countries without regard to (or indeed, in conscious subjugation of) social, economic and political structures indigenous to those countries. Similar remonstrations against the ‘Eurocentricity’ and neo-colonial tendencies of international law are *de rigueur* in the TWAILer scholarship of the likes of Chimni (2006 and 2002), Okafor (2005), Ngugi (2002), Mutua (2000a and 1995a), Gathii (2000a and 1998), Sinha (1996) and Grovogui (1996).¹⁸⁵

¹⁸⁵ Gathii (1998) distinguishes between weak and strong forms of TWAILing. The weak form is ‘integrationist,’ debating the extent to which international law would be amenable to developing countries and accepting international laws claims of human rights, the right to development, self-determination, etc as beneficial to developing countries. Strong formers would view the weak formers’ position as apologist not only ‘for their uncritical reflection of the promises of international law in the post-decolonisation era but also for repressing the record of post-colonial forms of ... power over the ... [Third World]’ (Gathii 1998:189). Gathii (1998) adjudges Sinha (1996) to belong to the weak tradition for asserting that while international law has a Eurocentric genus, it has now become universal. On the other hand, Anghie (1999:75-76) expresses strong TWAILer views when he doubts that international law is capable of redemption because its ‘fundamental concepts, “sovereignty” and “law” [were] so explicitly and clearly formulated in ways ... that furthered colonialism.’ Ngugi (2002) is similarly of the strong-tradition persuasion when he expresses scepticism about the attempted reconstruction of international law to rid it of Eurocentricity.

TWAIL is particularly relevant to our argument in its identifying the Eurocentricity of modern legal discourse and the repression thereby of indigenous perspectives and methods of doing things in the Third World.¹⁸⁶ Aspects of the TWAIL critique suggest that Eurocentric domination creates an inferiority complex in the Third World about indigenous practices. The inherent potential of those spontaneous practices to constitute the natural path to emancipation is lost thereby as the subjugated Third World seeks development instead along alien (Western) paths that it struggles to comprehend.¹⁸⁷ That theme of the TWAIL critique proceeds from the same logic as the argument in this dissertation on the alienation of modern law in Africa.

Many of the things TWAILers say resonate with our argument, particularly if ‘modern law’ is substituted for ‘international law’ and ‘Africa’ for ‘Third World.’ Neumann (1998:2), for instance, finds, to her surprise and of her students, that international legal theory has ‘never been borne out by events in the Third World.’ Furthermore, ‘central concepts such as anarchy, the state, sovereignty, rational choice, alliance and the international system’ become problematic when they are sought to be applied to the Third World (Neumann 1998:2). Neumann puts this down to the fact that the ‘unstated normative and empirically unsubstantiated assumptions’ underlying much of what is written in the field is ‘essentially Eurocentric theory ... founded almost exclusively on [experience in] the West’ (Neumann 1998:2). Mutua (2000a:852) argues that TWAIL ‘opposes all hegemonic doctrines and practices that

¹⁸⁶ Grovogui’s (1996) exploration of how international law continues to suppress ‘non-European subjectivity’ (in the context of Namibian decolonisation) is an example of this aspect of TWAIL. Grovogui’s study is, in Gathii’s (1998) estimation, within the strong tradition of TWAIL.

¹⁸⁷ Chimni (2006) also warns of the reverse, ‘non-modernity’ thesis of contemporary Eurocentric discourse which seeks to elevate pre-scientific societies in the Third World to nirvana, thereby robbing those societies of their aspirations to scientific development. Chimni (2006:18) argues that development *per se* is not the problem; it is development through certain kinds of harmful policies that need to be indicted, ‘rather than the aspirations of the people to be able to exercise greater choices and a higher standard of life.’

foster exploitation and the dehumanization of Third World cultures, communities and philosophies.’

As Chimni (2006:3-4) acknowledges however, TWAILers usually fall short of projecting an alternative vision of international law; their concentration is more on complaining about the Eurocentricity of international law than explicating any alternative framework.¹⁸⁸ The Afrocentric critique in this chapter (and the argument in the dissertation) goes further. Not only does it make the case for an alternative to modern law as the basis for the Rule of Law in Africa, it does so from an Africa-specific viewpoint that is scarcely developed in the overarching ‘Third World’ perspective of TWAIL (Abonyi 2009). Leading TWAILers like Gathii, Mutua, Ngugi and Okafor are scholars of African origin but their concern is more often with international law as a discipline (and the Third World as its subject) rather than developing an Afrocentric perspective of modern law and the Rule of Law.¹⁸⁹

In the absence of a developed body of postcolonial African legal theory, foundational perspectives upon which to invoke precedent or departure (for an Afrocentric critique of modern law) have to be drawn from postcolonial theory generally. One such perspective is provided by Mudimbe (1988) who challenges the hegemony of Western epistemologies over African systems of thought. Mudimbe (1988:34) adopts the Foucauldian objective of ‘questioning [the Western will] to truth; to restore to discourse its character as an event; to abolish the sovereignty of the signifier.’ He

¹⁸⁸ Mutua’s (2000a) application of critical race theory, for example, is strong on the complaint of Eurocentricity in international law but offers no novel insights despite a promise to do so.

¹⁸⁹ Given their TWAIL pedigree, it is somewhat surprising that when Gathii (1999 and 2000b) and Ngugi (2005), for instance, turn their focus to critiquing neo-liberal law reform in Africa, the critique turns out to be mainly a generic, ‘orthodox’ critique of neoliberalism rather than an Afrocentric critique that extrapolates on TWAIL.

asserts that thus far, African traditional systems of thought ‘have been evaluated using theories and methods whose constraints, rules and systems of operation suppose a non-African epistemological locus’ (Mudimbe 1988: x).

If Mudimbe’s (1988) sweeping assertion is narrowed down to African systems of thought about law, then it can be used to question yet again whether the modern legal form cannot be regarded as but a cultural event, a contingency rather than universal rationality, and the product of *an* episteme rather than *the* episteme. Continuing along the same lines, the further challenge then would be whether there are African systems of thought about law which can be ‘made explicit within the framework of their own rationality’ (Mudimbe 1988:x). If the answer is in the affirmative, then perhaps there is an alternative to the modern legal form which is better suited to African systems of thought and therefore to the Rule of Law in Africa. This is what our dissertation explores.

6.7.3 Distinguishing Legal Pluralism

Arguing the possibility of another legal form, or indeed other legal forms, sharing the signified ‘law’ with the modern legal form might raise some confusion with contemporary theories of legal pluralism which suggest that legal pluralism exists everywhere and in all legal systems. Legal pluralism, as a field of study, commenced with examination of the dualism of colonial and post-colonial legal orders where ‘received’ Western law was seen to exist in parallel to and sometimes in direct conflict with indigenous law (Eberhard and Gupta 2005, Tamanaha 2001, Merry

1988). Gradually however, legal pluralism metamorphosed into an argument for the enlargement of the definition of law (Merry 1988, Eberhard and Gupta 2005). It saw legal pluralism as constituted in and by all spheres of life, in all societies. The regulatory orders of corporate organisations and even criminal networks were portrayed as constituting ‘legal orders’ in their own right and thereby being on par with the ‘lawyer’s law’ as far as the name ‘law’ was concerned (Vanderlinden 1989).

The major tropes of legal pluralism as so re-constituted obscure the implicit but fundamental question it raised when it first emerged. That question was whether the dualism observed in postcolonial societies meant that those societies had a different form of law in contest with the modern legal form. This Other form could be a form of law that has no judiciary or configures the public-private divide differently from the current norm. Instead of exploring this possibility, legal pluralism in its current incarnation (as discussed in Chapter 2, section 2.7.2) seeks to expand the ambit of ‘law’ to include, along with ‘lawyer’s law,’ all other forms of social ordering which allegedly have comparable ‘legal’ force.

Legal pluralism thus conceived seems to be essentially an argument against the Austinian legacy of seeing ‘law’ only in terms of that which emanates from a sovereign or backed by the sovereign’s threat of force to ensure compliance. It implicitly accepts the hegemony of the Western legal form over the law of the sovereign and in the main does not concern itself any longer with whether post-colonial society could have produced a different law of the sovereign and an alterity of jurisprudence. Instead, legal pluralism’s current major concern is to enlarge the

semantic compass of 'law' beyond the law of the sovereign to include other forms social ordering that instil a sense of obligation.

Our argument for another form of the law of the sovereign to replace the current modern form therefore has a different objective from legal pluralism. Essentially, the argument does not quarrel with the conceiving of 'law' in the Austinian tradition of commands of the sovereign, especially when 'sovereign' is conceived of widely and flexibly as Austin's intellectual successors have done in taking the term beyond just an identifiable human monarch.¹⁹⁰ The opposition of legal pluralists to what they term the 'legal centralist's view,' namely that the usage 'law' is and should be confined to the law of the sovereign, is irrelevant for the purposes of an argument that an alternative form of the law of the sovereign can exist. The goal of the argument is to open up the possibility that there can be another form, other than the modern form, of the law of the sovereign. The argument does not go as far as to make a specific description of the alternative legal form(s) but even so, allows in the extreme that an alternative legal form may reside wholly in 'private ordering' so that there might not even be a state as recognised by modernism.

¹⁹⁰ Attempting a proper definition of 'positive' (man-made) law, 19th century jurist Austin excluded rules made by private persons, customary law (except when adopted by the state as a formal legal rule) and the rules of international law on the basis that they did not emanate from any identifiable sovereign. For Austin, the sovereign was constituted by the habitual obedience of his commands by the populace. Those commands, backed by sanction, constituted what was properly called 'law' (Menski 2006, Dias 1985, Morrison 1982). Following in that positivist tradition, Hart (1961) doubted that 'primitive' law and international law could be described as 'law' for their lack of legislatures, conventional courts and centrally organized effective systems of sanctions.

6.8 THE AFROCENTRIC POSSIBILITY OF AN OTHER LAW

Enabling possibilities other than familiar modern forms have been a defining feature of apocryphal, postmodern and postcolonial critiques.¹⁹¹ The challenge is to recognise that the prevalent paradigms of knowing are not natural but are kept in place by the force which excludes and represses other ways of knowing (Davies 2008). In questioning whether the modern legal form is inevitable or universal, such critiques point to creeping disaffection with, and an imminent crisis of, modern law. The growth in subscription to alternative dispute resolution ('ADR') is a possible indication of this crisis. Underlying ADR is a breakdown of confidence in the judicial method and a drift towards dispute resolution otherwise (Barrett and Barrett 2004, Spigelman 2001).

It would of course be extreme to predict the disappearance of the judiciary or even to claim that apocryphal, postmodern and postcolonial critiques do so. Yet, the portents of a growing ADR movement links in with an Africanist critique suggesting that perhaps the development or centrality of a judiciary is not natural or inevitable.¹⁹² It is telling that 'primordial' African dispute resolution, which failed to pass muster by most modernist conceptions of law, inhered in method and principle similar to those of the 'post-modern' alternative dispute resolution that modern law now gravitates towards.¹⁹³

¹⁹¹ The categorisations between Marxism, feminism, post-modernism, etc are of course not mutually exclusive and the different critiques often share common themes.

¹⁹² Gulliver (1969a:12) asks whether law necessarily entails 'the possibility of the use of use of force, or the practice of the adjudication or the existence of a court.' He finds (at p.21) that there have historically been two principal modes of dispute settlement, namely negotiation and adjudication, and that some societies were characterized by the absence of adjudication.

¹⁹³ Bozeman (1971) identifies conciliation as the major purpose of dispute resolution in African customary law. Gulliver (1964), writing on traditional African dispute resolution without courts, produces a study of the Arusha, a tribe in Tanzania, where settlement for everything from petty offences to homicide is negotiated. Fiadjoe (2004) puts forward the thesis that particular experiences

Let us imagine then an African legal genus that but for colonialism might have bypassed a judiciary entirely and developed a system of dispute resolution that was entirely non-judiciary based. Let us imagine further that this legal form had been the colonising form. As Allott (1980) points out, if a person who had never thought about law in the abstract were to come upon Western law, he would look for law comparable to his own in the files of the United States Supreme Court and not finding it, would conclude that *those people* had no law.

More empirically, Woodman (1998) observes of Ghanaian legal experience that the implanted modern law must have seemed incomprehensible, irrational and dysfunctional to the natives. He finds that that continues to be the case, four decades after the state apparatus passed under the control of indigenous governments. If this modern legal form is actually incomprehensible, irrational and dysfunctional to the ‘natives’, as alleged, then it must be questioned why the pursuit of the Rule of Law continues to be forced within the bounds of such a legal form. At the heart of this question is the proposition that the problem with the Rule of Law in Africa might not then be society itself but with the form of ‘law’ within which the Rule of Law is sought to be produced. This question raises recondite issues about the legitimacy of the modern legal form in Africa.¹⁹⁴

of the developing world might help reshape traditional notions of ADR. Sourdin (2004) identifies four types of ADR approaches or models: settlement, facilitative, therapeutic and evaluative. Of these, only the evaluative model seeks to achieve settlement by reference to legal rights rather than ‘broader interests.’

¹⁹⁴ Teubner (1984) argues that law will fail where there is incongruence between law, politics and society. In that event, the incompatibility between the regulatory order and the self-producing relations of the regulated system renders the regulatory order irrelevant. Law is then highly ineffective. Similarly, Habermas (1996) and Bohman (1994) have argued that law derives its legitimacy from the full agreement of citizens. As Anleu (2000:53) surmises, this is not an argument for ‘direct participatory democracy, but one that seeks to embed radical and democratic principles in an account

An Afrocentric critique of modern law has been broached by an East African School led from Dar-es-Salaam by Shivji.¹⁹⁵ Ghai (1987:771) writes of this school that they were ‘more concerned with the forms and processes of law than its doctrines.’ Shivji (1972:6) questioned the worth of ‘the meticulous legalism and dissection of each section, comma and apostrophe [which] is the epitome of a lawyer’s academic writing.’ He doubts that this contributes to any greater understanding of society or moves it towards rational, human and social order. Rather he says, a lawyer-intellectual should ‘analyse the legal form to reveal the real substance ... that underlies much of the law’ (Shivji 1972:7).

The East African School mainly proceeds along Marxist lines, hinting darkly at bourgeois conspiracies and pointing at the use of law as an instrument of colonial oppression. Lyall (1986), Paliwala (1986), Picciotto (1986) and Shivji (1986) argue that lurking behind the legal form are class interests which are antagonistic to legal development, and that this is linked to the political economy of colonialism. Tenga (1986) finds the theoretical limits of the Marxian approach to legal reform to be ‘social’ – the suppression of working-class struggles and organisation by the petty-bourgeois African state.

From an Afrocentric perspective, there are two problems with this Marxian approach to evaluating modern law in Africa. In the first place, the Marxian approach merely inheres in applying a critique, from within jurisprudential orthodoxy, that sees the

of the ... legal institutions of modern [states].’ If modern law is indeed regarded as alien in Africa, then according to this line of argument its ineffectiveness should really come as no surprise.

¹⁹⁵ *Limits of Legal Radicalism* (1986) edited by Shivji gathers the views of former teachers at the Faculty of Law in the University of Dar es Salaam, most of which were critiques of the suitability and application of the Western legal form in Africa.

modern form of law, even if it is transient, as universal and a given at this point in time. Secondly and more fundamentally, the relevance of Marx to an African theory of law is doubtful. As Asante (1988:8) puts it, ‘Marxism is not helpful in developing Afrocentric concepts ... because it, too, is a product of a Eurocentric consciousness that excludes the historical and cultural perspectives of Africa.’¹⁹⁶

Our approach to an Afrocentric critique is different. While it shares the focus on forms and structures, it steers clear of the ideological bent of Shivji *et al.*¹⁹⁷ It acknowledges that colonialism imposed that legal form not because that form was inherently oppressive but because it was the law that colonialism knew and the means to order that colonialism understood. Fundamentally, there was little difference between the legal form colonialism imposed and that in its home domain. If anything, the use of that legal form for oppression in the colonies points to the indeterminacy of law. Again, it is doubtful that the law was intended only for oppression. Many imperialists evidently believed it to be the opposite – an instrument for a benevolent, civilising mission.¹⁹⁸

¹⁹⁶ Leys (1971:307), who is given to Marxist analyses of African society particularly with regard to Kenya, acknowledges that the analyses might be somewhat artificial ‘partly because of the difficulty of finding Kenyan equivalents to the most familiar Marxian categories.’ Recognising the limitation of his Marxist analysis of African law, Lyall (1986) hopes that Africans ‘will not take it as a failure to pay due attention to theoretical problems of law in Africa’ but a recognition that African lawyers are better placed to take up the task than others from outside the continent. Our critique seeks to do more than the Dar es Salaam set and much like MacKinnon’s (1987) ‘feminism unmodified,’ explicate the possibility of an African narrative that is an alternative to orthodoxy.

¹⁹⁷ The Marxist analyses of the Dar es Salaam faculty seem to have been influenced by Tanzania’s flirtations with socialism in the 1960s and 1970s, as Mahalu (1986), a member of the faculty, acknowledges. Kenya, in contrast, had no such pretensions, with the result that the analysis of Kenyans Ojwang and Kuria (1977), which questions the assumed perfection of the modern legal form, is entirely devoid of Marxism. However, the Marxist/socialist analysis was quite popular in African academia at the time, even in countries that had no overt, leftist leanings. The Nigerian jurist Ogwurike (1979:195), after making a case for the unsuitability of colonial and neo-colonial legal systems in Africa, submits that ‘there is a general desire by the masses to break away from the rigid capitalist economy of the West and move towards socialism.’

¹⁹⁸ Lord Lugard, colonial administrator, remarked in 1922, ‘As Roman imperialism laid the foundations of modern civilisation, and led the wild barbarians of these islands along the path of progress, so in Africa today we are repaying the debt, and bringing to the dark places of the earth, the abode of barbarism and cruelty, the torch of culture and progress, while ministering to the material needs of our

The contention herein is that whatever the motive for imposition of the legal form, whether altruistic or not, the legal form has remained alienating. On this point, there is a fair degree of consensus in legal anthropology as demonstrated by the likes of Menski (2006), Woodman (1998), David and Brierly (1978) and Cotran (1966).¹⁹⁹ The need has always been recognised to Africanise law in Africa, even though beyond the realm of rhetoric not much has been done to expatiate on how this can be done (Menski 2006, David and Brierly 1978). Modern law might therefore be the problem rather than the solution in ensuring the Rule of Law in certain regions, particularly Africa.²⁰⁰ The problems of the Rule of Law there might be symptoms of a resistance bordering on the rejection of modern law as we know it.²⁰¹

In Chapter 4, a distinction was drawn between the Rule of Law as the rule of a particular regime of rules and the Rule of Law in functionalist terms. The latter conceptualisation was thereafter adopted and governs conceptualisation of the Rule of Law in this dissertation. The Rule of Law as a state of functionalism in which rules are applied generally and prospectively to achieve and maintain libertarian and equitable outcomes is therefore one thing. The form of ‘law’ by which this state of affairs is achieved is another and it is this form of law that is taken to task in this chapter. Once the Rule of Law is viewed in broad functionalist terms and the argument broached that the modern legal form is not the only way in which it can be

own civilisation ...’ (Young 1995:29). Bradley (1966:45) says of the Africans in Northern Rhodesia (Zambia) in 1926 that none of them questioned the right of the British colonials to be there: ‘We were giving them a new and better life which already held the seeds of a future civilisation.’

¹⁹⁹ Ogwurike (1979:194) submits that thus far, law and society in Africa ‘are not in ... harmony.’

²⁰⁰ Anghie (2007) makes the rare argument that in their drive to impose Western style institutions on developing countries, law reformers fail to realise that those countries’ problems might stem from the institutions themselves.

²⁰¹ Ogwurike (1979:193-194) argues that Africa’s history and its imperatives for development ‘call for a conception of law that is both meaningful and unique to Africa.’ He says that if rapid progress is to be made, the link with ‘orthodox and too conservative notions of law’ must be broken.’

achieved, context begins to be put to the criticism of the likes of Africanists like Gathii (1999) and critical legal scholars like Unger (1975) that there is no such thing as the Rule of Law.

Unger (1975), for instance, does not quarrel with the desirability of objectives enshrined in the Rule of Law like equality, equity, etc. What he quarrels with is whether the modern legal form produces these outcomes. Like a good critic, he argues that all that this modern form produces is the perpetuation of inequality and class relations of domination. He quarrels therefore with the Rule of Law being synonymous with the modern legal form. This is what he shares in common with the argument in this dissertation – that the Rule of Law is not synonymous with the Rule of modern law. An Afrocentric critique of modern law suggests that there should be another type of law in which system fidelity would inhere in Africa to the degree required for the Rule of Law to exist.²⁰²

6.9 SUMMARY

An Afrocentric critic proceeds from an Africa-centred viewpoint to query the hegemony of modern law over ‘law.’ The critique challenges the settlement on

²⁰² The positivism in Western jurisprudence that has been so influential in propping up the modern legal form is partly a reaction to the difficulty of propounding any comprehensive theory on why people obey law. Kelsen (1934) observed that the reason for obedience to law was an anthropomorphic metaphor which was not worthy of serious enquiry. The systemic-fidelity analysis here is not on the question of individual obedience to law, which quickly degenerates into the arguments on morality that have polarised jurisprudence into natural and positive schools. Systemic fidelity looks more to societal reification and veneration of law in its totality (even if, as always, there is disobedience or even infidelity to individual laws). This is of course the starting point for an argument that introduces multiplicity in the conception of ‘law.’ Yet, any analysis of systemic fidelity to ‘law’ is still attended by the difficulty of answering why it happens. It is not pretended here that there the ‘why’ question will be answered – that is a thesis all by itself. However, applying methodology that any self-respecting positivist might recognise, the question is sidestepped entirely and instead an attempt is made to demonstrate the possibility of an Other wherein systemic fidelity is more likely.

modern law with its subscription to abstract principles and legal fictions, its formality and its institutional categorisations between executive, legislature and judiciary. Breaking away from the strictures of orthodoxy, the Africanist critique suggests that the modern legal form is actually Western customary law - a customary law originating in certain civilisations collectively described as 'Western.' The critique draws corroboration from some 'orthodox' critiques of law.

Critical Legal Scholarship ('CLS'), a critical movement that arose in the late 1960s, took an anti-foundational position on modern law. Critics argued in part that modern legal doctrine was historically contingent and indeterminate. This line of reasoning suggests that the whole scheme of modern law may be contingent rather than the epitome of rationality. Radical feminism proves even more anti-foundational, arguing that modern law is the product of a male-centred world view rather than universal rationality. CLS and feminist jurisprudence have been criticised as nihilist exercises that provide no alternative construction but their defenders argue that their purpose is to pave the way for such constructions to be made.

CLS and feminism have however been called 'internal' or 'regular' critiques which take modern law as constituting 'discursive regularity' - the boundaries of possibility for debate. The rare critiques of law that attempt to take the conception of law beyond discursive regularity have been called 'apocrypha' to distinguish them from the 'heresy' of regular critiques. The argument for an alternative to modern law is apocryphal and carries beyond the usual polarisations in orthodox jurisprudence between natural and positive law theories and between positivism and regular critical

perspectives. Yet, even in seeking to establish another discourse, the apocrypha must encounter the dominant discourse even if only as a take off point.

Apocryphal jurisprudence falls within the critical and theoretical perspectives classified as ‘postmodern.’ Whereas ‘modernism’ is constituted a metaphor for closure on knowledge and meaning, the ‘post’ in ‘postmodern’ means ‘anti’ rather than ‘after.’ Postmodernism (as does ‘poststructuralism’) therefore refers to intellectual perspectives, across disciplines, which oppose closure on knowledge and meaning. A postmodern treatment of ‘law’ opens up the terrain of ‘law’ to other forms of law that might compete with modern law. The apocryphal Afrocentric critique may therefore be regarded as a postmodern critique. To the extent however that the critique perceives modern law as a Western conception of law and challenges its hegemony over ‘law’ as such, the critique may be more narrowly situated within postcolonial theory.

Like postmodernism and poststructuralism, postcolonial theory is neither a single theory nor homogenous body of thought. Postcolonialism is a set of perspectives and problematisations that work in different, sometimes contradictory, ways to emancipate epistemes repressed by dominant Western (‘colonial’) discourses. ‘Postcolonialism is now the main mode in which the West’s relation to its “Other” is critically explored.’ There has been only limited engagement between law and postcolonial theory. This engagement, in international law, has however produced the Third World Approaches to International Law (‘TWAIL’) school. TWAILers remonstrate against the Eurocentricity of international law and offer up critical, Third

World perspectives on contemporary legal discourse that resonate with an Afrocentric critique of modern law.

Despite a paucity of Africa-specific postcolonial legal theory (even within TWAIL), recourse to the general themes of postcolonialism provides the basis for questioning whether there are African systems of thought about law that can be made explicit within their own rationality. If the answer is in the affirmative, then perhaps there is an alternative to modern law – an Other modern law - that is better suited to African systems of thought and therefore to the Rule of Law in Africa. This is what the Afrocentric critique of modern law proposes and the dissertation argues. The key question then would be whether that Other law exists or can work. The next two chapters demonstrate the possibility.

CHAPTER 7- CUSTOMARY LAW AS PAST ALTERNATIVE TO MODERN LAW

‘Immediately white men came, justice vanished’ (unnamed elder in Okigwe, Eastern Nigeria, quoted by Afigbo 1972:283).

‘Evolutionism, functionalism, diffusionism – whatever the method, all express otherness in the name of sameness, reduce the different to the already known, and thus fundamentally escape the task of making sense of other worlds’ (Mudimbe 1988:72-73).

7.1 INTRODUCTION

This chapter focuses on the third subsidiary research question which is whether it can be demonstrated that another type of modern law is possible in Africa. The last chapter broached the possibility of an ‘Other’ of modern law in which systemic fidelity and ultimately the Rule of Law might reside in Africa, in contrast to the modern legal form which has so far proved problematic in much of Africa. The starting point for the demonstrating the possibility of the ‘Other’ law must be customary law, the existence of which serves notice of an Africa Other.

There are two major approaches to analysis of customary law, the one being to seek customary law out in court decisions and the other being to concentrate on the results of anthropological fieldwork in African communities. This chapter first examines both types of customary law. The chapter then argues that it is possible to view African customary law as having been a form of law on a different evolutionary path from modern law. The chapter argues that the legal cultures and rationalities that simultaneously produced and were embedded by this other form of law are different from those required for the modern Western legal form. It is suggested that this

difference in legal cultures and rationalities remains and continues to undermine the success of modern law in Africa. The chapter ends with a summary.

7.2 THE NATURE OF CUSTOMARY LAW

7.2.1 Colonial Legal Policy

In theory, British colonial policy on customary law differed from that of the French, Portuguese and Spanish. The British implemented a system of Indirect Rule which permitted the natives to remain within the jurisdiction of their own rules of custom (Okereafoezeke 2002, Mamdani 1996, Elias 1962). By contrast, the other colonials implemented the theory of assimilation which ostensibly gave primacy to the metropolitan law of those colonials (Lambert 1993, Ferreira 1974, Crowder 1962). In those latter colonies, only those lacking in status were subject to an admixture of metropolitan law and customary law. Europeans fell under the European legal order along with Africans elites who had attained the status of *evolues* (in French colonies) or *assimilados* (in Portuguese colonies). In practice however, there were relatively few *evolues* and *assimilados* so that the judicial system that evolved was similar in all the colonies (Benton 2002, Mamdani 1996, Ferreira 1974). There was a bifurcated system in which native courts, presided over by chiefs, exercised jurisdiction over natives according to customary law while metropolitan-style courts handled disputes involving white Europeans according to metropolitan law (Benton 2002, Mamdani 1996, Ferreira 1974). Appeals from the native courts were usually heard in tribunals staffed by administrative officers, called ‘commanders’ in French colonies and ‘commissioners’ in British colonies.

In the British colonies, natives were to remain subject to customary law in ‘personal’ matters of marriage, succession, inheritance, testamentary dispositions and land tenure (Elias 1957:6-7, 1965:186-187). Chieftaincy and traditional matters were also within the purview of customary law.²⁰³ Customary law applied in all other disputes if both parties were African and the subject-matter was neither subject to English law nor expressly made subject thereto by the parties. If only one party was African, customary law would still apply if it would be unjust to apply English law. Whatever the case however (in both British and non-British colonies), criminal law and adjudication were removed from the purview of customary law and reserved unto the colonial administration (Mamdani 1996, Manuh 1995, Elias 1965).

In British West Africa, the customary or native courts were vertically integrated in the overall court system and featured as a first tier (Elias 1956 and 1962). In ascending order, there were then magistrate courts and a high or supreme court. Appeals lay from the supreme courts to the Judicial Committee of the Privy Council in England. For a limited period, there was interposed a West African Court of Appeal between the supreme courts and the Privy Council. In East and Central Africa, there was the ‘Tanganyika’ pattern in which the customary courts ran parallel to the magistrate and high courts.

Notwithstanding the regional nuances, the recognition of a customary law and native courts gave rise to dualist legal systems in all of British colonial Africa (Mamdani 1996, Manuh 1995, Elias 1962). For most of the colonial period, there was little integration between the two systems. Africans were more likely to be bound by

²⁰³ *Eshugbayi Eleko v Government of Nigeria* (1931) AC 662.

customary law, in personal matters, than by metropolitan law and to be subject to the jurisdiction of customary courts. The principle by which customary law would be established was initially set out by the Privy Council in *Angu v Attah*.²⁰⁴ Customary law was to be proved by calling witnesses acquainted with a custom until the custom had become so notorious that the courts would take judicial notice of them. No proof of customary law was however needed in a native court if the members of the native court were themselves possessed of expert knowledge of the custom.

7.2.2 Colonialism's 'Invented' Customary Law

Beyond the satisfaction of the rule in *Angu v Attah*, customary law could not be applied if it was found to be 'repugnant to natural justice, equity and good conscience.'²⁰⁵ It would also be invalid if it was inconsistent with local legislation or written law.²⁰⁶ This subjection to higher authority represented one of the express points of departure of judicial customary law from customary law in its pre-colonial form. As Ojwang (1989) and Asiedu-Akrofi (1989) observed, the striking down of customary law based on notions of justice and morality from without meant that the scope for retention of customary law in its original form was substantially eroded. Okereafoezeke (2002) and Gower (1967) submit thus that customary laws ceased to

²⁰⁴ [1874-1928] Privy Council Judg. 43 (Ghana 1916).

²⁰⁵ This was the wording, in Nigeria, Sierra Leone and Ghana, of the 'repugnancy clause' which appeared in some form or the other in the colonies to set limits to customary law. In Kenya and Malawi, the terminology was 'not repugnant to justice and morality.' In Southern Rhodesia, it was 'not repugnant to natural justice and morality' and in Sudan, 'not repugnant to justice, morality or order' (Mamdani 1996, Manuh 1995, Obilade 1979, Goldin and Gelfand 1975).

²⁰⁶ Sometimes, a public-policy requirement was also added. In Nigeria, the Evidence Act required custom not to be contrary to 'public policy.' In the Native Courts Proclamation of 1942 in Bechuanaland (Botswana), native law and custom were to be upheld to the extent that they were not 'incompatible with Her Majesty's power and jurisdiction.' A similar phrase appeared in the charter authorizing the colonization of Rhodesia (Mamdani 1996:117, Obilade 1979).

operate except to the extent that they could satisfy the repugnancy and consistency tests.²⁰⁷

It was not only in substantive norms that customary law was changed by its situation within the modern legal form.²⁰⁸ The mechanisms and processes by which the law was deciphered and applied had changed entirely. The native courts were largely creations of the colonial authorities (Mamdani 1996, Manuh 1995, Elias 1956). Proceedings in these courts were recorded, a hitherto unknown event in most of pre-colonial Africa. Gradually, the chiefs and elders that served as adjudicators in the earliest native tribunals were replaced with civil servants. Elias (1956) observed that these officers could not be expected to be entirely innocent of English legal ideas. There were strong grounds for suspecting that the officers' views of customary law were 'not undiluted and evolving versions of the native genus' (Elias 1956:279). Harris (1996) summarises the position. She says that colonialism transformed customary law from 'a subtle, adaptable, and situational code to a system of fixed and formal rules' (Harris 1996:3). Furthermore, customary law changed from 'the embodied, spoken and interpreted text into a fixed, abstracted and disembodied one that was written' (Harris 1996:3).²⁰⁹ In the same vein, Allott (1960b:89) stated that once custom has been codified or settled by judicial decision it loses its essence and ceases to be customary law.²¹⁰

²⁰⁷ To compound matters, the repugnancy tests, being quite vague, were applied in an ad hoc manner (Mamdani 1996, Asiedu-Akrofi 1989).

²⁰⁸ Woodman (2002:141) demarcates institutional and normative 'recognition' of customary law by modern law. He criticises Sheff (2000) as concentrating on the problems of normative recognition of customary law by judges and not paying attention to the extent to which customary law is transformed by its enforcement through state institutions.

²⁰⁹ Ojwang (1989:131) distinguishes between tribal law and customary law. He says that customary law is what remains of tribal law after its interplay with modern legal form.

²¹⁰ Allott's (1960b) argument is that it is a defining feature of customary law that its legitimacy depends on habitual obedience. Once the binding force depends on statute or judicial authority, then it can no longer be called customary law. Woodman (1969:128) disagrees, arguing that the conception

This position was similar in non-British colonies (Mamdani 1996, Manuh 1995). Repugnancy clauses were the norm. The French and the Belgian systems required customary law to be consistent with ‘public order and morality.’ The Portuguese subjected customary law to ‘the principles of humanity, the fundamental principles of morality’ and ‘the free exercise of sovereignty [by Portugal].’ There were therefore the same questions of the authenticity of this customary law which was dispensed by native courts created by the colonial regimes. Snyder (1987) provides a case study on the creation of customary law by colonialism in Senegal. A land dispute among the Banjal was ultimately referred to the French colonial administration which affirmed a conception of the Banjal rain priest as ‘master of the land.’ However, as Snyder (1987) reveals, this conception was unknown to the Banjal. The colonial administration had confused the leading of rituals relating to the land with the holding of proprietary interests in the land. To Snyder (1987), the notion of ‘customary law’ was little more than an ideology of colonial domination which resulted in African legal forms being reinterpreted according to European legal categories.

7.2.3 Anthropology’s ‘Real’ Customary Law

Dissatisfaction with judicial customary law as an accurate representation of indigenous law directs attention to customary law as deciphered by legal anthropologists carrying out fieldwork in indigenous African communities. The notable pioneering studies here include those by Rattray (1929) on the Ashanti of

provides no certainty upon which a lawyer can advise his client of what the law is in a particular case. From a lawyer’s perspective, Woodman (1969) opts for the Realists’ definition that law [whether customary or otherwise] is what the courts say it is. He however submits (at p.149) that the lawyer’s definition may be as misleading to the sociologist as the sociologist’s definition, favoured by Allott, would be to the lawyer.

Ghana, Schapera (1938) on the Tswana of Southern Africa, Cory and Hartnoll (1945) on the Haya of Tanganyika (Tanzania), Howell (1954) on the Nuer of Sudan, Gluckman (1955) on the Barotse of Zambia, Lambert (1956) on the Kikuyu of Kenya and Bohannan (1957) on the Tiv of Nigeria.

Elias, the Nigerian jurist, was one of the earliest indigenous writers to attempt to distil and propagate common features of African customary law.²¹¹ Studiously avoiding judicial customary law in his analysis, Elias (1956) concentrated on a synthesis of the various anthropological studies done across Africa as well as his personal knowledge of custom in various parts. Elias (1956) however noted that a major problem with anthropology was how to distinguish between what practices were ‘law’ properly so-called and mere customary practices.

Customary law was unwritten, relatively decentralised and informal. There were no clear dividing lines between it and everyday social practice; both appeared to move seamlessly into each other. The amorphousness had led early twentieth century anthropologists to conclude that law did not exist in traditional society. Evans-Pritchard (1940:162) declared that given the absence of courts and other defining institutions of the modern legal form ‘in a strict sense, the Nuer [tribe in Sudan] have no law.’²¹² Indeed, the lack of demarcation of law from custom was the key feature by which ‘modern’ society was to be distinguished from ‘tribal’ or ‘pre-literate’ society. Hartland (1924), Morgan (1925) and Hobhouse (1925), among

²¹¹ Ajisafe (1924) and Danquah (1928) wrote on customary law among the Yoruba and Akan respectively.

²¹² Even when Evans-Pritchard (1940:168) subsequently uses the word ‘law’ for the Nuer, he quickly explains that he uses the word in the sense of ‘a moral obligation to settle disputes by conventional methods and not in the sense of legal procedure or of legal institutions.’

others, had been of this view, with Morgan insisting that tribal society had a *social* but not a *legal* system.

It is now the norm, as Elias (1956:29) and Ojwang (1989:125) do, to distinguish the early anthropological view of law in tribal society from that of later anthropologists. The latter school took a less dogmatic approach to defining 'law.' In Elias' (1956:30) words, they 'were prepared to say that African law is law although there are understandable differences between some of its provenances and those of other types of law.'²¹³ If the earlier school suffered from exclusiveness, the more recent one was plagued by the opposite. Harris (1996:3) refers to Bourdieu's lament on the 'legalist illusion' which led the later anthropologists to reify custom into customary law in the same way that the colonial administrations did. Thus, even where it was accepted that 'law' was present in traditional society, difficulties continued to attend anthropological attempts at deciphering what were legal rules and what were mere customary practices.²¹⁴

The tendency developed to use the generic term 'native law and custom' to cover one or the other. Elias (1956:29) deprecated the usage yet even he fails to come up with any conclusive formula by which native law could be separated from custom. In the search for such a formula, anthropologists found themselves grappling with the definition of law. This was a difficult and mostly unfulfilling exercise as the likes of Lloyd (1962) and Woodman (1969) who attempted it reveal. Invariably however, the

²¹³ There are, of course, exceptions to this periodisation of anthropological views. Lowie (1920:404) had taken a positive view of African jurisprudence calling it the 'highest developed' among primitive peoples, 'with an orderly method of procedure before a constituted tribunal.' By contrast Hamnett (1975:9) finds customary law as falling short of the requirements of the ideal legal system.

²¹⁴ Elias (1956:294) illustrates this by pointing out that many writers misunderstood the drumming and feasting accompanying customary marriages as part of the legal requirements. In reality, only the discharge of the marriage payment by the prospective groom was part of the contract.

benchmark adopted was the modern legal form and the frame of analysis that of Western legal theory but this created problems of its own. The dissatisfaction noted with the judicial customary law was its situation of discovery and enforcement of customary law within the framework of the processes, norms and concepts of modern law. The anthropological approach faced similar questions.²¹⁵

7.3 DIFFERENTIATING CUSTOMARY LAW FROM WESTERN LAW

7.3.1 Bohannan v Gluckman on Differentiation

Bohannan (1957) had proposed that for authenticity, traditional legal concepts were to be analysed through the thought systems and language of the natives themselves. He considered it a fundamental error to use the terminology and theory of Western jurisprudence to analyse traditional African law. Bohannan's postulations on method were essentially a critique of Gluckman (1955). Gluckman's analysis had made great play of his finding, in Barotse legal reasoning, the equivalent of the common-law concept of the 'reasonable man.' A lot of the subsequent debate between the two and their respective supporters would degenerate into polemics over the language in which the true purport of native legal concepts could be captured. That reductionism often detracted from the more fundamental issue in contention, regarding the possibility of disconnection between traditional Africa's legal cosmology and that associated with modern law.

²¹⁵ Since African custom was largely unwritten, anthropologists faced the methodological problem of whether the rules of customary law could be better deduced from 'trouble' cases or from 'trouble-less' cases. Holleman (1973) summarising the strengths and weaknesses of each method, expresses a preference for trouble-less cases on the basis of limited occurrence of trouble cases and the expression of many legal norms lying outside the province of dispute-resolution. On the other hand, as Holleman notes, Epstein (1967) and Gulliver (1969) follow Hoebel's (1942) preference for the trouble-case method in the study of customary law.

Even in the diametric positions that they take on methodology and purpose, Bohannan and Gluckman are united (unwittingly, perhaps) by their essaying of the scope for differentiation between African jurisprudence and the Western one. Gluckman, in response to Bohannan's criticism, goes to great lengths to disclaim that his analysis necessarily points to sameness. Gluckman (1969:370) argues that even within the 'reasonable man' concept, he emphasises a divergence between Barotse and Western law. He says that while modern Western law is 'specialised in defining types of rights and duties, Barotse law is developed in definitions of social positions and types of property.'

Gluckman's parallelism irks Bohannan. Bohannan is sceptical about the utility of such an exercise given that the natives might not perceive, rationalise or analyse law in any manner resembling that of Western jurisprudence. Bohannan (1957:404) goes so far as to point out that the Tiv, who were the subject of his own study, had not developed any indigenous jurisprudence (in the sense of an organised body of reflective legal theory). Comparison with Western legal theory, which was Gluckman's stated purpose, was not therefore possible as there was no basis for such comparison.

7.3.2 Elias' Differentiation

Difference in jurial narratives between African and Western systems is a theme that emerges directly from the analysis of Elias (1956). He identifies divergence between the general ideas of legal responsibility in African customary law and those in the imported English one, the latter emphasising individual status and the former focusing

on group status. With regard to dispute resolution, he says that there is an emphasis in African systems on the maintenance of the social equilibrium. This was in contradistinction to preference in modern legal systems for 'a strict declaration of legal rights and duties of litigants without regard to the social consequences' (Elias 1956:298).

Elias (1956) says that rather than 'spinning out abstract theories of law,' the aim of traditional adjudication was the 'more pragmatic' one of removing the causes of social tension and reconciling the parties. The same attitude of give-and-take reciprocity covered even matters of a criminal nature and the process aimed at achieving re-incorporation of the erring member in the social structure. Direct restitution to the victims or their families was the more significant feature and 'unilateral' punishment such as imprisonment was virtually unknown. It was only where the activities of the errant person were disintegrative of social solidarity that there was resort to banishment or execution. The conscious purpose being 'reconciliation by a fairly just apportionment of blame or deserts,' the atmosphere was usually one of peaceful debate. The environment of dispute resolution was not intended or made up to be majestic or awe-inspiring. Furthermore, most African societies lacked any system of institutionalised police and other law enforcement officers.

It is perhaps ironic that Elias (1956) ultimately highlights difference between African law and the Western legal form because at first he seems to be making a case for correspondence. He repeatedly tries to show that the same basic notions exist including the dichotomies between custom and law, criminal and civil liability, and

private and public realms. He identifies concepts such as contract and tort in traditional law and disparages the contention that traditional tribunals should not be regarded as courts. He even seems initially to reject the idea that the restoration of social equilibrium is valid as a distinction between traditional African dispute resolution and that of the modern legal form.

Close examination reveals that what Elias (1956) has done is to identify equivalence of concepts on a very general level and then try to show difference in the detail of conception. This is in a way understandable as Elias' expressed major goal is to establish that 'law,' by the standards and criteria for identification used by orthodox jurisprudence, existed in traditional Africa. Broad equivalence therefore had to be first established. It is only thereafter that he sets about to show differences in legal rationalities such as that matters categorised under 'public' and 'private' were not the same as between traditional law and modern law. Similarly, he identifies differences between the kinds of matters that were considered criminal offences and those left to private arbitrament. He says that 'what is put in each category must, however, be different in the African legal context from what it is in [modern law]' (Elias 1956:295).

7.3.3 Allott's Differentiation

Allott (1968), writing more than a decade after Elias, also observes difference.²¹⁶

Allott (1968:135) points out that traditional law was not an 'arcane mystery' but a

²¹⁶ Like Elias (1956), Allott (1968) does not fail to point out broad similarities such as the fact that contrary to popular perception, custom was not the only source of law; overt legislation was also a feature of the traditional legal form. Unlike Elias (1956) however, Allott (1968) does not dwell on or

‘matter of public concern.’ Allott (1968) disputes Maine’s (1861) suggestion that in the epoch of customary law, knowledge of laws was vested exclusively in the aristocracy or ‘juristical oligarchy.’ According to Allott (1968), African customary law was generally known to all rather than by only a privileged minority. The language of the law, being oral, was simple; citizens could understand it and participate in its making and enforcement in a manner impossible under modern Western law.²¹⁷ The localisation of legal process further contributed to the popularisation of law. Traditional dispute resolution did not inhere in a specialised, central institution but depending on the nature of the dispute, could be settled by a moot, the village head, the lineage elder, or father of a restricted family and so on.

Allott (1968) finds that many of the questions which concern modern jurists are almost meaningless when directed at traditional African law. He finds absent in traditional African law, the attempt at separation of legal and moral norms. He also finds that many of the principles and assumptions revered by modern Western law had no place in Africa. For instance, the fiction of judicial ignorance cherished in modern Western law would have been severely challenged in African customary judicial processes where litigants and judges or arbitrators all knew each other. The facts of the case as well as the antecedents of the parties were also likely to be public knowledge even before the dispute officially came to be settled so that the gap between legal truth and actual fact were diminished. The rules of evidence were as a result less formalistic and restrictive than those of modern law.

overtly seek to establish equivalence. Indeed he seems to take equivalence for granted when talking about ‘law of procedure,’ ‘law of crimes,’ etc.

²¹⁷ Allott (1968:135) gives the example of the Tswana among whom new laws were deliberated and enacted at a *pitso*, or general assembly of all adult males of the tribe. He accepts that not all African societies went as far as the Tswana but says that popular participation in some form was a general feature of African legislation and dispute resolution.

Like Elias (1956), Allott (1968) also found that the prevalent theme of dispute resolution in African traditional systems was final reconciliation of the parties. The applicability of formal legal rules was invariably subject to the demands of substantive justice. This reconciliatory function appeared in both adjudicatory and arbitral modes of dispute resolution. As Allott (1968:145) puts it, the job of a court or arbitrator was ‘less to find the facts, state the rules of law, and apply them to facts than to set right the wrong in such a way as to restore harmony within the disturbed community.’²¹⁸

7.3.4 Corroboration on Differentiation

Elias’ (1956) and Allott’s (1968) are generalisations with random examples from various parts of Africa but corroboration is provided for their conclusions by a wealth of anthropological literature on specific subjects of African customary law or on the customs of specific groups. Cotran’s and Rubin’s (1970) compilation on the traditional law of persons and family in Africa provides excerpts from studies on groups as diverse as the Tswana, Ashanti, Swazi, Ibo, Xhosa, Kikuyu, Haya, Nuer, Luo, Gusii, Akan, Yoruba, etc.²¹⁹ Cotran and Rubin (1970:1) draw attention to the sheer variety of social structures (and *a fortiori* of legal structures) revealed. Yet they observe that even within this diversity, several unique features of customary law in

²¹⁸ Allott (1968:144-146) finds two interrelated reasons for the tendency towards reconciliation. The close-knit nature of communities meant that survival depended upon co-operation which in turn depended upon mutual goodwill. Furthermore, without the enforcement machinery of the Western legal form, mutual acceptance of a judgement and reconciliation constituted the only guarantee that judgement or settlement could be enforced.

²¹⁹ The authors of the excerpts collated by Cotran and Rubin (1970) read like a *Who’s Who* of African legal anthropology including Schapera, Rattray, Elias Kuper, Holleman, Fortes, Radcliff-Brown, Evans-Pritchard, Allott and Howell.

Africa are encountered, 'all of them relating to the greater emphasis on the legal role of groups.'

Similarly, Holleman (1949:51-52) writing on Bantu (especially Shona) law, finds that its approach is 'undoubtedly communal' whereas in the Western system the approach is 'from the individual point of view.' He also finds that generally 'but not unreservedly' the Western system is abstract and rational while the Bantu system is tangible and emotional. Holleman (1949) quickly adds that he means neither that Western society lacks communal, concrete or emotional elements nor that in Bantu law there are no individualistic elements or examples of abstract thinking. Rather, he means that assuming that all the elements are present in both systems, 'the West leans towards the individual, abstract and rational, while the Bantu leans towards the communal, tangible and emotional' (Holleman 1949:52).

Ebo (1979), studying indigenous law in Southern Nigeria, finds the same general lack of external enforcement mechanisms that Elias and Allott identified. Sanctions being mainly consensual and reconciliatory were usually self-enforcing so that there was no need for institutions such as the police. Imprisonment was unknown as a means of punishment. Restitution was the main aim of dispute resolution in order that harmony be restored and the social equilibrium maintained. The mode of dispute resolution was arbitral rather than adversarial adjudication except where the issues involved offences against the public interest.

In discussing crime and the public-private divide, Ebo (1979) elaborates on the divergence, captured earlier by Elias (1956), of traditional schema from those of

modern law. Criminal offences were distinguishable from civil offences, as in modern jurisprudence, but the make-up of public and private realms were different so that what counted as criminal in Africa was different from what so counts in modern law. Private law in the indigenous legal systems covered causes which could be adjusted and settled by one party making restitution to the other. Thus theft fell within the ambit of private law. Public law, by the same token, covered only those causes which threatened the fabric of society, such as murder, incest or witchcraft.²²⁰

African systems of landholding provide the greatest suggestion yet of a different jurisprudence. Judicial notice of such a difference was even taken in *Amodu Tijani v Secretary, Southern Nigeria*,²²¹ where Viscount Haldane observed:

‘... in interpreting the native title to land, ... much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English Law. But that tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence ... there is no such full division between property and possession as English lawyers are familiar with.’²²²

Repeatedly, doubt is expressed in studies whether the terms ‘ownership,’ ‘tenure’ and ‘property’ meant the same thing in African legal reasoning as they do in Western jurisprudence. There is doubt as to whether the concepts existed at all, in relation to land, in the majority of Africa’s traditional systems.²²³ Where existence of ownership is accepted as having established, there is still considerable confusion over whether

²²⁰ David and Brierly (1978:507) similarly find that in African customary law the distinctions between public and private law, civil and criminal law, law and equity were ‘a *fortiori*, unknown.’

²²¹ [1921] AC 399.

²²² [1921] AC 399, at 402-403.

²²³ Hooker (1975:139-143) discusses some of the difficulties of translating the native concepts in terms of English law principles.

there was any vesting in individuals, the most clearly visible holdings being communal in nature.²²⁴

The meaning of 'land' itself is the subject of further controversy. Obi (1963:32) argues that 'land' did not mean the same thing in African legal systems as it does in English law, although Bentsi-Enchill (1965:130-132) suggests that the view arises from being trapped in a 'terminological morass.' There is doubt whether many of the interests and concepts pertaining to land in the native jurisprudence have any parallels in Western jurisprudence.²²⁵ Even Gluckman (1969:358) proposes a set of neologisms to deal with certain African landholding concepts.²²⁶

If it is accepted that anthropological literature establishes different jural narratives as between modern Western law and the traditional African one, the question is what is to be made of the difference. Is it an indication of an Other, a distinct and different African legal universe, or is it something less serious, as in a variation of the same legal form much in the same way that common law and civil law systems make up the modern legal form?²²⁷ The next section looks at a possible answer.

²²⁴ In *Amodu Tijani v Secretary, Southern Nigeria* [1921] AC 399, Lord Haldane declared '... the notion of individual ownership of [land] is quite foreign to native ideas. Land belongs to the community, the village, or the family, never to the individual.' However, the literature also indicates that whereas radical title remained in the group, an individual could be granted the right to possess and use the land exclusively: Elias (1956:162-164). Elias (1956:164) says that land-holding recognised by African customary law was neither 'communal' holding nor 'ownership' in the strict English sense. He prefers the term 'corporate' to describe the complex intercourse of communal and individual rights.

²²⁵ In *Alade v Aborishade* [1962] WNLR 74, the court grappled with whether an interest analogous to the English fee simple absolute existed in under native law and custom and decided that it did not. Allott (1968:139) expresses the puzzlement of Western trained lawyers in classifying and treating native landholding concepts.

²²⁶ Gluckman distances himself from the use of the Roman-law concept of 'usufruct' to describe individual interests in tribal land. This usage was quite popular and Viscount Haldane, despite his self-caution against drawing conceptual analogy from Western law, adopted it in the *Amodu Tijani* case: 'A very usual form of native title is that of a usufructory right ...' Hooker (1975:140) says that the right described was not similar to the Roman *usufructus*.

²²⁷ The question rarely finds deep exploration in the literature. Seidman and Seidman (1984) countenance it in passing. They find two contradictory perspectives to customary law, the first wanting

7.4 FUNDAMENTAL DIFFERENCE BETWEEN THE TWO TYPES

7.4.1 One is not More or Less of the Other

Elias (1956) seems intent on showing that the differences in jural narratives are in the nature of variations on a common theme so that the jurisprudence is practically the same even if particulars may vary. This is of course the attitude adopted by Gluckman (1969) who, despite token protestations to the contrary, appears to need little convincing on the analogousness of jurisprudence. Bohannan (1969) is either unsure or unwilling to express a conclusion on the significance of the divergence. He however firmly rejects the hastiness of conclusion that African jurisprudence is merely less of the same. This is especially because, in Bohannan's (1969) view, the analysis carrying such conclusion routinely takes for granted the 'given-ness' of the conceptual framework of Western legal theory and then proceeds from within it to force analogy.²²⁸

Holleman (1949:51) had warned against the dangers of the analytical method that Bohannan (1969) would subsequently oppose, pointing out that the 'points in question may not be comparable (being founded on entirely different bases).' Bohannan (1969) insists that the danger in comparison of Western and non-Western law for the sake of contrast is still that it assumes that the two things being compared are of the

customary law to be nurtured as representing a different value system from modern law. The other perspective sees customary law as the law of primitive tribes which must be done away with in order to become modern. They rhetorically ask how to make a choice between the two perspectives but do not explore the matter further. Idowu (2006b), on the other hand is categorical that African jurisprudence is different from Western jurisprudence but provides little elaboration.

²²⁸ Bohannan (1969:412) talks about the common 'mistake of forcing the data into boxes of English jurisprudence.'

same genus so that there is a basis for comparison. This is made worse when equivalence is established by nothing more than juxtaposition, to wit taking the criteria for identification of one thing and juxtaposing them on the other. The relevant question then for Bohannan (1969:408), as far as anthropological comparison was concerned, was ‘when are two things the same thing?’ Bohannan (1969) refused to deny or admit that African jurisprudence and Western jurisprudence were of the same species.

In notable departure from the line Bohannan (1969) would tow, Holleman (1949:51) did allow that comparison reveals contrast so that ‘even if comparison were not altogether valid, it revealed a difference of social action and expression more vividly than description.’ Bohannan (1969) preferred to leave it at description. He doubts that the ‘real thing’ (in some non-Western jurisprudence) can be represented except by some grossly ethnocentric viewpoint or else by some kind of technique such as the folk system or ethnoscience, to get at something less ethnocentric. Gluckman (1969:366) critiqued Bohannan on the point, saying that the delineation of tribal conceptions is but the first step. Thereafter comparisons with other conceptions of similar type must ensue. Bohannan (1969) countenances comparison but is afraid that objectivity and neutrality will be weighed down by the comparativists’ pre-conceived notions. He is therefore wary of proceeding to comparison unless there is a method of ‘controlled comparison’ that avoids ethnocentric baggage. He uses the ‘backward translation’ of Gluckman (1969) to illustrate the inherent dangers of ‘casual

comparison,' accusing Gluckman of translating fundamentally Western ideas into Lozi instead of translating fundamentally Lozi ideas into English.²²⁹

Gluckman (1969) had earlier sought to criticise Bohannan (1969) on the basis that if Bohannan were correct about elevating folk systems to analytical systems, cultural solipsism would result. There would be no basis to compare or generalise unless a whole new independent language without a national home were developed. Bohannan (1969:415) accepts this as being indeed his (Bohannan's) position. Bohannan (1969:416) says that ethnographers must then learn to put up with the 'theoretical weightlessness' that would come from escaping from their own gravity.

7.4.2 Theoretical Weightlessness on Otherness of Customary Law

Theoretical weightlessness is the province that Comaroff and Roberts (1981) appear to step into when they challenge the ethnocentrism inherent in even the legal anthropology that is empathetic to the existence of law among the Tswana. They attack the rule-centred ethnographic method, adopted by Schapera (1938), which tries to construct an internally consistent and integrated body of rules from the observed practices of the Tswana. Comaroff and Roberts (1981) reject the existence of any such legal framework among the Tswana and question the validity of rule-directed interviews from which the rules were elicited.²³⁰ They then go on to observe that deviations from rules, such as those observed by Schapera in Tswana chieftaincy

²²⁹ Restating a belief in letting the reader judge for himself (instead of directing him to analogousness), Bohannan (1969:411) clarifies that he is not saying that the Lozi and English do not have fundamentally similar ideas; rather, by the Gluckman method of exposition, 'there is no possible way for a reader to discover whether they have or not.'

²³⁰ Hund (1982:30) also questions the authenticity of 'restatements' of indigenous law elicited through rule-directed interviews. He says there is no way of telling how complete, representative or actual the legal prescriptions produced really are.

succession, were not anomalous but the essence of a dynamic system of constant competition. Comaroff and Roberts (1981) suggest that among the Tswana, such rules as existed were not determinants of the outcomes of legal disputes but more in the nature of fluid guidelines for legitimising competing constructions of reality. This is similar to the same conclusion Gulliver (1964) has arrived at while observing the Arusha of Tanzania.

Gulliver (1964) says that in the Arusha's arbitral proceedings, legal norms were guides and not absolute principles to be rigidly followed. This phenomenon having been also observed in many parts of Africa, Chiba (1989) describes it as the 'elastic' treatment of legal rights by Africans. Woodman (1992) takes the view that Western jurisprudence has not been able to come to terms with this so-called elastic application of legal rules in traditional Africa. The tendency, he observes, has been to either treat it as a pathological departure from the Rule of Law or to conclude that it entails an absence of law.²³¹ Woodman (1992) suggests that not only is the elasticity tag tinged with ethnocentricity, but that the perception may arise from incomplete deciphering of the whole law on a topic in African legal systems. He says that this may result from an unfounded assumption that the whole law on the subject falls within the pattern of Western laws on the subject.²³²

The common feature again that emerges from the analyses of the likes of Chiba (1989), Comaroff and Roberts (1981) and Gulliver (1964), on the one hand, and the critique of Woodman (1992) on the other, is a covert hint at the possibility of an Other

²³¹ This is indeed the interpretation that Hund (1982:38) urges Comaroff and Roberts (1981) to adopt regarding the *mekgwa le melao ya Setswana* (Tswana law and custom).

²³² Woodman (1992:147) also turns his critique on himself by immediately pondering whether even his search for further rules may not emanate from a Western ethnocentric particularity that forever seeks a comprehensive body of non-elastic legal rules.

jurisprudence that is distinctly African. Such an African jurisprudence has so far not proved capable of reduction according to the template of Western jurisprudence. Malinowski (1922) is often acclaimed as one of the primogenitors of the intellectual heritage which seeks to rid anthropological analysis of the indigenous legal systems of pre-conceived notions of Western legal theory.²³³ Boas (1896) was at the forefront of the movement in cultural anthropology.

Boas (1896) detected the hypothesis lurking in anthropology that the like cultural phenomena everywhere developed in the same manner, represented the same thing, and had the same meaning. Boas (1896) deplored the hypothesis, arguing that there was no basis for assuming that because so many fundamental features of culture occurred in diverse, unrelated places, there was one grand system according to which mankind developed. By the assumption, any noticeable variations were no more than minor details in the grand, uniform evolution. Unsubstantiated as it was, the assumption had become the basis of the highly questionable doctrine that Bohannan (1969) calls the 'psychic unity of humankind.'

7.5 THE RELATIVIST PERSPECTIVE

7.5.1 Challenging the Psychic Unity of Humankind

Challenging the psychic unity of humankind goes to the roots of not only the view of differences in jurisprudence as mere variations on a common theme. It also takes to task the related view that the traditional African legal form was merely lower down the same evolutionary ladder from which modern law had emerged. By that view, in other words, traditional African law was a manifestation of modern Western law at an

²³³ Malinowski is acknowledged by the likes of Hund (1982) and Roberts (1979).

earlier stage of evolution. The view had held sway in the pioneering years of organised anthropology on African law and custom. Elias (1956:34) notes it, citing Hailey's (1948) statement that the law of primitive African peoples was analogous to the law of ancient Babylonians, Hebrews, Romans and Saxons. In Hailey's (1948) estimation, those laws exhibited to the modern world 'some of the scenes that must have been exhibited 5000 years ago in parts of Mesopotamia' and at later dates in Western Europe.²³⁴ The thinking thus was that study of African traditional laws could fill historical knowledge gaps in anthropology and this excited and motivated many of the early anthropologists in Africa.

Allott (1968) identifies the flaw in theory. Modern Bushmen, Baganda, Ashanti or Barotse were not ancient Britons, Germans, or Greeks nor representative of Palaeolithic or Neolithic man in prehistoric times. It was therefore conjectural, at best, to posit African laws of the last two centuries as corresponding with what law must have been like in ancient Europe. One moral of Allott's argument is that the presence of pre-literate societies in nineteenth century Africa might represent a different species of development rather than a stunted version of a unilinear one. This is the possibility that the likes of Boas and Bohannan seem to be saying we should avoid ruling out, in as much as there is no less proof it than there is of a theory of uniform linear progression.

²³⁴ Elias (1956:36) also cites Hone (1938) who says that while in external appearance there seemed to be similarity between African law and modern law, 'the fact is that one is the other at a different stage of development.'

7.5.2 Relativism and the Psychic Disunity of Humankind

Relativism is the species of argument that questions the psychic unity of humankind. Bohannan is a 'relativist' according to Nader (1965). Hund (1982) applies the same tag to Comaroff and Roberts (1981). Relativism has become somewhat a term of deprecation in academic discourse. The relativist argument is too easily transformed into the logic of racism and allusions to Otherness can easily be used as the launch pad for propagating xenophobia. Much more comfortable is a subscription to theories of psychic unity, unilinear social evolution and cultural convergence. Yet denying relativism means that we automatically leave open the door to the hegemonic claims that ground Eurocentrism. This is the paradox attending Gluckman (1955:271) when he says that what he is trying to do is to demonstrate that Africans 'use of processes of inductive and deductive reasoning are in essence similar to those of the West.' In one fell swoop, Gluckman negatives his empathetic intentions by trying to show that 'they' are as good as 'us.'

It is ironic that relativism is now routinely viewed in less than salutary terms. When it emerged from the works of Boas *et al* the turn of the twentieth century it was as a denial of any claims of racial superiority. The attitude of many contemporary relativists is to accept the charge of relativism only if 'relativism' is understood in terms of a methodology of comparison that avoids ethnocentric assumptions and pre-conceived notions. Relativism as so delimited is then an effort to determine what the other person's world view is. It is not necessarily to accept that world view as correct but, in the first instance at least, to recognise that it exists and not to summarily

foreclose it. Geertz (1984) says that relativists want us to worry about provincialism – the dulling of our perceptions by the overvalued acceptance of the familiar. Anti-relativists on the other hand are worried about an ‘anything goes’ attitude.

Bohannan (1969) distances relativism, as methodology, from the ‘anything goes’ school which is the opposite of absolutism (but might itself be a form of absolutism). Bohannan (1969) explains that denying psychic unity or the omni-appropriateness of one set of assumptions (such as English jurisprudence) does not mean that one is a relativist (in the sense of anything goes). Relativism is only valid if it means that every society and hence every ethnography must be understood in its own terms. The question of whether those terms are unique or not is irrelevant, according to Boas, but general theory is then to be forged based on the terms.

The relativism debate carries forth the tension that has always existed in the social sciences between human sameness and cultural diversity. On the one hand cultural relativism is a force against claims of racial or cultural superiority; on the other it is a potential tool for grounding those same claims. In each of those realms, as cultural relativism is applied in one direction, universalism is applied in the other direction.

7.5.3 Reconciling the Nomothetic and Idiographic

The reconciliation of the nomothetic and the idiographic in the human experience has challenged thinkers going back to the Enlightenment (Thomae 1999). Kant argued that human perceptions of reality were mediated by certain universal structures of the mind (Zammito 2002, Thomae 1999). His student, Herder, argued on the other hand

that the diversity of cultures showed that in addition to universal structures, the human experience was mediated by particularistic cultural structures as well (Zammito 2002).²³⁵ Herder had put forward the implications of cultural diversity in favourable terms but Sumner (1906) would point out that culture could limit perceptions and thereby lead to the belief that one's culture was the best against which others' should be measured.

Sumner (1906) coined the term 'ethnocentrism' to define the viewpoint that one's group is at the centre of everything. Boas (1940) concurred on the perception-limiting effect of culture on the individual. He gave culture a wide definition, taking it beyond tastes in food or music and religious beliefs. Culture, for Boas, was the totality of mental and physical reactions and activities that characterised the behaviour of the individuals composing a social group collectively and individually.²³⁶ According to Boas, scientists like other humans were necessarily ethnocentric since they were subject to a particular culture. To accurately analyse a culture with which he or she was unfamiliar, a social scientist had first to free himself or herself from the biases and world view ingrained by his own culture.

Boas' epistemology was rapidly transformed into a methodological tool by which anthropologists of the early twentieth century tried to extricate the study non-Western cultures from Western ethnocentrism (Kroeber and Kluckhohn 1952). While Boas did

²³⁵ Humboldt, the German linguist and anthropologist, advocated an anthropology that would combine Kant's and Herder's views and sought to find out the particularities of the leading European nations which could be formulated into universal rules for other peoples' to follow to similar levels of achievement (Zammito 2002, Bunzl 1996).

²³⁶ Kroeber and Kluckhohn 1952:13. White (1959:228) criticized Boas' conception of culture as being too abstract to be of any scientific utility: '[W]hen culture becomes an abstraction, it not only becomes invisible and imponderable, it virtually ceases to exist. It would be difficult to construct a less adequate conception of culture.'

not use the term ‘cultural relativism,’ it was popularised by Benedict, one of his students. Benedict (1934) argued that in the study of physical matters, such as plants, insects or constellations, all possible variant forms were studied before any generalisations were drawn up. It was only in the study of man that social scientists had used one form, that of Western civilisation, as the baseline. Benedict (1934), as the likes of Bohannan have done since, argued that she was not romanticising ‘primitive’ cultures but trying to show that as wide and varied a sample of cultures must be studied in order to formulate any general laws about humanity. Furthermore, by appreciating a culture fundamentally different from one’s own, one could begin to measure the extent to which one’s beliefs and activities were not universal or natural but culture bound.

7.5.4 Cultural Relativism as Critical Device

Cultural relativism is then a critical device. As Marcus and Fisher (1986:1) say, ‘using portraits of other cultural patterns to self-critically reflect on our own ways ... disrupts common sense and makes us re-examine our taken-for-granted ways.’ It is in the sense of a critical device however that cultural relativism starts becoming problematic. Marcus and Fisher (1986) reveal that as cultural relativism was popularised after the Second World War, it came to be misconstrued as a doctrine rather than as a method. It was taken to mean that all values were capable of being upheld; after all everything was relative.

Cultural relativism then became synonymous with moral relativism. Moral relativism translated into ‘anything goes.’ Kluckhohn (1949) tried to distinguish the two types of

relativism. He argued that the relativism could be abused and misused. He stated that cultural relativism did not foreclose the existence of moral absolutes but was the method by which these moral absolutes could be discovered. Kroeber (1950) is in agreement that by starting from relativism and its toleration, a new set of absolute values and standards may be worked out. Kroeber (1950) however wonders whether such absolutes are attainable or even desirable.

7.6 RELATIVISM AND THE OTHERNESS OF CUSTOMARY LAW

7.6.1 Customary Law as the Other

Accepting relativism as a method, not a doctrine, still leaves unanswered the question of how to construe observed differences between the traditional legal form and the modern legal form. Orthodoxy, premised on the double-barrelled assumption of psychic unity and monistic social evolution, presents one legal form as the other but at a different stage of development. Yet, even if we pay but a little attention to the likes of Allott (1968) and Bohannan (1969), doubt begins to be cast on this theory and it begins to unravel at least to the extent that there is no conclusive scientific proof of its veracity. That lack of proof leaves open a window of opportunity for an alternative explanation – that given the acknowledged differences from the modern legal form, it is plausible that the endurance of a traditional African legal form, as a distinct species of law, is the manifestation of Otherness.

Customary law might not be homogenous across Africa but in its heterogeneity is united in difference from the modern legal form. Together the different variations of African customary law constitute a foil not just to the modern legal form but to the meta-narrative of the Western epistemology of law. This is therefore an argument of

‘Othernesses’ of African customary law which recognises the internal variety of African customary legal orders but contends, as Elias, Allott, Menski and others have demonstrated, that when observed as a group, these orders display certain key features that challenge the meta-narrative of modern Western law.

The conglomeration of African customary law, according to our argument, occupies a different cosmology from that of the conglomeration of modern law. It is the materialisation of a course of legal evolution that runs parallel rather than in continuum with that of the modern legal form. Just for purposes of illustration, its unadulterated end-product might have been a legal form without courts, where law is not autonomous from social norms and is not necessarily administered by specialists. Even in its watered down ‘modern version,’ customary law stands as the nearest thing to an empirical grounding for the argument of Otherness.

Any attempt to go further than merely asserting that there is a possibility of an Other legal form immediately sends us into the province of theoretical weightlessness. Legal discourse is circumscribed by ‘settled’ theory on the side of Orthodoxy. That theory props up an argument of uniformity of legal rationality, hegemony over which is held by the modern legal form. As has been alluded to in the last chapter, it was this implicit settlement of theory about what law should look like, running as it does through orthodox jurisprudence, that grounded the early assertions that the traditional legal form in Africa was not law. If legal rationality were monistic and culture-neutral, and singularly manifested by the modern legal form, then pre-colonial African law was indeed not law since it was remarkably different from modern law.

As we have also seen, a subsequent tide of relativism and anti-racism successfully defeated the argument that there was no law in pre-colonial Africa. The relativist rebuttal was bolstered by a difficult-to-refute take on Hobbes to the effect that there could not be society without law. It had been shown to be undeniable that, contrary to stereotype, there was indeed society in Africa before the introduction of modern law. There must therefore have been law in this society even if on the surface it appeared different from modern law. Herein, however, lay the paradox for the cause of political correctness. If difference was acknowledged to be anything other than superficial, the acknowledgement would play into the hands of those who argued that the African was a lower species (since of course it was not in doubt on both sides that modern law was the ultimate repository of legal rationality).

In stepped the likes of Gluckman (1955:271) therefore to show elemental equivalence and ‘demonstrate that Africans ... use of processes of inductive and deductive reasoning are in essence similar to those of the West, even if the premises are different.’ Thus was a doctrine of ‘basic sameness’ of legal forms forged and the door was carefully shut on the continued acknowledgement of difference to any degree that could have justified exploration of the possibility of Otherness.

7.6.2 Refuting Basic Sameness

The doctrine of basic sameness was undoubtedly a good-faith attempt to rebut the thinly-veiled racism permeating earlier assessments of whether law existed in Africa. Even Bohannan (1969:409) ceded this virtue to what he otherwise deprecates as Gluckman’s (1955 and 1969) attempt to prove that Africans are as good as

Westerners. The irony of the doctrine of sameness is that it ends up in the very quagmire it starts out trying to avoid and perhaps eradicate.

For all its supposed good intentions, what it ultimately painted was still a strikingly similar monistic picture that placed the African and his legal form lower down the social evolutionary scale, albeit a few notches higher than the early legal anthropologists had placed them. If African law was really fundamentally the same as modern law, then the former was really a less-evolved manifestation of the latter. This was the only way in which palpable differences could be explained away. The legal form was the same as the modern legal form only that it was not as fully articulated or developed.

The consensus even among relativists was that jurisprudence had to be developed for the native Africans since they had not yet attained that level of thinking about their law. Gluckman (1955:382) could confidently assert that the ‘refinements of English jurisprudence’ provided a more suitable vocabulary to describe tribal law concepts than ‘do the languages of tribal law.’ Hoebel (1961:431) cautioned that it would be ‘erroneous to slip into an acceptance of Tiv thinking about their [legal] system as representing the real thing.’ Bohannan (1969:404), overlooking the irony of his own position, went further to state that both Hoebel and Gluckman missed the point because the ‘Tiv have not [even] developed any jurisprudence.’ Therefore, Bohannan continued, for comparison to be possible, the ethnographer had first to do for the Tiv what they had not done for themselves – ‘find a “theory” of Tiv legal action.’

In such an intellectual climate, the odds were always going to be against any concerted rebuttal of the doctrine of basic sameness or allowance for the possibility of (discovery of) a uniquely African jurisprudence. Even those empathetic to the existence of law in pre-colonial Africa were convinced that there was no indigenous jurisprudence to go with it. By Bohannan's own elaborately argued case, it was the African who lived the experience and understood it intricately that was best placed to articulate such jurisprudence, shorn of the ethnocentric biases that would attend the ethnographer from without. Yet, as the African had not developed any jurisprudence and did not have the appropriate linguistic and other conceptual tools to do same, it had to be done for him using tools from without, with all the dangers of ethnocentric bias and inaccuracy inherent therein.

African scholars themselves, wittingly or not, subscribed inordinately to the doctrine of basic sameness. Elias (1956) as we have seen started out trying to establish sameness even if there were differences in content or detail. Elias's (1956) position is understandable. He had been schooled in the orthodox jurisprudence and could only define law according to the characteristics of the modern legal form. Yet, he had to establish that his people had 'law' even before the advent of colonialism. If the existence of law, as he knew it to be characterised, could not be established, then confirmation was given to the racialist commentary that held Africa lawless and barbaric before European Imperialism.

Thus, Elias (1956) strove to show that law, by the parameters of the modern legal form, did exist in pre-colonial Africa. The customary law was the same. Subsequent generations of African writers have felt as obliged as Elias to establish that there was

‘law,’ according to their Westernized notion of it, in Africa before colonialism.²³⁷

What this does is to make ever more remote the possibility of establishing that the pre-colonial law of Africa was a different genus from the modern legal form and if so, whether there were aspects of it that were even superior to the modern legal form.²³⁸

Writing in the early years of independence, Kuper and Kuper (1965:17) noted that the denigration of pre-colonial African law and society had deflected attention from the theories of African law that were possibly in existence. They held out the hope that emancipation from colonial control, with concomitant racial counter-assertion, would provoke a demonstration that traditional African societies were regulated by just and efficient systems of law. Displaying remarkable sensitivity to the existence of the Other, they felt that the demonstration would take the form of either ‘drawing close parallels between African and European systems of law, or of seeking out the qualities of law, uniquely African and superior to European’ (Kuper and Kuper 1965:17).²³⁹ It would now seem that conventional wisdom having been steeped in the doctrine of basic sameness, the former approach is what has been adopted to the detriment of African systems of law.

²³⁷ Mensah-Brown (1976) typifies the tendency towards establishment of equivalence. More recently however, Africanist writing has started more openly to insist on recognition of difference between the legal forms as is evident in Menski (2006), Idowu (2006b) and Elechi (2004).

²³⁸ Chanock (1989:82) observes that the need to establish equivalence between indigenous African law and Western law stems from the ‘remarkably resistant strain of legal thought’ that it is more socially advanced to have had rules, courts, judgments, etc than to have operated other modes of social ordering. He argues however that this evolutionist thinking that privileges Western social institutions can now be discarded. Once that is done, there is no need any more to assert that ‘normative weapons of pre-colonial societies were like lawyers’ rules or that the processes employed by them were like courts’ (Chanock 1989:82).

²³⁹ Allott (1984:71) similarly ruminated that the end result of law in Africa could be ‘an African system with Western trimmings or a Western system with African trimmings, or ... a reconciliation of the two.’

After independence, the formal dualism of Africa's legal systems was quickly abolished in one country after another. Customary law was merged with the modern legal system and slotted in the lower reaches of the unified legal hierarchy. Matters of customary law were to be tried in the first instance in customary courts which were the lowest courts in the hierarchy. Appeals from customary courts lay to 'superior courts of record.' The movement in unification was always towards making customary law more like Western law. The expectation was that eventually customary law would disappear. The more people became 'enlightened,' it was believed, the more they would subscribe exclusively to modern law and its norms and logics would eventually overwhelm that of customary law. In not one country was the tendency in the reverse – to make the modern legal form resemble customary law. Customary law was taken to be an inferior form of law. Even if it was accepted not to be of the same genus as modern law, it was undoubtedly the one that had to give way.

7.7 WHAT THE EUROPEAN EXPLORER SAW

7.7.1 A Different Legal Form

Let us however return for a moment to the initial explorers and anthropologists in Africa who saw pre-colonial Africa as possessing no law. Using the modern legal law as referent, they saw nothing in pre-colonial African society that bore similarity to that which they had come to identify as 'law.' Even an anthropologist as overtly sympathetic to the African cause as Evans-Pritchard (1940) found no 'law' in traditional African society. Yet, Evans-Pritchard (1940) was not saying that the Africans were 'lawless' in terms of disorder and chaos. Rather he meant that they were 'lawless' in the sense of being devoid of anything resembling modern European law. Thus, there is 'law' in generic terms which means regulation of social conduct,

which every society had. Then there is 'law' in specie. The latter 'law' is synonymous with modern law. It is the form of law needed to make societies modern and by which they are qualified as modern. Any other form of social regulation, although 'law' in the generic sense, was not 'law' in specie.²⁴⁰

Accommodating the Eurocentric perspective that informed the definition of 'law' in specie by early 20th century legal anthropologists renders their point of view, that traditional African society had no law, less objectionable.²⁴¹ Indeed, it then immediately provides credible foundations upon which to build an argument of fundamental difference between African customary law and modern Western law. That argument starts with the proposition that most societies in pre-colonial Africa did not have anything resembling the modern legal form. However, since there could be no 'society' without 'law,' they had to have had law but what they had was of a different genus from the modern legal form.

To the suggestion that European law had passed through a stage in which its law was similar to what existed in pre-colonial African society, the argument answers with Allott (1968) to the effect that late-19th century 'modern' Bushmen, Baganda, Ashanti or Barotse were not ancient Britons, Germans, or Greeks nor representative of Palaeolithic or Neolithic man in prehistoric times. The argument continues with the contention that the course of legal development between Africa and the West had

²⁴⁰ This is obviously what Gulliver (1969) means when he says that 'law' is a Western concept and should therefore be defined in Western terms. Gulliver is referring to 'law' in specie: law as conceptualised by reference to the modern Western legal form.

²⁴¹ The legal positivism of Bentham, Austin, etc which prevailed in the 19th century influenced the Anglo-American conception of 'law' at the time. Austin's 'command theory' of law included only the commands of a sovereign in 'law properly so-called.' By this definition, all forms of customary law, including British constitutional conventions and rules of international law (except as enacted by a sovereign), were excluded. Elias (1956:38) admits that by this definition, 'African customary law would have been even more rigorously excluded.'

therefore differed until colonialism imposed the Western model on the African one. The force of colonialism overwhelmed the African systems of thought including with regard law but it did not extinguish them.²⁴² What it did was to create a hybrid environment where a legal model produced under and catering for a different system of thought could not function as effectively as it did in the milieu from which it had emerged. The argument may then be continued under two interlinked categories of culture and rationality.

7.7.2 Otherness of Legal Culture

The pre-colonial legal culture of much of Africa was oral. There were no legal texts, written pleadings, documentary writs, written conveyances or legal commentaries. This had a fundamental effect on the shape of the legal form, the relationship of the people to law, and the processes of legal development. Intricate textual examination of statutes or of judicial decision did not exist. Law was expressed in terms everyone understood. Controversy over technicalities such as forms of action and the like did not arise. As Allott (1968:133) puts it, ‘a broader, more ambitious and humane approach dominated the law.’ Recalling Boas’ broad definition of culture, the oral culture of pre-colonial Africa produced a legal form and culture different from the form and culture of modern law.

Ours is then an argument on the existence of and divide between two cultures. The first is modern legal culture deriving from and integral to general Western history and

²⁴² Menski (2006:453) submits that incoming colonial law has not succeeded in superseding customary law because the latter was by nature a ‘different type and category of law.’ ‘The official new colonial law ... could never have achieved total abolition of the pre-existing African customary laws and the value systems underpinning them’ (Menski 2006:453).

overall culture. The other is the legal culture that is a legacy of Africa's own historical and culture pathways. We have seen that pre-colonial customary law hardly remains in its original form having been swamped by the conditions of modernity and change. Harder to wipe out than the form of law has been the residue of the culture engendering it and which it engendered. This culture has many facets of differentiation from the one demanded as a necessary concomitant by the modern legal form. One such facet as we have seen is in the relationship of individual and the society to law itself.

Under customary law there was a greater tendency to treat rules as just guidelines rather than outcome-determinants to be followed slavishly. There is then a leaning away from formal, abstract rationality. A closely related feature is a preference for compromise in dispute resolution rather than privileging the technical superiority of argument.²⁴³ We have argued in the previous chapter that these cultural attributes are antithetical to the structuralism grounding many of the 'wisdoms' and strengths of the modern legal form. Africa's indigenous legal culture then becomes an obstacle to the success of the modern legal form on the continent as compared with its success in Europe.²⁴⁴

²⁴³ This is of course an idealised model of African customary law but it is a model that is popular in legal anthropology. It stands as counterfoil to the idealised model of modern Western law typified by Weber's formally rational law. Velsen (1969) challenges the comparison drawn on the basis of both idealised models, arguing that certain African dispute-resolution also had elements of formality and strict rules of evidence. Conciliation, Velsen (1969) says, was not always the purpose and there were adjudications on a winner-takes-all basis. Conversely, small-claims courts in the West have procedural informality comparable to idealised African tribunals and pre-trial reconciliation procedures are a prominent feature of Western adjudication. The point however of comparison based on idealised models is, as Holleman (1949) observes, not to suggest that the characteristics ascribed to each model are exclusive to that model. Rather it is to highlight the difference in leaning between the legal systems that fall under one model and those that fall under the other. 'The West leans towards the individual, abstract and rational, while the [African] leans towards the communal, tangible and emotional' (Holleman 1949:51).

²⁴⁴ Muller (2008) argues that how modern law interacts with culture is fundamental to Rule of Law development. He however finds that worryingly little is known about the relationship between law and

7.7.3 The Meaning of Legal Culture

It is necessary to carefully demarcate meaning here. 'Legal culture' is capable of conceptualisation on different planes and therefore of different meanings. One such meaning is as a description of the cultures pertaining respectively to different systems of the modern legal form. Thus it would be possible to speak of the common-law culture and the civil-law culture. It would also be possible to speak of the British legal culture, French legal culture or American legal culture. In this type of usage, 'law' is synonymous with the modern legal form, as is the adjectival derivation 'legal,' so that 'legal culture' is any of various cultural manifestations pertaining to that singular form.

For the purposes of our current argument however, on the possibility of differentiation between an African legal culture and the Western legal culture, 'legal culture' is used at a different level of meaning. It is used to denote a culture of 'law' where 'law' is a neutral term so that the usage 'African legal culture' refers to a culture concomitant with an Other law, while 'Western legal culture' is the culture of the modern legal form. Even if we do not agree that the concept of law can be divided between a modern legal form and an Other (traditional) legal form, a case may still be made for differing cultures towards law as a unitary concept. Thus the argument may be that the African legal culture displays a greater tendency towards viewing law's rules as flexible guidelines than does the Western legal culture.

culture. He calls it a matter of great urgency to carry out the multidisciplinary and interdisciplinary empirical research required to understand better how law and culture interact.

It is worthy to note that legal culture, delineable as it is at multiple levels of abstraction, is still a contested and unsettled concept in orthodox jurisprudence. Friedman, who has pushed as hard as any for conceptual recognition, says that it encapsulates the attitudes, values and ideas that a society holds about law. Legal culture is integral to culture generally and is those parts of general culture – ‘customs, opinions, [and] ways of doing and thinking that bend social forces towards or away from law and in particular ways’ (Friedman 1975:13). Even if putative, legal culture is not a unitary concept and there exists an ‘immense multi-textured overlay of levels and regions of culture’ (Cotterrell 1997:17).

Friedman (1975 and 1997) writes of ‘national legal culture’ (1975:15 and 209), ‘world legal culture’ (1975:220), ‘Western legal culture’ (1997:198) and ‘the legal culture of modernity or modern legal culture, which is characteristic of many contemporary societies’ (1975:204). This imprecision motivates in Cotterrell (1997) ambivalence towards the utility of legal culture. He wonders how legal culture can be used as a theoretical concept in the sociology of law when its scope is so variable. Cotterrell (1997:21-22) expresses a preference for ‘legal ideology’ which he says is made up of ‘value elements and cognitive ideas presupposed in, expressed through and shaped by ... legal doctrine within a legal system.’

It becomes clear that so far as ‘legal ideology’ and ‘legal culture’ are concerned, Cotterrell and Friedman are not talking about the same thing. Cotterrell is looking at things from the traditional jurist’s standpoint and considering the effect of legal doctrine on society. Friedman on the other hand is using legal culture to capture broadly the social forces that impact upon law and the social context in which it

operates. Countenancing Cotterrell's critique, Friedman (1997:39) says that he (Friedman) is starting from the outside and not the inside as Cotterrell does.

Friedman's (1975 and 1997) framework commends itself to our purposes. This is neither an arbitrary choice nor to denigrate Cotterrell's (1997) 'legal ideology.' It is merely that Friedman's (1975 and 1997) framework provides a useful conceptual vehicle to describe the phenomenon that our thesis says is a legacy of pre-colonial Africa's culture. Indeed it is, as Cotterrell (1997) recognises, that Friedman's legal culture is 'a convenient concept with which to refer provisionally to a general environment of social practices, traditions, understandings and values in which law exists' (Cotterrell 1997:21). In that sense, says Cotterrell (1997), legal culture may have the same degree of significance for the sociology of law that the idea of legal families has for comparative law. It is a means of 'characterising in extremely broad and perhaps, more or less impressionistic terms large aggregates of distinct elements' (Cotterrell 1997:21).

7.8 MORE OF WHAT THE EUROPEAN EXPLORER SAW

7.8.1 Differing Rationalities

An argument of difference between Western and African legal cultures may also be expressed in terms of differing legal rationalities among different peoples. The debate has raged in anthropology on whether there are different standards of rationality or indeed different rationalities between different cultures. One school of thought is that there is an objective rationality against which everything else must be measured. Other anthropologists eschew universal rationality and argue that rationality must be perceived in relativist terms. This latter school allows that non-Western societies

have different rationalities from Western society and have to be understood from within the context of their own rationalities. Rationalities even differed between epochs within the same society so that primitive societies had a different rationality from modern society. The difference in rationalities was what marked one epoch out from the other.

Lukes (1967) distinguished between 'rational (1)' criteria which were universal and 'rational (2)' criteria which were context-dependent. According to him, all beliefs were to be evaluated by both criteria. Beliefs which failed to satisfy rational (1) criteria could be criticised according to those criteria. On the other hand, it was only by the application of rational (2) criteria that the point and significance that beliefs had for those who held them could be appreciated. Lukes' (1967) was a centrist position compared to those on either side who argued exclusively for either universal rationality or rationality in context.

Wilson (1970) argued that the thought processes of the Westerner might not be more rational but that he or she lived in a more controlled environment which had been achieved by the application of formally rational procedures of thought and action. For Wilson, therefore even if rationality was inherently the same everywhere, the Westerner had applied it better in terms of controlling his environment. Relativists argued that primitive or traditional societies had to be judged according to their own standpoint but even this view was divided between those who believed it was possible to see things from the point of view of persons who belonged to the societies and those who believed it was not.

For those who believed that it was not possible to see things entirely from the natives' viewpoint, the problem was whether taxonomies and concepts could be translated between cultures, especially given linguistic differences.²⁴⁵ In shades of the Gluckman-Bohannon debate, Winch (1964) draws on Evans-Pritchard's (1937) anthropology among the Azande to counter Wittgenstein (1961). Wittgenstein (1961), in Winch's perception, had written about language as if all languages were fundamentally the same and had the same kind of relation to reality. Winch (1964) however argues that Evans-Pritchard (1937) found that English and the Azande vernacular were so fundamentally different that much of what could be expressed in one had no equivalent in the other. For Winch (1964), this suggested that the outsider could only speculate on the native's conception on reality. According to him, the form in which rationality expressed itself could not be elucidated simply in terms of the logical coherence of the rules according to which activities are carried out in society; there was a stage at which became it impossible to determine what was coherent in such a context of rules, without raising questions about the point which following those rules had for the society.

The counter-argument to Winch's (1964) extreme relativism is that there is a physical reality which all human beings perceive with the biological senses. This common reality, for Lukes (1967), forms the basis of a universal rationality and is the precondition for understanding another culture or language. Furthermore, argues

²⁴⁵ Bohannon (1969:410-411) had highlighted the 'mythical beast' of backward translation masquerading as comparison. Illustrating with excerpts from Gluckman (1955), Bohannon argued that Gluckman was translating fundamentally Western legal ideas into Lozi rather than translating fundamentally Lozi legal ideas into English. MacGaffey (1981:252) describes the 'semiological illusion' whereby the process of ethnocentric distortion in anthropology sought to make 'African theories ... capable of selling well in the world markets.' African writers are not exempt from the 'smuggling of European concepts into African concepts and passing them off as African ... philosophy' (Mudimbe 1988:75). Epstein (1969) criticises Elias (1969) on that ground, charging that the Nigerian jurist started from English categories and tried to establish African equivalence.

Gellner (1968), if it is not possible to judge the rationality of another society's conceptualization of the world, then it makes no sense even to attempt to talk about 'rationality' as it would then just be another subjective concept. In that event, it would be impossible to ascertain that the rationality itself is a universal concept or means the same thing in different cultures. Even in that worst-case scenario of total relativism, Gellner (1968) suggests, the starting point for judging rationality would be to start by the familiar Western standard, given that the basis for much contemporary knowledge is Western.

7.8.2 African Rationality v. Western Rationality

The rationality debate found fertile ground in colonial Africa and during the first decade of independence when anthropologists could still easily identify 'primitive' or 'traditional' societies whose belief systems could be compared against 'modern' belief systems. This comparison was usually conflated with that between African rationalities and Western rationalities in general. Levy-Bruhl (1926) argued that primitive thought was not rational or logical but pre-logical. It was different from modern or civilised reasoning. Each society, including primitive society, had its own 'mentality' but not every mentality was rational.

Levi-Strauss (1962) attempted to avoid Levy-Bruhl's (1926) rigid dichotomies but came up with his which divided cultures into preliterate and modern cultures. Both were essentially types of scientific thought. The modern person was an engineer, with systemic, rigorous and abstract thought patterns that employed writing, numbers and geometry. This was 'rational' thinking. The preliterate person was a 'bricoleur,' a jack of all trades, whose system of thought was 'empirical' and was based on directly

observable physical objects. According to Levi-Strauss (1962), Western thinking was rational even if bricolage, in forms such as poetry and music, was also part of Western culture.

Evans-Pritchard (1934 and 1937) had articulated an even more profound critique of Levy-Bruhl (1926). Using his observations among the Azande, Evans-Pritchard (1934 and 1937) argued that traditional society was as rational as modern Western society even if the rationalities were different in content. Western rationality was scientific and the Azande's unscientific but both were types of rationality all the same and performed the same function of ordering and explaining how the world worked.

A mixture of ideas similar to Levi-Strauss' (1962) and Evans-Pritchard's (1934 and 1937) found its way into the question of whether rationality in African cultures was the same as that in Western cultures. The difference between African and Western rationality lay in different levels of technological achievement attributable to each culture. Both cultures were suffused with superstitious beliefs, there being essentially no difference, as Sogolo (1993) argues for instance, between Christianity and traditional African religions. However, Western rationality also had another aspect, a scientific aspect, which had little parallel in African cultures. If religious beliefs were 'irrational,' the West could be excused because it had also 'rational' scientific knowledge and technological achievements that served as a counterfoil. The rationality of Western culture could be measured by its scientific achievements. The only thing that existed in African cultures was of an unscientific rationality. This is one ground for challenging arguments by relativists such as Winch.

Winch (1958) argued that Western science was culturally produced and did not represent an objective reality. Therefore, it could not be held up as a measure of the superior rationality of the West. The argument against Winch's (1958) position was that while Africa had superstitious thought systems upon which close parallels could be drawn with Western superstition, there was no comparable scientific tradition. If superstition was a 'type one' kind of rationality and science a 'type two,' Africa could not point to possessing a comparable 'type two' with the West. This was the rationale for Horton's (1967) comparison between African traditional thought and Western science. Horton (1967) equated traditional African thought with African religions, attracting criticism from Beattie (1970), Sogolo (1993), Wiredu (1997) and others that the same categories of each culture should have been compared as between Africa and the West. Horton seems to proceed however on the basis that African systems of thought on causality are borne out entirely by African religious beliefs whereas Western systems are dominated by science.

Horton (1967) argued that there were similarities between Western science and African traditional thought. Both were theoretical activities with explanatory functions aimed at grasping causality. They put events in a wider causal context than that provided by common sense. Matters capable of challenging common sense such as germs, atoms, molecules and waves in Western science and gods, spirits, and ancestors in African traditional thought were used to introduce theoretical unity into diversity, simplicity into complexity, order into disorder and regularity into anomaly. There were however differences between the two systems of thought. For Horton (1967), compared to Western science, African traditional thought was a closed system of thought. Its theoretical concepts were expressed in personal idioms such as spirits

and witches. Words were invested with magical powers and ideas were bound to occasions rather than to ideas. There was a lack of reflective thinking and a protective rather than destructive attitude towards established theory.

Horton (1967) captured many of the differences which are thought to exist between rationality as manifested in traditional African thought and that of Western scientific thought. Accepting the differences as fact, Senghor (1965:35) the Senegalese statesman and father of the Negritude movement declared that classical European thought was ‘analytical and makes use of the object’ while African reason is ‘intuitive and participates in the object.’²⁴⁶ If we accept that difference exists, it is the basis for consolidating the argument sketched out through this chapter on the possibility of difference in conception of and relationship to law. Whether expressed in terms of culture or rationality, this could be a fundamental and unbridgeable difference which informs a search for a legal form that is so compatible with African rationality that it produces the outcomes we have called the Rule of Law.

²⁴⁶ Senghor and Negritude have been criticised for entrenching racial stereotypes, as Mudimbe 1988 notes, but the theme of different rationalities has carried over into contemporary writing. Nyamnjoh (2001) typifies the trend when he argues that the popular epistemological order in most of Africa does not subscribe to the real-rational and unreal-irrational dichotomy of Western Cartesian rationalism and empiricism. Rather, African epistemologies build ‘bridges between ... the so-called ... rational and irrational ... making it impossible for anything to be one without also being the other’ (Nyamnjoh 2001:29). The inapplicability of the Cartesian *cogito* to African conceptions of self and personhood is celebrated in Africanist anthropology (Nyamnjoh 2001, Piot 1999, Shutte 1993, Jackson 1990, Riesman 1986). Personhood in African societies, it is argued, is largely understood by those external relations to whom the person is connected by his or her position in the system (Riesman 1986, Shutte 1993, Jackson 1990). ‘In European philosophy of whatever kind, the self is ... something “inside” a person [but] in African thought, it is seen as “outside”’ (Smith 1999:14). The reality in Africa is of a ‘relational self,’ a self ‘thoroughly penetrated by the external world’ and [this] ‘manifests itself in the ontologies, cosmologies and psychologies of African peoples’ (Piot 1999:18). The diffuse and fluid African self – ‘multiple and permeable, and infused with the presence of others, both human and inhuman’ (Piot 1999:19) – is not within the contemplation of much of Euro-American social theory (Piot 1999, Smith 1999). Accordingly, recognition of the African concept of self, *umuntu*, effectively negates any lingering belief in the ‘Greco-Roman/European rational man’ (Smith 1999:12) as universal model (Smith 1999, Shutte 1993). The divide between individual and society which is presumed in Western social theory is not ‘part of the construction of sociality in many African societies’ (Piot 1999:17). ‘The recognition of non-natural entities ... the importance of social groups ... the perpetuation of legal personality after death ... are just three of the problems typical of African law ... for which ... European-based comparative law, apparently offers no explanations’ (Allott 1969:180)

The argument we have seen on the other side, however, is that the difference (if it does exist) is transient. The traditional African systems of thought, by this other argument, are just an earlier form of European scientific thought and given the psychic unity of mankind, will ultimately give way to scientific thought just as in Europe. The conviction comes through in Horton's (1967) writing for example that that African traditional thought is on a progression towards Western scientific thought. Horton draws parallels between traditional African cosmologies and European cosmologies before Descartes, and seeks to show the conditions for take-off [from traditional thought] into science.

7.8.3 Death and Rebirth of Rationality Debates

The impact of social evolutionist theories thus runs deep, even among the best relativists. Social evolutionism grounded modernisation theory which held that, especially with the impact of colonialism, Africans were on the way to modernity in the sense of adopting Western modes of scientific thought (Abonyi 2009, Ferguson 2005). Rationality debates petered out after the 1970s, perhaps in silent acknowledgement of the inevitability of African progression towards this Western scientific standard. The standard was held out, by virtue of its technological achievements, as the most dynamic standard of rationality even by those who argued that there were different standards or different rationalities between cultures. If there was a universal progression towards Westernization or modernity, then there was little to sustain interest in debating difference in rationality. Differences were merely temporary and would soon be gone anyway as African systems of thought caught up with modernity. Being that modern rationality was gauged by subscription to

scientific thinking and allied social achievements (such as the Rule of Law and ‘development’), the failure of independent Africa to catch up saw anthropology in the 1990s starting to hint once again at different rationalities.²⁴⁷ These hints were masked in another paradigm, that of alternative modernity, which forms the basis of the next chapter.

7.9 SUMMARY

Dissatisfaction with judicial customary law as an accurate representation of indigenous law, directs attention to African customary law as deciphered by anthropologists in pre-colonial and colonial African communities. Anthropological literature identifies substantial differences between modern Western law and the traditional African one. The question however is whether the differences are an indication of an Other, constituting a distinct and different African legal universe, or amount to merely a variation of the same legal form in the same way that common law and civil law systems make up the modern legal form.

²⁴⁷ Early anthropologists characterised widespread witchcraft beliefs in Africa as a mark of difference between Western scientific rationality and African pre-scientific or pre-logical rationality (Levy-Bruhl 1926, Evans-Pritchard 1937, Moore and Sanders 2001). The question of different rationalities found expression in courts in colonial Africa grappling with criminal cases concerning belief in witchcraft. Framed in legal terms, the question was the standard of reasonableness to apply in determining guilt, especially where self-defence or provocation was pleaded. The leading case is *Attorney-General of Nyasaland v Jackson* [1957] R. & NLR 443 where the accused had killed the victim because he believed the victim was about to bewitch him. Finding the accused guilty, the Supreme Court held that the standard of reasonableness was that of a reasonable Englishman (which was an ‘objective standard’) and not of an ignorant African bushman. Seidman (1966) argued on the basis of that case and others adopting the same logic that more consideration should be given and allowance made in the African jurisdictions for the ‘pre-scientific’ rationality of ‘tribal’ Africans who then constituted the majority in African populations. This seemed to be the basis of decision in the Ugandan case of *Fabio* (1941) 8 EACA 96. The defendants in the case discovered a person they had earlier accused of wizardry crawling about, naked, in their compound. Believing him to be fomenting sorcery against them, they killed him. The court upheld a defence of provocation, in effect sanctioning the rationality of the defendants’ beliefs. Seidman (1966) however believed (as did most anthropologists at the time) that the march of modernity would eventually bring most Africans within scientific rationality and eradicate the need to accommodate superstitious beliefs. By the 1990s however, anthropologists realized that rather than disappearing, witchcraft beliefs seemed to be on the rise in Africa (Moore and Sanders 2001, Geschiere 1997). This defeated the orthodox narrative of ‘modernity’ which held modernity incompatible with non-scientific rationality. The enduring belief in witchcraft and its comingling with the epiphenomena of modernity in Africa is taken to indicate an alternative rationality of modernity among Africans (Ferguson 2005, Bastian 2001, Fisiy and Geschiere 2001, Moore and Sanders 2001, Nyamnjoh 2001, Rasmussen 2001, Geschiere 1997, Rowlands and Warnier 1988).

The Orthodox view is that observed differences between African customary law and modern law were transient. Traditional African systems of thought, by this ‘basic sameness’ perspective, are just an earlier form of European thought and given the psychic unity of mankind, will ultimately give way to scientific thought just as in Europe. The basic sameness perspective ultimately paints a Universalist picture that places the African legal form lower down the social evolutionary scale, albeit a few notches higher than the early anthropologists had placed them. If pre-colonial African law was really fundamentally the same as modern law, then the former was just a less-evolved manifestation of the latter. This was the only way in which the Orthodoxy could explain away palpable differences.

A strong, contrarian argument is derivable from the literature that African customary law was an Other of Western law. Confronted with the informality and seeming ambiguity of customary law, early anthropologists had concluded that law did not exist in traditional African society. A relativist turn in anthropology in the twentieth century led to acceptance that law existed in pre-colonial Africa but left unresolved the question of whether it was fundamentally different from modern law. The Eurocentrism that informed early anthropologists’ definition of ‘law’ (and therefore the conclusion that African society had no law) however provides building blocks for an argument of fundamental difference between African customary law and modern Western law.

That argument starts with the proposition that the anthropologists encountered a pre-colonial African society with nothing resembling the modern legal form familiar to

Westerners. Since there could be no 'society' without 'law,' pre-colonial African society did have law but what it had was a different genus from that which Western anthropologists then considered 'law.' The argument further contends that even if African customary law was the equivalent of Western law at an earlier stage of evolution, the former's persistence into the modern era indicates a divergent evolutionary path between Africa and the West. Legal development between Africa and the West had differed until colonialism imposed the Western model on the African one. The force of colonialism might have overwhelmed the African systems of thought including with regard law but it did not extinguish them. What it did was to create a hybrid environment where a legal model produced under and catering for a different system of thought could not function as effectively as it did in the milieu from which it had emerged.

If it is accepted therefore accepted that traditional African law was different from modern Western law, the possibility cannot be discounted of a lingering difference in conception of and relationship to law as between African society and the West. Whether expressed in terms of culture or rationality, the difference could be fundamental and unbridgeable, justifying a search for a legal form that is so compatible with African cultures and rationality that it produces the outcomes we have called the Rule of Law. The next chapter continues this argument under the concept of alternative modernity.

CHAPTER 8 – TOWARDS AN ALTERNATIVE MODERNITY OF LAW IN AFRICA

'By modernity, I mean those everyday forms of culture, politics, and economy associated with the rise of industrial capitalism in Europe of the sixteenth, seventeenth, and eighteenth centuries and disseminated globally by European imperial expansion – forms, however, which have no essence and whose content is unstable and shifting' (Piot, 1999:179).

'The notion of multiple modernities ... allows us to problematize modernity: to see it as a deeply cultural project, to treat its claims to rationality not as natural, universal truths but as particular discourses about truth that require explanation' (Moore and Sanders 2001:12-13).

8.1 INTRODUCTION

Like the previous chapter, this Chapter 8 focuses on the third subsidiary research question which is whether it can be demonstrated that another type of modern law is possible in Africa. The previous chapter argued that African customary law is historical evidence that an alternative to modern law is possible. The previous chapter also held out customary law as evidence of the Otherness of African legal cultures, rationality and mentality. This chapter proceeds on the premise that if customary law, especially given its antiquation, is not regarded as sufficient proof of Otherness, the concept of alternative modernity provides a more contemporary framework within which to rationalise Africa's need for an 'Other' law.

This Chapter 8 first examines the basis for conceiving of modernity in plural terms. Thereafter the chapter explicates the concept of alternative modernity, including highlighting its positive and negative connotations. The chapter then makes the case, located within the positive connotations, for an alternative modernity of law in Africa by which the Rule of Law might be achieved. The chapter co-opts anarchist theory,

which suggests certain alternatives to modern law, in support of the case. The chapter argues that even if some of anarchist theory might be regarded as far-fetched or utopian, Africa's experiences and subjective circumstances suggest that doing away with the modern legal form and the structures it generates might sometimes be a realistic step in the quest for the Rule of Law in Africa. The chapter ends with a summary of key points.

8.2 PLURALISING MODERNITY

In the last chapter, it was argued that African customary law may be viewed as a different form of law from modern law. We tried to show that rather than modern law at an earlier stage of evolution, customary law (at least in pre-colonial form) was a separate and autonomous form which had evolved differently from modern Western law. The essence of this argument was to buttress our contention that the modern legal form is not 'law' universally but is a product of socio-historical contingency. Having been transported away from its cultural origins, the modern legal form which has proved so successful in the West has been an abject failure in Africa. The Rule of Law therefore continues to remain problematic not because the African is irrational but because the modern legal form works best within a given cultural context that is still absent in much of Africa.

The opposition to the argument will proceed mainly from customary law being portrayed as a relic of pre-modern times. Even if a different form of law, it was suited to certain social conditions which no longer exist. The conditions of the modern state are so complex that it would be impossible for localised customary law to provide any

sustainable means of social control. The counter-argument would discountenance the fact that what is being argued for is not pre-colonial customary law *per se* but for the ethos of the law. Instead of law as rules that must be obeyed, perhaps an overarching ethos derived from customary law would have fashioned a legal form in which the rules were more of guidelines to be used flexibly, or not at all, to seek substantial justice in every case. A different perception of the role and function of law in society would have yielded a different relationship with law which in turn might have produced a legal form different from the modern legal form.

The possibility (or necessity) of a uniquely African legal form can however be argued on premises other than customary law. This other argument avoids the potential pitfalls of trying to hold up customary law as evidence that African cultures had in fact evolved a different form of law from the modern legal form. Rather, it simply points to the contemporary Rule of Law problems in Africa and says that those problems are sufficient by themselves to indicate that Africa's modernity is a different modernity from that in the West.

While exploring the endurance and proliferation of belief in witchcraft in urban Nigeria, Bastian (2001:89) has asked, 'Can people's experience of being modern ever be homogenous, when their histories, societies and basic cosmological understandings are not the same?' This question is the take-off point for the notion of alternative modernity. The question is asked for the purpose of undermining the teleology that equates modernity with the contemporary Western condition and way of life. Instead of modernity being a specific condition, the attainment of which must be pursued by all who do not yet possess that condition, modernity is simply regarded as the 'here-

and-now.’ These are modern times so that whatever condition each society or culture finds itself in today is its modernity. Thus there is a multiplicity of modernities across the globe and each that is not a near copy of Western modernity is an ‘alternative modernity.’

8.3 ALTERNATIVE MODERNITY

8.3.1 New Conception of Modernity

The alternative modernity argument thrives on a third possible meaning of ‘modernity’ as distinct from the two earlier encountered in Chapter 6 but ultimately linked to them. In section 6.6.1 of that chapter, modernity was encountered as an era commencing from the Enlightenment and terminating when postmodernism sets in. Modernity is also the philosophical pursuit of the transcendental truth that provides closure on knowledge or meaning. The third meaning of modernity is as a condition epitomized by Western civilisation. The Western condition is represented as the most rational and scientific in the globe and is supposedly the destiny of all other peoples. This third meaning of modernity encapsulates the other two.

The Enlightenment is thought to be the age of reason and scientific emancipation that set the West on the path to the seminal condition of modernity (Tamanaha 2006, Outram 2005, Porter 2001). That modernity involved deciphering those ways of life and self-evident ‘truths’ in the human existence that guaranteed the best available material, physical and social conditions for the most people. Western achievements in science and technology which translated to more prosperous and powerful societies seemed to prove that if the West had not found the right answer, they had at least found the best available answers and had done so first. The West’s was therefore the

condition of modernity to which all of humanity would eventually arrive at. All other cultures and peoples were to be benchmarked by their proximity to the Western condition.

The lack of convergence of humanity by the end of the 20th century, even with the achievements and precedents of Western society now being visible to the whole world, led to acknowledgement that perhaps modernity was not a homogenizing project after all (Sahlins 2005, Piot 1999, Comaroff and Comaroff 1993).²⁴⁸ Modernity followed neither a uniform plan nor a single trajectory. It had neither a single built-in telos nor the same rationalizing *raison d'être* (Moore and Sanders 2001). Even if it was first derived in the West, it had since spawned innumerable other models. The expansion of the modern public had shattered it into a 'multitude of fragments, speaking incommensurable private languages' so that the 'idea of modernity thereby lost much of its vividness, resonance and depth' (Berman 1983:17). Postmodernists' expositions on plurality and fragmentation fed directly into a notion of multiple modernities. It is a notion of the world as a 'story of continual constitution and reconstitution of a multiplicity of cultural programs' (Eisenstadt 2000:2).

8.3.2 Original Modernity and Modernisation Theory

In the sense of a singular condition to be achieved, Western modernity was the basis of the modernisation theories that held sway in development discourse from the 1950s (Abonyi 2009, Ferguson 2005, Trubek and Galanter 1974). Taking the Western

²⁴⁸ Comaroff and Comaroff (1993:xi) would remark that in the late 20th century, grand European teleologies holding Western hegemony as human destiny had become quite dated.

industrial nations as a referent, development discourse defined being 'modern' as achieving a mixed bag of elements that included industrial economies, scientific technologies, liberal democracies and secularism (Ferguson 2005). The inequalities between nations were explained on the basis of social evolution. The nations emerging from colonialism were lower down the ladder to the modernity achieved by industrial nations. Society was assumed to evolve along a unilinear path so that developing nations were assured of the same trajectory as the industrial nations.

The belief in social evolution was a product of nineteenth century theorizing in anthropology (Hayden 2009, Ferguson 2005, Stocking 1991). As we have seen in the previous chapter, the early anthropologists were convinced that those African societies they classified as 'primitive' represented mankind's earlier condition while more 'advanced' societies showed where mankind was going. The journey was common to all societies so that eventually, as Maine (1861) famously described it, primitive societies would move through various stages from status to contract, to wit starting from savagery until they attained the civilization of Western modernity. Given that social evolutionism has now been discredited as being politically incorrect and scientifically unproven, it is ironic that it was first conceived as a politically correct critique of the earlier paradigm of a 'Great Chain of Being' (Ferguson 2005).

The Great Chain of Being was a Western medieval theory of natural hierarchy in the universe but its roots go as far back as ancient Greece (Ferguson 2005, Bynum 1975, Lovejoy 1936). It held hierarchy as the natural order of things between and within species. All the creatures of the world could be ranked according to hierarchy, from the highest to the lowest. Hierarchy was determined by nearness to 'perfection'

according to Aristotle or, as later Christian theologians would have it, nearness to God (Ferguson 2005, Bynum 1975, Lovejoy 1936).²⁴⁹ In medieval Christian thought, man had been created in God's image and was the highest ranked of all creatures. All other earthly creatures were ranked after man. By similar logic, human relations were also ordered according to hierarchy. Christianity was ranked nearer to God than any other religion. As modern racial theory emerged from the 18th century onwards, the different races were ranked according to attribute. The doctrine of Polygenism, popularised by Morton and Agassiz, held that God had given the races different attributes which determined their place in the hierarchy (Desmond and Moore 2009, Ferguson 2005, Stocking 1991). God's creation being perfect, racial hierarchies could not be breached. They were not evolutionary but final and complete.

By the 19th century however, a new paradigm had taken root (Desmond and Moore 2009, Ferguson 2005, Stocking 1991). The Great Chain of Being had been transformed from a static categorisation into a progressive sequence whereby inhabitants of lower orders could progress up the hierarchy. Darwin's theory on the biological evolution of the species was co-opted in this new thinking and, much to Darwin's chagrin, provided the foundation for social evolutionism – the idea that primitive societies were evolving after the fashion of civilised societies (Hayden 2009, Ferguson 2005, Stocking 1991). A firm belief in social evolutionism was

²⁴⁹ Lovejoy (1936:7) described 'continuous, hierarchical *plenum* as 'the primary and persistent or recurrent dynamic unit' of Medieval Western conceptions of world. According to him, 'through the Middle Ages and down to the late eighteenth century, many philosophers, most men of science, and, indeed, most educated men, were to accept without question – the conception of the universe as a "Great Chain of Being," composed of an immense, or – by the strict but seldom rigorously applied logic of the principle of continuity – of an infinite, number of links ranging in hierarchical order from the meagrest [*sic*] kind of existence, which barely escapes non-existence, through "every possible" grade up to the *ens perfectissimum*' (Lovejoy 1936:59).

incorporated in the modernisation theory that became the bedrock for 20th century notions of ‘development’ (Ferguson 2005).

Societies in Africa and other countries emerging from colonialism could be remade – ‘developed’ - in the image of the modern West. The theory took a structural-functional view of modern society. All the different elements of modernity constituted an integrated package. Industrial economies, modern healthcare, transport and education went hand in hand with nuclear families, secularisation and individualism (Ferguson 2005). The ‘traditional,’ whether in terms of beliefs or social structures, practices and etiquette was backwardness and antithetical to the modern. Any semblance of juxtaposition of the traditional on the modern was considered a contradiction or lag.

For law in Africa, modernization theory meant that customary law was automatically classified as backward. Not only was it subjected to such qualifying standards as the test of natural justice, equity and good conscience but it was also treated as lower in hierarchy than modern law (Benton 2002, Mamdani 1996, Asiedu-Akrofi 1989). The Rule of Law could not depend on customary law alone, whether in terms of form or substance; without consolidating modern law, there would be no prospect of the Rule of Law. Customary law was not considered to be worthy of serious study except to find ways of ‘reforming’ it so as to bring it within the framework of modern law. Law in Africa was therefore caught up like most other things in the evolutionary narrative of modernisation theory which, disparaging the ‘traditional,’ predicted future convergence on Western modernity.

8.3.3 Demise of Modernisation Theory

The deterioration in economies and worsening of the Rule of Law across the continent put modernisation theory to test. The failure to converge culturally with the West compounded the challenge. Betraying the degree to which Eurocentric modernisation theory was embedded in the subconscious, Africanist writers like Chabal (1996) and (1999 with Daloz) expressed no little surprise at discovering that Africa was ‘re-traditionalising’ rather than modernising. It was an insufficient explanation that the timeline for modernisation might have been set too short. Not only was Africa not developing, it was actually retrogressing according to the standards of modernity set by the West. Alternative modernity emerged as a convenient euphemism for that retrogression. It is politically correct and preferable to some other term that might on the face of it resuscitate notions of Africa as inherently inferior and incapable of modernisation.

Alternative modernity means that Africa is modern but in its own way. A closer examination shows however that as applied to Africa, alternative modernity ultimately results in the same derogation that it starts out trying to avoid. When applied to the Asian Tigers, alternative modernity means convergence on the technological capabilities and standards of living which define Western modernity but with the retention of distinct cultural practices and values. The alternative modernity of Asia is therefore a success story. In Africa’s case, alternative modernity is exculpation for failure; it is the creative use of terminology to gloss over Africa’s perceived inability to modernise in socioeconomic terms.

8.4 POSITIVE AND NEGATIVE CONNOTATIONS OF ALTERNATIVE MODERNITY

8.4.1 Alternative Cultural Modernity

Africanist anthropologists like Moore and Sanders (2001) and Comaroff and Comaroff (1993) celebrate alternative modernity in the sense of its decentring of Western cultural practices from the discourse of modernity. This is alternative modernity as ‘alternative cultural modernity.’ Alternative cultural modernity confers equal status to the culture of the Other, including that of the African, so that Western cultural practices are not held up any longer as the epitome of culture and social progress. This is usually taken to be a good thing by anthropologists fighting the old stereotypes of Africa as possessing backward cultures. By the deployment of a new, politically-correct terminology, African culture is suddenly no longer ‘traditional’ but modern.²⁵⁰

8.4.2 Alternative Societal (Socioeconomic) Modernity

Cultural modernity is distinct from ‘societal modernity’ which implies socio-economic parity with the West. In terms of socioeconomic progress, alternative modernity is applied to Africa as a back-handed compliment at best. It translates into an endorsement of Africa’s poor socioeconomic conditions by labelling them Africa’s own modernity. As Ferguson (2005:15) says, ‘once modernity ceases to be understood as a telos, the stark status differentiations of the global social system [are] no longer softened by the promises of not yet.’ In other words, by de-temporalising the differences in socioeconomic achievement, alternative modernity runs the risk of

²⁵⁰ Piot’s (1999) ethnography of the Kabre of Northern Togo is an example. Piot (1999) says that he is for ‘an oppositional space – an alternative modernity’ (p.21) and that the Kabre in the remote interior occupy ‘a site – and also in many ways, an effect – of the modern, one that is as privileged as any other’ (p.178).

reintroducing notions of inherent difference in ability of different peoples to plot or attain a better material future. If the cost of conferring notional equality is the sanctioning of poverty, disease and a lack of the Rule of Law, it is doubtful that alternative modernity would hold any great appeal for the majority of Africans who live in the alternatively modern conditions.²⁵¹

8.4.3 Negative Connotations for Africa

Outside anthropology, alternative modernity has usually resulted in dark visions for Africa. Chabal and Daloz (1999:14) provide one of these. Having made a strong case for perceiving Africa's political and economic crises as one of an alternative modernity, they gloomily conclude that there is in Africa 'an inbuilt bias in favour of greater disorder' and against 'development as it is usually understood in the West.' Kaplan's (2000) *The Coming Anarchy* is another example which places Africa on the precipice of descent into chaos, war and suffering that might eventually reverberate around the globe. This 'Afro-pessimism' (Steadman 1993) obviously holds out little prospect for sustainable improvements in the Rule of Law in Africa. However, it seems to stem from an enduring if unacknowledged belief that the path to development, be it the Rule of Law or economic growth, must be a path fashioned within the precedents of Western societal modernisation. Beyond those precedents, nothing exists but chaos and oblivion. This is the logic behind Chabal and Daloz's (1999:162) averment that Africa is doomed to failure unless it can counter its inbuilt

²⁵¹ Ferguson (2002:560) sees Piot's (1999) interpretation as ethnographic romanticism and provides the following riposte: 'Indeed if we consider modernity, as many Africans do, not simply as a shared historical present but as a social status implying certain institutional and economic conditions of life, it becomes immediately evident that the Kabre do not inhabit a site that is as privileged as any other. Where the anthropologist extends the label "modern" to the impoverished African as a gesture of respect and acknowledgement of coeval temporality, African urbanites who believe their lives will not be "modern" until they have running water and a good hospital may find the gesture an empty one.'

bias against the formation of ‘the Western-style legal, administrative and institutional foundations required for development.’ By this logic, unless Africa begins to deploy the same modern legal form and in the same way as the West, there is no hope for the Rule of Law in Africa.

For all their expressed African empathies, Chabal and Daloz (1999) might have unconsciously fallen into the Eurocentric trap that they start out deprecating. Their argument is that what occurs in Africa and is viewed as disorder in the West can be explained, from the perspective of African actors who perpetrate it, in terms of ‘rational behaviour.’ Chabal and Daloz (1999) then miss the possibility that in the milieu of that kind of rationality, it is Western-style institutions and forms that would be highly irrational.²⁵² This is the logical extension to their argument; Chabal and Daloz (1999) surmise that continuing the way Africa is, with the epiphenomena of Western-style institutions but with a logic attuned towards disorder in the Western sense, can only spell disaster. There are therefore two things that can be changed here – either the African logic or the Western-style institutions. Chabal and Daloz (1999) however see only one option. They say that ‘only when ordinary African men and women have cause to reject the logic of personalized politics ... [etc]... will meaningful change occur’ (Chabal and Daloz 1999:162).

²⁵² Chabal and Daloz (1999) hastily add that they do not mean that Africans possess a different rationality but this is what their argument contrives. It is a throwback to Evans-Pritchard (1934 and 1937) and the Azande. The anthropologist strove to show that the Azande have a rationality. This was important in an era when it was still believed that pre-colonial Africans did not possess rationality. Evans-Pritchard (1934 and 1937) argued that the Azande were not irrational but that their rationality was a different type of rationality from Western rationality. The Azande rationalized their actions according to their own world views and even if that world view did not tally with the West’s, there was still as much rationality involved as in the West. They Azande were not acting because they did not possess rationality – that was *their* rationality.

The question that is central to this dissertation is why it should be the African logic that must be changed and not the institutions and forms that have been established to be antithetical to that logic. Development orthodoxy rests on the same assumption that the Western-style institutions are the only path to progress, whatever development paradigm is prevalent within the orthodoxy. It is therefore the Africans that must change their mentalities to adapt to Western style-institutions. The Rule of Law, as conceived by orthodoxy, requires Africans to bend to the ways of the modern legal form.

8.5 TOWARDS A POSITIVE ALTERNATIVE MODERNITY OF LAW

8.5.1 Decentring Western Modernity

Despite its current negative connotations for African development, a concept of alternative modernity might yet provide an epistemic outlet for arguing for the possibility of achieving the Rule of Law through other means than the modern legal form or Western-style legal institutions. It will however mean an even greater degree of decentring of the West from the condition of modernity than has usually been achieved with current notions of alternative modernity. The West must be so decentred that it just becomes one of the Others, rather than the referent by which Other is defined. Even writers like Chabal and Daloz (1999) who present arguments indicating approval of alternative modernity are still so entrapped in the West-as-referent that they cannot allow for the possibility of other types of institutions and forms of law that might achieve similar or better outcomes than the West.

Gaonkar (1999:1) captures the sentiment when he says that even though modernity no longer emerges from the West alone, the West remains the 'major clearing house of

global modernity.’ In this context, alternative modernity becomes a false dawn. It allows for differences in culture and even rationality – as alternative modernity – but says that if the Other has to achieve societal modernisation, then it must seek convergence on the institutions of the West. The only alternative modernity it conceives of, in the absence of convergence with the West on the means and crucibles of societal modernisation, is an anarchic modernity. Thus, without the modern Western legal form, in any of its varieties, the Rule of Law cannot be achieved.

If we must use the concept of alternative modernity as take-off point for arguing the possibility of the Rule of Law being achieved in Africa by means other than the modern legal form, then that legal form must be deprived of privileged status. It must be shown to be merely one possible form of legal modernity. This involves grounding alternative modernity in what Taylor (1999) has called a cultural theory of modernity, instead of an ‘acultural’ theory.

8.5.2 A Relativist Theory of Modernity

The acultural theory of modernity is Universalist: it represents that there exists universal and culture-neutral *modus operandi* for societal modernisation. The *modus operandi* is the requisite mechanism for the transformation of any society. By this theory, the *modus* is not intrinsically Western, even if it first appeared in the West. Rather, it is the universal *modus* which all cultures converge towards. The acultural theory therefore provides an axis of convergence (societal modernisation) where all societies gravitate towards the same basic forms and institutions, whatever their cultural differences. Subscribing to this idea of universal *modus operandi* for

modernity provides an inadequate conception (for our purposes) of alternative modernity on two grounds.

The first ground of objection to the acultural theory is the failure to appreciate that the entire apparatus of Western modernity is a 'culture with a distinctive moral and scientific outlook' (Gaonkar 1999:15). This outlook consists of an amalgam of understandings of 'person, nature, society, reason and good that is different from both its predecessors and non-Western cultures' (Gaonkar 1999:15). The second ground for objection to an acultural theory of societal modernisation is that it raises the false expectation that non-Western encounters with the allegedly culture-neutral forms and processes (science and technology, industrialisation, bureaucratization, etc) will produce similar outcomes to those they have produced in the West.

On the other hand, a cultural theory of alternative modernity acknowledges that modernity always emerges from within a specific cultural context so that the institutional forms and arrangements which it yields are not universal but culturally contingent. Some of the forms and arrangements may be similar across different modernities but convergence is not necessarily implied. Different starting locations will require different mechanisms or routes for achievement of similar outcomes. Conceiving of alternative modernity in this way necessitates an examination of how the pull of sameness and the forces of divergence interact under historical and political exigency to produce alternative modernity at different national and cultural sites (Gaonkar 1999). 'To think productively along the lines suggested by the idea of alternative modernities,' Gaonkar (1999:16) says, 'we have to recognise and problematise the unavoidable dialectic of convergence and divergence.'

8.5.3 Sites of Convergence and Divergence on Modernity

It seems therefore that even with a relativist ('cultural') approach to alternative modernity, there must be some sites of convergence, some lowest common denominators that qualify a condition to be 'modern.' There must be some core of modernity; otherwise, the concept of alternative modernity means that anything can be modernity, in which case the term loses any utility. Modernity must therefore have an essence even when it is conceived of in multiples: it is many but one at the same time. If that is so, then we must decipher what sites of convergence are inevitable, even within the limited frame of societal modernisation.

Taylor (1997), like Habermas (1996), argues that the emergence of a market-industrial economy, a bureaucratically organised state and modes of popular rule are irresistible. In that sense, according to Taylor (1997:43), modernity is 'a wave, flowing over and engulfing one traditional culture after another.' Whoever fails to adopt its elements in one form or another 'will fall so far behind in the power stakes as to be taken over and forced to undergo these changes anyway' (Taylor 1997:43). McCarthy (1999) agrees that such institutional changes are unavoidable concomitants of modernity but that their cultural accompaniments in the West are not. Some convergence in culture and tradition will be necessary but 'there is a good deal more latitude here than with economic and administrative structures' (McCarthy 1999:203). Following this line of argument, the question then is whether modern law is one of those institutions that are definitive of all modernities or is a cultural form that can be replaced by something else.

8.5.4 Rule of Law as Site of Convergence; Law as Site of Divergence

The case in this dissertation has been that modern law is merely a cultural form of the West and that it is possible that what Africa needs is an Other law, an alternative cultural form that will go with Africa's own logics. The likes of Chabal and Daloz (1999) have identified those logics as antithetical to the Western legal form. Taylor (1996) distinguishes between 'norms of action' and the 'legal forms' in which they are inscribed. There is likely to be universal convergence on 'norms of action' but the 'legal forms' in which they are inscribed belong to the variable part of modernity. Taylor (1996) argues that while Western legal forms are tightly interconnected with Western legal philosophy, they are extricable from the basic norms that are expressed and inscribed in them. Even if the norms are integral to modernity, the institutional forms may vary from culture to culture.

Taylor's (1996) argument bears substantial affinity with our arguments on the Rule of Law and the modern legal form in Africa. If we take the Rule of Law, in terms of outcomes as we have defined it in Chapter 1 and Chapter 4, to be one of the basic norms of action that Taylor (1996) envisages, then our argument holds that the modern legal form is extricable from that basic norm. The Rule of Law does not have to be expressed or inscribed in the modern legal form. A question that Taylor (1996:18) asks is then apposite for our purposes: 'what variations can we imagine ... in legal forms that would still be compatible with meaningful universal consensus on what really matters to us, [the Rule of Law]?'

Of course, the argument thrives or collapses on whether the Rule of Law can be made autonomous from the modern legal form. If the norm is inseparable from the form, then the scope of alternative modernities is narrower than we currently want to make it. If Habermas (1996) is to be believed, then law must have the modern legal form to fulfil the functions – such as the Rule of Law – that it currently fulfils or is used to fulfil. In that case, ‘there are no alternatives to its formality, positivity, reflexivity, individuality, actionability and the like’ (McCarthy 1999:205). By this line of argument, the Rule of Law and form of modern law are specifically tailored to one another. Any society that wants the Rule of Law, whatever its cultural traditions, must have some version of modern law because without it there can be no Rule of Law.

Yet, in the context of Africa, we have seen arguments from Chabal and Daloz (1999) that the African crisis is grounded in the existence of a different rationality from that required to produce the Rule of Law using the modern legal form. If Habermas (1996) is right that without modern law, there can be no Rule of Law, we are left with the dire visions of Kaplan (2000) and indeed Chabal and Daloz (1999) for Africa’s future. We must disagree with Habermas (1996) here based on the arguments outlined in this dissertation, especially because Habermas (1996) subscribes to the modern legal form merely on its proven achievements in the West. So far, this dissertation has taken the oppositional route of arguing that Africa provides empirical evidence that not only does the modern legal form hold no universal guarantees of success but also that the Rule of Law should be able to thrive on other forms of law. It is upon this kind of oppositional route that Taylor (1996:20) hopes to encounter ‘a convergence on certain norms of action’ along with ‘a profound sense of difference,

of unfamiliarity, in the ... rhetorical tropes and reference points' by which the norms are actualized.

Differences within Western modernity itself should suggest that modernity supports different forms. As Gaonkar (1999) and McCarthy (1999) point out, Swedish society is not the same as French society or Italian society, let alone U.S. society. The differences between these Western societies are however too finite to satisfy Taylor's (1996) desired range of diversity for alternative modernities. Taylor (1996) wants the term to be available as a tool for greater epistemic emancipation – to allow for the imagination and achievement of much broader and deeper differences in the ideas, institutions and practices of modernity than currently exists. Taylor's (1996) goal is to be able thereby to rebut the claim that modernity's only viable assemblage is that which has become dominant in West.

McCarthy (1999) says that to the question then of how much and what kinds of difference there are good empirical and theoretical reasons to expect, there is no generally accepted answer but that it is more than most modernization theorists have predicted. This leaves open of course, the question of whether there can be Other legal forms that can work in Africa as well as the modern legal form has worked in the West. Our theory is that there are or must be. If that premise can be accepted, the first thing to do will be to hold constant (and acceptable) the African logic which produces disorder in the Western sense. Once that is done, the next thing would be to find the alternative legal form or institutional framework which works with that logic to produce the same or a better quality of the Rule of Law as found in the West.

8.5.5 Missed Opportunity of Neoliberal Structural Adjustment

The nearest that orthodox development theory has come to permitting a departure from the modern legal form has been neoliberal structural adjustment. In its first incarnation in Africa from the early 1980s, structural adjustment was all about getting the state out of the way. This involved repealing laws which made the state an active participant in most areas of economic and social life (World Bank 1984, 1986 and 1989a, Zulu and Nsouli 1985, Gulhati 1988, O'Connell 1988, Mills 1989). Modernisation theories of the 1960s and 1970s had instrumentalised law, especially public law, to put its state-led industrialisation strategies to work (Cypher and Dietz 2003). Neoliberalism's initial concern with the public-law structures crowding Africa's development landscape was merely in their dismantling.

While neoliberalism therefore implied the primacy of private law, it was not particularly prescriptive as to form or detail. That was the function of the market which would shape its own structures as it went along. The key was to deregulate, liberalise and privatise as quickly as possible to remove the state from the scene and leave the 'invisible hand' free to do its work (World Bank 1984, 1986 and 1989a). If this approach had been persisted with, perhaps it would have eventually led to the dismantling of the modern legal form in parts of Africa in favour of a legal form more in tune with the contemporary cultures and rationality of Africa. However, the need for quick-fixes and early results meant that the laissez faire approach of the initial structural adjustment programmes was soon abandoned in response to criticism that it created more problems than it solved.

As crucial development indices had continued to decline in Africa, the conventional wisdom emerged that freeing up markets was not enough. Markets needed a strong regulatory framework and this had to be provided by a state committed to good governance (Plateau 1994a and 1994b, Sachs and Pistor 1997, World Bank 1997, Sachs 1998). Through the 1990s, governance issues metamorphosed into and were brought under the umbrella of the Rule of Law. The markets could only work within a predictable framework of law and order guaranteed by the state, but in which individual rights were protected against encroachment by the state (Plateau 1994a and 1994b, Sachs and Pistor 1997, World Bank 1997, Sachs 1998). The template for the new agenda was to try to reproduce the level of active regulation in industrialised Western countries. Rather than minimize the modern legal form therefore, the new structural adjustment sought to re-consolidate it.

The fresh optimism that with a raft of regulation and some ‘capacity building,’ Africa would get it right seemed to ignore some of the rationale for the laissez faire approach in the first place. That approach was adopted not only on a doctrinal fixation with proving that markets work better than the state; rather, there also seemed to be the perception (first noted by political scientists like Callaghy 1984, Sandbrook 1986 and Fearon 1988) that the governance situation in Africa defied Western formal rationality. Given the minimisation of formal control therefore, Africans might be able to express themselves freely and perhaps produce ways and means that provided development without necessarily mirroring the institutional framework of the West.

Writers like Young (2004), Chabal and Daloz (1999), Bratton and von de Walle (1997) and Bayart (1993) have since alluded openly to a neo-patrimonial African

rationality that continues to defy the purport of the modern legal form and the institutional framework that the modern legal form enables.²⁵³ The problem with governance in Africa might not be as much as that the people do not know how the West does it, as implied by the Rule of Law Orthodoxy, but that there is a collective refusal, for whatever reason, to do it that way.²⁵⁴ Persisting with the initial *laissez faire* approach of structural adjustment might eventually have led to alternatively modern forms and structures but this would have required pursuit of that approach to an extent that even the neoliberal reformers themselves seemed wary of.

It is instructive that even with all the suspicion of the state, there is little evidence of any prescription in the reform programmes that the state, or the modern legal form upon which the state relies, should be dismantled entirely. Whether as *laissez faire* or as regulatory governance, neoliberal reforms were always situated within the boundaries of the modern legal form and never outside it.²⁵⁵ Reform that does away with that legal form seems to be unthinkable. The only thing outside the modern legal form is ‘anarchy.’

²⁵³ Bratton and von de Walle (1997) distinguish between patrimonialism and neo-patrimonialism. In patrimonialism, authority is completely personalised. ‘Neo-patrimonialism’ on the other hand refers to ‘hybrid systems in which the customs and patterns of patrimonialism co-exist with and suffuse, rational-legal institutions’ (Bratton and von de Walle 1997:61). Neo-patrimonialism, including the conflation of public and private spheres, has long been the accepted explanation in political science for the failure of the modern state in Africa (Simons 1998, Sandbrook 1986, Callaghy 1984, Hyden 1983).

²⁵⁴ Johnstone (2008) also argues that while African political culture may be malleable, that malleability does not necessarily render it teleologically guided towards Western forms of government and governance.

²⁵⁵ Cooter’s (1996c) *The Theory of Market Modernization of Law* epitomises this limitation in neo-liberal thinking. Cooter questions the orthodox belief that modernisation of law in developing countries should be by comprehensive reform carried out by state officials. He proposes an alternative called ‘market modernization’ whereby the state’s role in reform is to repeal laws creating obstacles to markets. The state then ‘selectively enforces norms that evolve in institutions located between individuals and the state’ (Cooter 1996c:141). Cooter’s (1996c) theory is far-reaching, even for a neoliberal thinker, but it is clear that he cannot (or does not permit himself to) envisage statelessness. While he calls for the market to lead and the state to follow in the evolution of norms, his suggestion of ‘selective enforcement’ by the state of market evolved norms still bestows primacy to the state in the legitimising of norms.

However, anarchy might not be such a bad thing if public-choice theorists like Ellickson (1991) and Sneed (1977) are to be believed. Rather than defining anarchy as chaos or unbridled violence, they define it in terms of the theory that humanity would function more efficiently without the modern State, the modern legal form and all forms of external government. Anarchism in that sense is not a subscription to disorder but the belief that a better ordered society would result in the absence of the modern legal form (Marshall 1991). Such a society would be anathema of course to liberals like Locke whose ruminations on the necessity of government and the law to secure liberty consolidated the modern legal form and gave rise to the modern conceptions of the Rule of Law. It however deserves a bit of study, if for only the alternative configurations of society that anarchists insist are possible in the absence of the state and the modern legal form.

8.6 CO-OPTING ANARCHISM: MODERNITY WITHOUT LAW OR THE STATE

8.6.1 Order without Law

The fundamental difference between anarchists and liberals is on the nature of man (Suissa 2010, Mises 2002). Liberalism approves of Hobbes' vision of man's natural condition as warlike and of life without law as nasty, brutish and short. Anarchists on the other hand lean more towards Rousseau's belief that man was not inherently bad in a state of nature but was corrupted by the transition from primitive to modern society. While liberals and anarchists have the common goal of securing liberty, the difference in conception of the nature of man has led to differing opinions on how the goal can best be achieved.

Liberals approve of a negative conception of liberty where humanity is free within limits set by the law to protect the individual from tyranny and arbitrariness (Tamanaha 2006). Anarchists on the other hand pursue positive liberty that leaves man free to act devoid of any restraint by law (Goodway 2006). Marshall (1991) writes that the line between the anarchist and libertarian is thin.²⁵⁶ By observing that it is possible to have law without legislation, many classical liberal scholars have leant towards the anarchic extreme. Ellickson (1991) has taken this a step further by arguing that not only is legislation not necessary for law but also that law is not necessary for order. Based on his study of informal dispute resolution among ranchers and farmers in California, Ellickson (1991) is convinced that all three functions of the modern law, namely rule formation, rule enforcement and dispute resolution, can be fulfilled by informal means.²⁵⁷

Ellickson's (1991) logic mirrors that of Sneed (1977) who theorised protection from criminality in an anarchic order without law. For Sneed (1977) the choice between the current state system and anarchy is the classical choice between monopoly and competition. Sneed argues that like monopolies in other markets, the monopoly on the public defence industry will be found to be intolerable. The alternative to the state system is 'an order without law, a truly free society ... [which] is anarchy' (Sneed 1977:124). He says that once the state's law-enforcement monopoly is destroyed,

²⁵⁶ Goodway (2006:4) observes that 'libertarian' and 'libertarianism' are often used by anarchists as synonyms for 'anarchist' and 'anarchism' in order to avoid the negative connotations of 'anarchy' and its derivatives. However, Russell (2004:509) was of the view that anarchy and despotism were opposite dangers faced by every community and that liberals strove for the golden mean between both.

²⁵⁷ Resort to informal rules is an implication of the Coase theorem but one that Coase (1960) did not advert to. the Coase theorem holds that in the absence of transaction costs rational self-interested parties will always bargain to the most efficient use of property rights regardless of the initial allocation of the property rights (Coase 1960, Stigler 1989).

each individual will then be able to consume protection services according to his own tastes and preferences.

8.6.2 Order by Private Ordering

Sneed (1977) opines that protection services would be divided between self-defence and specialist provision. The market would regulate the size of the specialist defenders; they would compete among one another regardless of organization along communist, capitalist or other economic lifestyles.²⁵⁸ Conflicts between clients of a defender would be settled internally by the defender while conflicts between clients of different defenders would be handled independently of either company's codes. Arrests of offenders would be by the defenders. Where a complainant was served by a different defender from the accused, the wisdom of reciprocity would motivate the defenders to cooperate among themselves. This reciprocity would make it likely that unduly long periods of detention during 'trial' and upon conviction would be avoided.

Bail would also be determined by a competitive mechanism and no longer 'would arbitrarily high bail be set by bigoted, venal or politically-motivated agents of a [governmental] monopoly' (Sneed 1977:120). The process of adjudication and enforcement of penalties would be derived along similar lines of reciprocity and voluntarism. Sneed points out that his structure is merely an example and not the only way that anarchy might be organised. The only requirement, consistent with anarchy, is that the structure be allowed to emerge from a competitive free-market environment.

²⁵⁸ Sneed (1977) is at pains to point out that the function of the anarchist is not to dictate an economic system but to allow all economic systems to compete on a voluntary basis.

Sneed's (1977) is an attempt to go beyond the anarchist critique of the state-centric modern legal form and sketch out an alternative system. In the course of it, he deploys much of the rationale of the anarchist argument which is that anarchy opposes law because law cannot lead to justice and cannot establish order. The law is often a tool by which the more powerful oppress the less so. For that reason, Sneed (1977) argues, the law deserves no respect and often receives none. Anarchists like Christoyannopoulos (2006) then seek to convince, in the words of Tolstoy (1900:13), that 'no anarchical disorder could be worse than the position to which governments have already led their peoples, and to which they are leading them.' Mazon (1978) insists that the modern state and its legal superstructure have been unable to eradicate misery and can be justifiably held responsible for some of history's greatest atrocities.

Sneed's (1977) proposals for protection from criminality in an anarchic society are archetypal – the anarchic society functions solely by private ordering. Similarly, Rothbard (1978) proposes arbitration as the way of resolving disputes, including those involving infractions that are styled as 'criminal' under the state system. Rothbard (1978) bases his proposal not merely in theory but on the empirical success of arbitration historically and in contemporary times. Dismissing the objection that arbitration only works successfully because courts exist to enforce the award of the arbitrator, Rothbard (1978) points out that voluntary arbitration was successful and already expanding in the U.S. and England before it became enforceable in courts.

Rothbard (1978) also alludes to the successful operation of merchant courts in the Middle Ages which without powers of enforcement successfully developed the entire

body of the law merchant (*lex mercatoria*). Private courts of shippers also developed the body of admiralty law in similar fashion. The merchants got these ‘anarchistic’ courts to work by simply agreeing to accept the results. Acceptance of the courts decisions were ensured by social ostracism and the refusal to deal anymore with the merchant who disobeyed them. The method of voluntary enforcement proved highly successful notwithstanding that anyone who ignored the courts judgement could not be jailed. The merchant who broke the understanding would not be likely to continue long in the trade for the ‘compliance exacted by his fellows ... proved if anything far more effective than physical coercion’ (Rothbard 1978:199).

Rothbard (1978) also argues that the voluntary method has been proven to work in modern times. Before 1920, when arbitration awards became enforceable in American courts, arbitration had caught on and developed a following in the American mercantile community. Cases of refusal to abide by the arbitrators’ award were so rare, according to Rothbard (1978), that one founder of the American Arbitration Association could not remember a single example. Like the medieval merchants, an American merchant who refused to comply with the awards would find it difficult to avail himself anymore of the tribunal for his claims. His name would be released to members of his association and he would find it difficult to continue in the trade. The cost of non-compliance was therefore always likely to be greater than the cost of the award with which the merchant disagreed. Thus, arbitration awards were voluntarily and privately complied with out of self-interest if not out of honour. Rothbard (1978) argues that technological advancement has produced improvements in data collation and dissemination that would facilitate the ostracism or boycotting of contract and arbitration violators.

Rothbard's (1978) proposition is on less firm ground when he takes it beyond commercial transactions to torts and crimes of aggression where there is no contract. Like Sneed (1977), Rothbard (1978) envisages the possibility of supply of court and police services by private firms, either in integration or separately. Rothbard (1978) sees competition between the courts ensuring that each strives for fairness or risk becoming defunct. The courts have 'clients.' Where the client of one court accuses a client of another court of a crime, the case can be tried in either court. Where it is tried in both courts separately, at the choice of each court's respective client, and conflicting decisions are reached, the two courts will submit the case to an appeals court or arbitrator which the two courts agree upon. Rothbard (1978:220) says that the anarchist society will have an 'accepted law' code which will fix the accepted cut-off point for trials and appeals. He suggests that agreement of *any two* courts should be decisive, the number 'two' reflecting the fact that there are always two sides to a dispute. Final decisions would be enforced by the courts.

8.6.3 Law without the State

Rothbard (1978) argues that empowering the courts to enforce decisions against guilty parties does not bring back the state or negate anarchism. His own definition of anarchism does not rule out the employment of defensive force by private agencies. He makes this even clearer when he confronts the 'Hatfield-and-McCoy' problem whereby a Hartfield kills a McCoy but McCoy's heir does not belong to any private defender or court. McCoy would be entitled to retaliate himself and their courts would not be able to proceed against him if he killed the right Hartfield. If he killed the wrong man, then the surviving Hartfields might proceed against him for murder.

The risk of making a mistake in self-help would therefore motivate individuals to take their cases to court. Judges, like arbitrators, would prosper on the market in proportion to their reputation for impartiality and efficiency.

Rothbard's (1978) anarchy is more nuanced than Sneed's. Unlike Sneed (1977), he does not want to do away with 'law,' whether semantically or in fact. Where Sneed (1977) struggles to avoid using the word 'law,' Rothbard (1978) does not shirk from talking about 'law codes.' His grouse is with a system where law is enforced by the state and he mainly wants to 'save law from the state' (Wieck 1978:216). Like Sneed (1977) however, Rothbard's (1978) proposal is for private ordering to replace the state. Everything that the state currently does, including the administration of the law codes, would be done privately. There would be no public sphere, in the sense that the term currently refers to a state existing in contradistinction from the private sector. The public-private divide would vanish as the current public jurisdictions would be taken over entirely by the private sector.

The irony of all this is that the scheme the anarchists propose sounds very much like the pre-colonial, African legal order, especially in the so-called acephalous societies. Like under African customary law, social regulation would necessarily be much more decentralized in anarchy than it is under the modern state. There would be no public-private divide in the type of anarchy that Rothbard (1978) and Sneed (1977) envisage. Courts would largely disappear and be replaced by arbitration. By its nature, arbitration would tend towards compromise and consensus rather than winner-takes-all resolution. Compliance would be secured by voluntary enforcement mechanisms, such as ostracism, rather than physical coercion or imprisonment. The

whole system would work on the mutual understanding that it was better to comply with the social conventions or 'law codes' than to disregard them. The conventions or codes arise spontaneously and be subject to the wishes of the market. There would be no legislatures to make laws and any abiding conventions would be more fluid, serving as variable guidelines and changing in tandem with the demands of the market.

8.6.4 Parallels with African Customary Law

Anthropological studies of arbitration-like disposition of criminal matters under African customary law have given at least one critic of anarchism cause for pause and further reflection on those ideas. Stone (1978) starts out with several criticisms of Rothbard's (1978) arbitration proposals. He argues that arbitration works best where there is prior negotiating interface and the parties, whatever their differences, share common interests and peers. This is not usually the case in criminal offences. Again, the arbitration system might prove inadequate in a case of mass murder where a whole family was wiped out and there were no successors to pursue arbitration. Even where heirs could reach a settlement with the murderer, it is still unclear whether such a settlement would satisfy the rest of society. The heirs' assessment of risk posed by the murderers might not equate with that of other people. Unpunished or under-punished murder would surely set a bad moral.

Stone (1978) agrees with arbitration rendering many 'victimless' crimes redundant but points out that some of such crimes pose a real threat to society if not punished. Ostracism 'and the refusal to deal any further' would be much less effective as

enforcement mechanism in rape cases for instance. It would hardly satisfy the victim that she and other women could refuse to deal with the offender. Stone is also not sure that justice can be appropriately served by some 'biblical tooth-and-eye' trading which does not seem to take account of mitigating circumstances.

In spite of all these misgivings, Stone (1978) thinks that there is sufficient merit in Rothbard's (1978) argument to justify exploring further the idea that arbitration could replace the present criminal law system. Stone (1978:213) confesses to having been intrigued by the successes of 'arbitration-type dispositions in criminal matters in Africa.' Even in America, he had been surprised at the rates of success in several cities that had diverted minor offences to an arbitration-type system. Only a single-digit percentage of the referred cases ever came back into the ordinary criminal prosecution system. In other cases, victims and offenders reached agreement on remediation, compensation or cessation of the offensive behaviour.

Anarchist theory has been attacked generally on the ground that it is a utopian fantasy (Clark 1978, Sheehan 2003) and that modern conditions, as problematic as they may be, are by their very existence evidence of universal rejection of anarchism (Wertheimer 1978). Wertheimer (1978) argues further that if modern legal systems cannot escape anarchist accusation of 'narrowness of territoriality,' there is no reason to think that small, decentralized anarchic communities will be any different. Wertheimer (1978) argues that it is difficult to conceive of rational men putting aside their own self-interest and always acting for the common good. Furthermore, human suffering cannot always be attributed to states and their legal superstructures; rather, states have considerable utility which has often helped to prevent human suffering.

Given the dominance of the state in the global system of the last century, a simple response of anarchists might be ‘why knock anarchy if you have not tried it?’ A certain region of the world may prove helpful here yet.

8.7 AFRICAN TEST CASE FOR ANARCHISM: LITTLE’S SOMALIA

8.7.1 Order without State

Africa has provided several test cases for aspects of anarchist theory, perhaps none more so than Somalia’s statelessness which provides reason not to summarily dismiss anarchism.²⁵⁹ Little’s (2003) study of Somalia in the late 1990s, after nearly a decade of state collapse, often reads like a paean to anarchy in Africa. From 1993 to 2000 which Little’s study covered, social, economic and political relations in Somalia inhered entirely in informality and without any semblance of a state or central government. Little (2003:138) argues that if a state were a requisite component, ‘then the Somali economy could not exist, nor could those of several other African countries, where formal government has virtually collapsed’ Instead, Little’s (2003) study shows a thriving economy in southern Somalia, especially among traders and herdsmen, notwithstanding the complete absence of state laws or regulations. Little (2003) discovered that in many respects there was more efficiency in statelessness than during statehood.

Without state mechanisms for enforcement, legal contracts were useless but economic transactions flourished solely on trust and reciprocity. ‘The financial market in particular has been very active and arguably more efficient than it has ever been’

²⁵⁹ Little (2003) points out other African countries, such as Liberia, Congo Democratic Republic and Sierra Leone, which have also passed through periods of statelessness. Furthermore, many economies, including those of Ghana, Mozambique and Tanzania, have seen periods of partial collapse when their official economies captured very little of the real economy.

(Little 2003:11) With no ministry of finance, central bank or official requirements for currency transactions, the Somalia Shilling remained the standard medium of exchange. Freed completely to market forces, the Somali Shilling was more stable through the second half of the 1990s than during the 1980s when central-government intervention and mismanagement resulted in wild fluctuations. Tellingly too, the ‘currency without a treasury’ was more stable than the government-supported currencies in neighbouring Kenya and Ethiopia.

The Somali Shilling also achieved greater geographic range and convertibility through the informal trade networks stretching into Ethiopia, Djibouti and Kenya. As before, Somali residents had little access to formal financial institutions but financial facilities improved phenomenally because informal banking grew on an extraordinary scale to meet demand. In particular, *hawilaad* (informal remittance houses) became big business to facilitate remittances from the Somali Diaspora and between Somali businessmen. The remittance services deployed telecommunications reliant on satellite technology and as a consequence, cheap phone, fax and internet services became widely available for general use. In 1998, Little (2003:144) notes, the UNDP remarked on the irony that telecommunications and money-wiring services in Somalia had become ‘significantly better’ in the absence of the state.

Little (2003) does accept that the overall picture in Somalia was not as rosy as that painted by the resilience and accomplishments of those parts of economy and society that he highlighted. Warlords continued to rule, terrorising and plundering the urban areas which, as a result, remained dangerous and chaotic places. Large sections of the populace were subjected to terrible deprivation, including atrocities such as the rape,

maiming and killing of women and children. Public health and educational institutions were non-existent. The vast numbers of Somalis fleeing their homeland, many into deplorable refugee camps, served sufficient notice that the country was in dire straits.

Still, in many rural areas, alliances of clan elders, religious leaders and businessmen made pragmatic use of 'traditional custom' to restore order and security. These local alliances reinvented social structures on the back of traditional kinship and clan systems, in the process challenging many widely held assumptions about how societies and economies operate. While the decentralised new political structures have drawn on pre-modern idioms, society in the relevant areas did not descend into savagery and barbarism; rather they became more stable than prior thereto.

8.7.2 Neo-traditional Modernity

Little's (2003) analysis suggests that in parts of Africa at least, there is wisdom in replacing modern social forms with other forms that are more consistent with local livelihoods and cultures. This 'neo-traditionalisation' does not imply a rejection of the goals of development or modernity; it is merely a certain path to those goals or a type of modernity that is renounced. In other words, Little's (2003) Somalia provided a laboratory for a form of modernity which selects and appropriates certain items associated with Western modernity but having been failed by that modernity's model of social regulation, actively seeks alternative pathways to modern standards of living. Little (2003) points out that even while subverting or negating many Western ideas about modern government and societal organisation, Somalis continued to take to technological gadgets, pharmaceuticals and capitalism. Like all Africans, Somalis

clearly yearned for improvements in living standards, welfare and administration but, as the totality of their actions showed, not necessarily by means of the Western models which had so failed them. Unfortunately, Little (2003) remarks, the return of donor agencies to Somalia would probably result in the unthinking reintroduction of Western models yet again.²⁶⁰

8.7.3 A Subjective Case

Little's (2003) exposé on the functional bits of Somalia's statelessness seems to bear out, even if only to the extent of those bits, the anarchists' argument on anarchy providing better efficiency than the modern state. However, the integrity of the argument is subjective to places like Somalia where prior to statelessness, the state was a mockery of the notion of modern statehood. Even pre-collapse, Somalia operated more as 'an unofficial or unconventional economy rather than an economy of wage earners, formal institutions and legal contracts' (Little 2003:7). Indeed, such was the level of misrule under Barre's pre-collapse regime that Little (2003) challenges the use of 'statehood' to describe the political situation. Little argues that while diplomatic convention and international law require every member of the United Nations to be regarded as a 'state,' it does not mean that in reality the system so labelled possesses the will to govern or any capacity whatsoever to do the things that states do by definition.²⁶¹ This argument is a throwback to the rhetorical question asked by Ellis (1996:9): 'Why should we call a certain large building ... the

²⁶⁰ Samatar (2002:242) says that if there is a silver lining in Somalia's circumstances, it is that 'Somalis may have the chance to start all over again, and to pioneer, whatever the variable geometry, a new sort of ... post-colonial national politics.'

²⁶¹ Recognition of the superficial nature of many African states, kept alive by international law rather than internal coherence and viability, led Jackson and Rosberg (1982) to term them 'juridical' states in contrast to real or 'empirical' states.

Central Bank ... when it has no money and fulfils none of the functions of a central bank?’

As Little (2003) recognises, the fact that the state was already dysfunctional in Somalia before collapse probably made the transition to statelessness less dramatic than if the state been fully functional. The observed increases in efficiency because of statelessness in Somalia are therefore relative to the particular condition in Somalia before the state collapsed. They do not necessarily bear out the anarchists’ claim that statelessness is more efficient in all circumstances than the state system. If there had been a well-governed modern state in Somalia up to 1991, it is doubtful that an abrupt descent into statelessness would have provided any increases in efficiency relative to the position hitherto. If any claims in favour of anarchy are therefore to be founded on the Somali experience, they would be limited to the proposition that anarchy might provide better conditions than a failing modern system.²⁶²

8.7.4 Corroboration of Core Thesis

The modified claim – that anarchy would be better than a failed modern system - still provides support for our core argument that there could be alternatives to the modern legal form. The African experience seems to indicate that the Rule of Law, in Africa at least, will thrive better on one or more of such alternatives. Theoretical support may be further extracted from the attempts by anarchists like Sneed (1977) and Rothbard (1978) to sketch alternative systems that would maintain order without law.

²⁶² Little (2003:5) emphasises that by highlighting the segments of the population and an activity that have attained success in the 1990s, he does not ‘propose that a government-less Somalia has been good for society as a whole or represents a basis for political solution.’

Anarchists say that what they propose is ‘lawlessness’ but to the extent that the term evokes images of a total absence of rules, it is misleading. Sneed’s alternative system is filled with rules or ‘conventions’ as Sneed calls them, even if arising spontaneously or informally and operating on a different ethos from the modern legal form. That rules are not made by a specialist legislature or enforced by an executive does not mean that they are not rules or norms all the same. As used by many anarchists therefore, the term ‘lawlessness’ means the absence of ‘law’ in the sense of the modern legal form rather than the absence of any kind of legal-rule governance at all.

Anarchist arguments that try to describe how order will be achieved in the absence of law often seem to be describing an alternative kind of legal system without realising or admitting it. The problem is one of an ethnocentric closure on the definition of law. The notion and cognition of ‘law,’ for theories steeped in Western epistemology such as anarchism, are exclusively and irrevocably tied to the characteristics of the modern Western legal form. Any society existing without the modern legal form is therefore in a state of ‘lawlessness’ notwithstanding that the functions of the modern legal form are howsoever still fulfilled. It is in this vein of course, as we have earlier seen in Chapters 5, 6 and 7, that pre-colonial African cultures and even pre-medieval European societies were described as being without law. Theory must then confront the fear, ingrained by centuries of Western philosophy, that without ‘law’ as we know it now, there would be a rapid and hellish descent into oblivion.

8.8 DOING AWAY WITH THE MODERN AFRICAN STATE

8.8.1 Interrogating Statehood

If anarchism is taken to be an absence of law and political authority of any sort, our argument is definitely not one of anarchy. Anarchism is however more, as has been seen with Rothbard (1978) whose argument is not for the absence of law but for curing the law of the state. Ambivalence, if not outright hostility, towards modern government and the state are common in anarchism (Clark 1978). Our argument shares some elements with anarchism in the sense that it does not necessarily oppose doing away with the state in Africa. In some instances, dissolving the state might hold better prospects for parts of Africa especially if Little's (2003) findings in Somalia are anything to go by. The state might have to be collapsed entirely, in order that more legitimate institutions and legal forms are evolved by the people themselves from below.²⁶³

The inevitability of the modern state is increasingly interrogated in the light of globalisation. Some of the wisdoms that emerge from such interrogation can be conscripted in aid of an argument that the state can and should be done away with in Africa. Bourdieu (1994) declares that the 'state is not natural but a self-reinforcing imposition.' Fleiner and Fleiner (2004:22), after similarly calling the state 'mainly an

²⁶³ This possibility has been canvassed repeatedly by political scientists confronting the reality of dysfunctional states in Africa. Villalon and Huxtable (1998) asked whether states were likely to disappear in Africa and whether emergent non-state forms were in response to the disintegration of state structures. Half a decade before the publication of Little's (2003) study, Simons (1998) suggested that the 'space-that-was-Somalia' might be forced to return to forms of political organization based on kinship. Forrest (1998) argued that analytical fields of vision should be made wide enough to allow 'indigenously authentic' non-state forms to emerge in Africa. Reno (1998) also found potential for new and alternative ways of political organization in West Africa. Reno's analysis seems at first glance to have been confounded by the reconfiguration of both Liberia and Sierra Leone on which he focused. But continuing instability and superficiality of state across much of Africa suggests continuing relevance of that analysis, Forrest's (1998) synopsis and Villalon's and Huxtable's (1998) hypothetical questions. Longman (1998) and Clark (1998) contend that the state is the problem not the solution in Africa so that its dissolution would be a positive development.

artificial construct,' go on to ponder whether the state in its traditional sense is still needed. 'Does one have to fragment the proud traditional nation state into smaller and smallest homogenous ... communities,' ask Fleiner and Fleiner (2004:22), 'because it should limit itself only to care for ... its natural community?' Bourdieu (1994:7-8) argues that the state imposes itself on the civilised mind through classification systems embedded in law and through bureaucratic procedures, educational structures and social rituals.

Going further on the theme, Ferguson and Gupta (2002:106) call states 'constructed entities' which are 'conceptualised and made socially effective through particular imaginative and symbolic devices.' The state has long been conceived of in the West as inculcating virtues such as reason, control and regulation in contrast to 'the irrationality, passions, and uncontrollable appetites of the lower regions of society' (Ferguson and Gupta 2002:107). Through certain images, metaphors and representational practices, states have succeeded in holding themselves out as reified entities deserving of a monopoly on what Ferguson and Gupta (2002) call the spatial properties of vertical encompassment. When the organisation of capitalism was situated more within the hegemony of the nation-state, they argue, statist projects of verticality and encompassment seemed natural. Neoliberal globalisation has since wrought disjuncture on the state's claims but, observe Ferguson and Gupta (2002), explorations of the Foucauldian 'governmentality' – a form of power exercised over populations - continue to assume the nation-state and remain strikingly Eurocentric.

Ferguson and Gupta (2002) say that the imposition, on state spatiality and territoriality, of other forms of spatial and scalar production demands the opening of

new lines of enquiry in the study of governmentality in today's world. On the heels of the collapse or retreat of the nation-state in Africa, new forms of power and authority are springing up across the continent that have not been sufficiently studied, described or analysed. These new forms, Ferguson and Gupta (2002) argue, ignore the nation-building logic of the old developmentalist state which sought to link its citizens into a universalistic national grid. Instead, the new forms thrive on 'the rapid, deterritoralised, point-to-point forms of connection (and disconnection)' that are inherent in new communications technologies and new practices of capital mobility (Ferguson and Gupta 2002:120).

8.8.2 Abnormality of Modern State in Africa

It is trite that the modern state is a recent arrival in Africa, having been suddenly thrust upon the continent in the late 19th century. For yet unclear anthropological reasons, vast expanses of Africa were stateless societies. The region was predominated by thousands of autonomous units, each lacking the scale and intricacy of political organisation and authority manifested by the modern state. The anthropologists Fortes and Evans-Pritchard (1940) seminally divided African traditional society into the acephalous and the state-like but the latter classification seems to have been the product of stretching analogy with modern state forms. The veracity of the analogy would subsequently be challenged as arising from a Eurocentric historiography of Africa which sought to fit the stateless societies of Africa into familiar Western theoretical frameworks (Feierman 1993, Ellis 1996).

Curtin (1995) observes that a fundamental difference between Western history and pre-colonial African history was that Western history has always been set within the framework of the state.²⁶⁴ In contrast to the West, explains Ellis (1996), many Africans from time immemorial and until barely a century ago lived in political communities without powerful bureaucracies, standing armies, a national language, cities, modern industry and the degree of centralised government that would be necessary for the definition of a state. Indeed, many of the political entities in Africa which historians called ‘states,’ like Mali, Benin or old Kongo, were not states at all in the modern meaning of the word. The Nigerian historian Isichei (2000:93) who refers repeatedly to pre-colonial African ‘states’ does so with the caveat that unlike modern states, they did not form ‘a block of territory within which the impact of government was equally felt.’

Imperialism sought to make statehood a reality in Africa. At the Berlin Conference convened in 1884 to bring order to the Scramble for Africa, capricious lines on the map demarcated spheres of control for each colonial power. Overnight, the modern African state was born, finding its immediate legitimacy in the Maxim gun (Afigbo 1986, Pakenham 1999).²⁶⁵ The functionality of the African state was sustained briefly by colonialism. After independence, functionality gradually eroded so that by the 1980s, dysfunctional states were more the norm than the exception. Dysfunctional statehood has impeded the Rule of Law in Africa. Derogatory epithets such as ‘fictive,’ ‘vampire,’ ‘predatory,’ ‘ghost’ and ‘quasi’ have been applied to the African

²⁶⁴ Curtin (1995:70) says that ‘as many as a quarter of all people in West Africa belonged to stateless societies at the beginning of the colonial period.’ Even the notion of tribe as a unifying political entity or social identity seems to have been invented only by the advent of colonialism (Southall 1970, Ranger 1983, Young 1986).

²⁶⁵ Subsequently, the ‘overpowering image of strength and authority meant that the coercive powers [of the colonial state] did not require constant application’ (Young 2004:27).

state (Blundo and Olivier de Sardan 2006a, Villalon 1998, Englebert 1997). The state has remained an aberration, an inorganic imposition incapable of inspiring the requisite measure of common consciousness and identity among its citizenry. The spirit of the Rule of Law, as analysed in Chapter 5, has been difficult to inculcate in and by the problematic state.

It is true that positivist legal theory has disparaged the necessity of a popular sense of identity for constituting the state, with Kelsen (1945) asserting that the question of statehood was not psychological but legal. For Kelsen (1945), it was immaterial how the state came to be; what is material is that the citizenry is subject to certain relatively centralized, coercive legal order (constituted by the state). But Kelsen's (1945) postulations go to international legality as distinct from internal legitimacy and coherence. Legitimacy was more the province of natural law philosophers, like Hobbes, Locke and Rousseau, who looked towards notions of social contract as the foundations of sovereignty. In Africa, where the state was a sudden and arbitrary construct, the semblance of a constitutive social contract has been conspicuous mainly by its absence.

We have seen the thesis of political scientists like Chabal and Daloz (1999) that prevalent 'neo-patrimonial' rationalities of African society are contrary to the functionality of a modern state. Ellis (1996) advances a historical explanation, linking those rationalities to the stateless nature of pre-colonial Africa. He says that taking a *longue duree* perspective, there are similarities between pre-colonial currents of

African history and the contemporary events.²⁶⁶ It was a mistake to think that Africa's older history was wiped out by the creation of the colonial state and its assumed consolidation after independence. The prior patterns survived in the collective mentalities, 'the fabric of social institutions or forms of collective activity' (Ellis 1996:10). As the modern forms of statehood fail them, Africans are responding to the urgent need for new structures in contemporary stateless societies by 'inventing, cobbling together pieces, or half-remembering from the past' (Ellis 1996:11).

8.8.3 Public-choice Theory Justified

Even if historicity, social contract and a common consciousness cannot be proven empirically as pre-requisites for successful modern statehood, the fact is that the state in Africa has so far failed, at least by the measure of what states do elsewhere. To the extent that it is dysfunctional, the African state bears out public choice theory. As propounded by Buchanan and Tullock (1962), public choice theory conceives of public officials as self-interested individuals who invariably act in their own interest. In contrast to the marketplace where self-maximisation leads to aggregate profitability, the pursuit of self-interest in political decision-making produces pathology in the form of 'free-riding' and 'rent-seeking' by politicians, voters, bureaucrats and recipients of public funds (McGuire and Olson 1996, Olson 1971, Buchanan and Tullock 1962). Public choice thus condemns public ownership and management as leading to Hardin's (1968) 'tragedy of the commons' where

²⁶⁶ Braudel's concept of 'history of the *longue duree*' is a long term view of history. It is a history that enquires into wholesale patterns over centuries and therefore 'appears unchanging compared with all the histories which flow and work out themselves out more swiftly, and which in the final analysis gravitates around it' (Braudel 1969:74)

individuals acting out of rational self-interest run down the commons but manage their own private property well.

Despite being a theory that claimed the empirical high ground, public choice was always assailed by critics who sought to provide scientific evidence to the contrary (Chong 1996, Starr 1988). Critical scholars like Green and Shapiro (1994) have tried to show that in the real world, markets do not always work and governments were not always systematically constrained towards dissipation of value. Numerous statistics could be provided from public-sector activity in developed countries that negated the absolutism of public-choice theory (Starr 1988). In the African state however, the dark scenarios predicted by public choice theory were being played out to the letter. It was not just theory or intuition that private ordering could achieve better results than the state. Here theory coincided with reality. For whatever reason, statehood in Africa was a parody of the term and perennially subject to capture by self-serving interests.

Modern statehood is inextricable from the modern legal form. Modern law 'can affect social order only if it has behind it the organised force of the state' (Trubek 1972b:6). The defining organs of the modern legal form – executive, legislature and judiciary – are also the defining organs of modern state. Perhaps then in Africa or at least in some parts, there is merit in exploring, as Rothbard (1978) suggests, curing law of the state and therefore of modern law as we currently know it. Yet, this dissertation does not prescribe doing away with the state as *the* solution or even a solution.

Like the anarchists George (1978) and Clark (1978), this dissertation presents the opinion that prescribing any alternative form undercuts the argument. The appropriateness of new forms will depend on each society's subjective circumstances, rationalities, wisdoms and discourses, in which case there is scope for a plurality of forms (Clark 1978). There is little value at this stage in trying to predict what exactly they will come up with and how it is going to work. Unlike a lot of anarchism however, this dissertation does not profess a universal disenchantment with authority, the modern legal form or the state. The dissertation argues that only in certain instances, particularly in Africa, has it been evident that the problems of the Rule of Law may be better achieved outside the modern legal form itself. The form has failed to do what it does in the West and alternatives are required that are more in tune with local logics and rationalities. Thus it is acknowledged that the modern legal form has worked relatively well in the West. The outcomes of applying the modern legal form in the West, whether called the Rule of Law or any other name, can be used as minimum standards against which the effectiveness of alternative legal forms in Africa is measured.

8.8.4 Legitimising Alternative Forms of Modern Social Organisation

Anarchism has its most utility in the sense of a mood or attitude rather than a prescription for specific, social, economic or political arrangements (Gaus and Chapman 1978). As an intellectual attitude, it permits the conception of forms of social ordering other than the familiar modern form that is Western in origin. The crises of state authority and the Rule of Law in parts of Africa demands openness to the emergence of non-state forms of political authority and the evolution of

‘indigenously authentic “states”... that reflect empire-like systems of decentralised rule’ (Forrest 1998:56). Even if in the end, there is found to be a convergence between the forms that Africans evolve and the Western form, there will still be a crucial difference from the current situation. The difference will be the perception that the new forms have been home-grown. Africans would have nurtured their legal forms from gestation to maturity, acquiring in the process collective knowledge and shared wisdoms about the mores of the end product. This would provide a legitimising myth, much like the ones on which there is convergence in successful modern states.

The utility of such legitimising myth for the African psyche is captured by Jahn (1961) who argues that the Africa which early ethnologists presented is a legend but one in which everyone believed. Similarly, in the context of neo-African culture, African tradition, including as expressed in evolving new forms of indigenous governance, may also be a legend but it is legend which, according to Jahn (1961), African intelligence is entitled to declare as authentic. The new forms therefore have a better potential (than current forms of modernity) to be legitimated by their appearance as ‘an unbroken extension, as the legitimate heir of [African] tradition’ (Jahn 1961:18). As Jahn (1961:18) says, ‘only where man feels himself to be the heir and successor to the past has he the strength for a new beginning.’²⁶⁷

²⁶⁷ Mudimbe (1988:192-193) draws on Jahn’s arguments to validate the legends invented by negritude studies about Africa’s past. These legends challenge the ‘truth of the Western enunciative space of models’ which depict Africa in terms of ‘deviations from the normativeness of a history or of rationality.’ ‘The new corpus’ argues Mudimbe (1988:193) ‘should reflect the local authority of systems of rules, signification, and order.’

8.9 SUMMARY

The possibility (or necessity) of an African alternative to modern law can be argued on premises other than that customary law was evidence of Africans having historically evolved a different form of law from Western law. This other argument, drawing on the concept of ‘alternative modernity,’ simply points to the contemporary problems of the Rule of Law in Africa and says that those problems are sufficient by themselves to indicate that Africa’s modernity is different from Western modernity. Alternative modernity is a polite euphemism for the failure of certain places to achieve the material progress implied by Western modernity. However, the derogatory connotations of the term should not prevent the realisation of its greater conceptual possibilities.

Modernity was previously held monolithic and deriving from a Western norm. All its various aspects were integrated and worked together as one package. There could be no modernity if there was lag – if any of the aspects did not converge towards the Western form. Modernisation theories which held sway in development discourse between the 1950s and 1970s took Western industrial nations as referent and defined ‘modernisation’ as achieving a mixed bag of elements that included industrial economies, scientific technologies, liberal democracies and secularism. The subsequent lack of global convergence towards a Western norm led to acknowledgement that perhaps modernity was not a homogenizing project following a uniform plan and a single trajectory.

By the emergent conception of alternative modernity, technological achievement must not necessarily be premised on the same cultural values and institutional forms as in the West. The result is a pluralisation of modernity. Once modernity is rendered plural, there is little justification for regarding the modern (Western-style) legal form as the alpha and omega of 'law' for achieving the Rule of Law. The notion can then be more easily entertained that there can be alternatives to the modern legal form. Anarchism suggests basic alternative frameworks. Experience in the failed states of Africa indicates that the kind of alternative forms of 'law' proposed by anarchism might not be as unrealistic or undesirable as they would seem in places where the modern legal form works well.

The nature of the new forms will depend on each society's subjective circumstances, rationalities and discourses in which case there is scope for a plurality of forms. There is little value at this stage in trying to predict what exactly different African societies will come up with and how they are going to work. Unlike a lot of anarchism however, universal disenchantment with authority, the modern legal form or the state is not professed herein. Only in certain instances, particularly in Africa, has it been evident that the problems of the Rule of Law may be better achieved outside the modern legal form itself. The form has failed to do what it does in the West and alternatives are required that are more in tune with local logics and rationalities.

CHAPTER 9 – CONCLUSION

‘After a while the truth of the old tales changed. What was before, became false afterwards’ (Kuba elder as quoted by Vansina 1978:19).

‘The peculiarly African character is difficult to comprehend, for the very reason that in reference to it, we must give up the principle which accompanies all our ideas – the category of universality’ (Hegel 1956:19).

‘What is needed is to move away from the fixation on how Africa ought to be and how to force-feed Africa into that state of being. Development must take the people not as they ought to be but as they are and try to find how the people can move forward by their own efforts, in accordance with their own values’ (Abonyi 2009:46).

9.1 INTRODUCTION

This chapter concludes the dissertation. The chapter starts by revisiting the research questions and establishing that they have been answered. The chapter then provides concluding remarks based on the findings in the dissertation. The chapter thereafter explains the dissertation’s contributions to knowledge before ending with the possible areas of further research that emanate from the dissertation.

9.2 SUMMARY OF DISSERTATION

9.2.1 Research Questions Revisited

The main research question was stated in section 1.2 (Chapter 1) as follows:

‘Can it be demonstrated on the current state of knowledge that the Rule of Law in Africa needs and can be built on another type of law?’

The following subsidiary questions were presented in section 1.2 as flowing from the main research question:

‘Can it be demonstrated that the Rule of Law is not necessarily the Rule of modern law?’

‘Are assumptions of the Orthodoxy (on how the Rule of Law is achieved) falsifiable?’

‘Can it be demonstrated that the Rule of Law by another type of (‘modern’) law is possible in Africa?’

9.2.2 Meeting the Research Aim

The aim of research (as stated in section 1.3) is to justify an alternative discourse of the Rule of Law in Africa by answering the research questions in the affirmative. Meeting that aim requires demonstrating that on the current state of knowledge, it is plausible that the Rule of Law needs another type of law to thrive in Africa and that such other law is possible. The dissertation set about meeting that aim in the following manner.

Chapter 1 introduced the dissertation including the research questions and aim. The chapter provided the background to the research by observing that despite the substantial resources poured into Rule of Law reform in Africa, results have been so disappointing that a departure from the Orthodoxy is justified.

Chapter 2 reviewed the treatment of the Rule of Law in development literature and identified gaps in knowledge of how the Rule of Law is established in societies that do not have it. Those gaps include the question of whether modern law is a prerequisite for the Rule of Law.

Chapter 3 explained the research methodology. It justified Africa as unit of analysis by locating that unitization within an established research tradition. The chapter also explained critical discourse analysis and rationalized its use in the dissertation to challenge the hegemonic discourse posed by the Rule of Law Orthodoxy on the centrality of modern law to the Rule of Law.

Chapter 4 answered the first subsidiary research question in the affirmative. The chapter deconstructed the 'Law' in the Rule of Law to show that it was not synonymous with modern law, particularly when conceptualised in functional terms. The deconstructive approach was premised on a historical discourse analysis of the term 'Rule of Law' which showed a consistent allusion more to a law of reason rather than the law of man.

Chapter 5 answered the second subsidiary question in the affirmative. The chapter falsified the Orthodoxy on establishing the Rule of Law. The chapter used coups and corruption to demonstrate the futility of the Orthodoxy in the absence of systemic fidelity to modern law in Africa.

Chapter 6 consolidated the argument in Chapter 5 by using an Afrocentric critique of modern law to challenge the universal rationality of modern law and its hegemony over 'law' in the Rule of Law Orthodoxy. The chapter used existing critical legal theory to corroborate the anti-foundational treatment of modern law by the Afrocentric critique.

The third subsidiary question was the subject of Chapter 7 and Chapter 8 of the dissertation, both chapters combining to answer the question in the affirmative. Chapter 7 presented African customary law as a different form of law from modern law and concluded that the different legal cultures and rationalities attending African customary law continue to undermine the success of modern law in Africa. Chapter 8 demonstrated that even if the argument on customary law is not beyond reproach, the concept of 'alternative modernity,' provides yet another theoretical framework for rationalising Africa's need for another type of modern law. The chapter used alternative modernity to argue that Africa's experience of modernity is different from the West's so that a different form of law from modern Western law is probably required in Africa to produce the Rule of Law outcomes that the West enjoys. The chapter then had recourse to anarchism in order to sketch out broad possibilities of how this kind of alternative modern law might work.

By answering the three subsidiary questions in the affirmative, the dissertation answers the main research question – on whether it can be demonstrated that the Rule of Law in Africa needs and can be built on another type of law - in the affirmative. The research aim, which is to answer the research questions in the affirmative, has therefore been met. The following concluding remarks are justified on the analysis, argumentation and findings in the dissertation.

9.3 CONCLUDING REMARKS

9.3.1 Futile Orthodoxy

Despite all the resources poured into Rule-of-Law programmes across the world and particularly, in Africa, the results have been disappointing. Where the Rule of Law

did not previously exist, it remains mysteriously difficult to establish. The Rule-of-Law Orthodoxy continues to insist that the modern legal form – a model of law and social organisation originating in Western modernism – is the only way to the Rule of Law. The modern legal form is the only form which qualifies as law and is therefore synonymous with the Rule of Law. This means from the onset that there is no debate about whether the modern legal form should be done away with in the Rule of Law.

If the Rule of Law is conceived of only in terms of the Rule of modern law, then the rationale of the Rule of Law Orthodoxy will be unimpeachable. In that event, ‘law’ only qualifies as such in its familiar form of modernity. The rule of any other form is not the Rule of Law and would not ultimately sustain the cornucopia of the benefits attributed to the Rule of Law. Law being synonymous with only the modern legal form, the key to establishing the Rule of Law in areas where it is lacking would be to try to entrench a culture of legality that works with the modern legal form to achieve the Rule of Law. Thus, the emphasis of the Rule of Law Orthodoxy on training government officials and civil society in the logics of the modern legal form would be justified.

However, popular usage of the Rule of Law does not appear to confine the term to running a society by the modern legal form only. Popular usage is of the Rule of Law as a functional concept, where the ends, if achieved, would justify the means. In such usage, the ‘Law’ in the Rule of Law does not necessarily coincide with the modern legal form. Once the Rule of Law is perceived in such functionalist terms, it opens up the terrain for exploring the achievement of the Rule of Law by means other than

modern law. The conception of such an alternative to modern law would hardly be an intellectual exercise undertaken merely for its own sake. The futility of attempts at forcing into the consciousness of Africans the logics by which the modern legal system is used to obtain the Rule of Law has resulted in 'theory exhaustion' within the ambits of conventional development discourses. All the competing theories (including heretical oppositions) within cognition of the development orthodoxy and originating in Western social theory have been tried to little avail. This must surely beg the apocryphal enquiry of whether there is not an alternative to the modern legal form.

It could be of course that even if such an alternative were found, the problem is really a lack of a culture of legality so that whatever legal form was used there would still be no Rule of Law. But several studies have shown that in Africa there is an unnoticed obedience to a 'law' that resides outside the ambit of modern law. If this is true, then it seems easier to concentrate on succumbing to the alternative 'law' that Africans gravitate towards with a view to making that the basis of social ordering and therefore of the Rule of Law (as defined in functionalist terms). It is probable that the logics of this Other form of law are incompatible with those of the modern legal form so that the existence of both logics, in competition, within the same terrain and at the same time, results in the problems of law and order in Africa.

9.3.2 African Otherness

The neo-patrimonialism and pre-bendialism explanations of African society demonstrate that Africa's indigenous rationalities and logics perennially undermine

the wisdom of organisation according to modern law and the modern state of Weberian rationality. Yet, there is still too little in any of these studies suggesting that those ‘peculiar’ African logics and rationalities, as embedded as they are, should be privileged and given vent. There is unanimity, even among the studies most sympathetic to the Otherness of African rationalities, that those rationalities are deviant and destructive and can never be the basis of any meaningful or sustainable re-configuration of society to achieve the outcomes called the Rule of Law. The ‘is’ of contemporary African society must therefore give way to the ‘ought’ of modern social theory and not the other way round.

The impact of social evolutionist theories, even as they are disclaimed across all spectrums of the social sciences, still runs deep. The future everywhere outside the West must be towards where the West is or not at all. Any Other, if it exists, is merely in progression along a road already travelled by the West and must be hastened along that road. Even where it is truly believed that the writ of social evolution is false, contemporaneous acknowledgement that the Western will to Truth is stronger and more accomplished than any other neutered debate on the utility of alternative models.

The ability of Western civilisation – particularly its science and technology – for innovation, re-generation, development, assimilation and expansion is so superior to other civilisations that the path to Truth must surely reside in Western models. This seems self-evident. Any comparisons on the basis of ‘show me yours and I will show you mine’ tip the scales in favour of Western modernity given the critical mass and reach of its product. In law, as in science and technology, no other system, model or

configuration has been proven to succeed, endure, spread and conquer as that of Western modernity. Not only is its superiority obvious for all to see but the incomparable density of record that describes, explains, analyses, categorises, criticises and problematises it not only consolidates it but centres it in the realm of human cognition and relegates any other discourses to the margins.

Claims of openness to alternative models – to the Other - reside mainly in rhetoric and are usually tokenisms that are more deprecatory than liberating. Such claims are often condescending and made more for legitimating the studies that they preface than with any real intent to put the Other on the same pedestal as the Same. Concessions to the existence of an alternative modernity are made either to accommodate the arrival of a previous Other at the position of the Same by a slightly quicker route than expected or to provide a polite euphemism for the inability an Other to ever attain the seminal modernity of the Same. Yet, it is from the acknowledgment that an Other does exist, no matter how deprecatory that acknowledgement may be, that discursive windows may be opened for liberating Otherness from the hegemony of the Same.

9.3.3 Failed Universality of Western Modernity

Critical perspectives contained in poststructuralism, postmodernism and postcolonialism, even if they are regarded as ‘critiques from within,’ challenge the Western will to Truth and suggest with varying degrees of success the arbitrariness of its schemes of signification. While other paths to Truth have neither been so self-reflexively developed nor shown a comparable capacity for hegemony as the Western one, recognition that other paths actually exist immediately raises doubts about the

inevitability of the Western experience. The continued obstinacy of those other paths, in the face of the evident advantages and hegemonic power structures of Western modernity, raises the suspicion that the Western way is simply an Other among many the various Others. It is a contingency of culture, geography and history, rather than inevitability and universal human destiny. Its current position of eminence might be only transient so that in time it yields to other civilisations and models. The Orient, historically constructed into an anti-thesis of Western civilisation, is already showing signs that it might be the next locus of global eminence.

Modern law is one of the definitive features of Western modernity and perhaps more than any other feature, typifies Western modernity's claims to universality. Continuing problems of the Rule of Law in most of Africa signal the contingency and cultural specificity of modern law. The Rule-of-Law Orthodoxy has essentially consisted of efforts to replicate in Africa, the place and function of modern law in the West. This approach has been persisted with despite criticism which was first broached with earlier Law and Development efforts in the 1970s that the Western legal model does not always travel well. Modern law is so central to Western society's understanding of social organisation and conceptions of order as well as the rationale for such organisation and order that acknowledgement of that law's false necessity threatens irruption of the entire basis of Western society. Critical legal theorists highlighting the false necessity of modern law have been met with vociferous opposition that barely conceals apprehension of the unravelling of the theoretical edifices on which order and certainty in Western society have been constructed and justified.

Law in its modern form is regarded as necessary not just for order in society but also, ultimately, for the modernity of society itself. The wisdoms of the great Western philosophers regarded as harbingers of Western modernity, like Hobbes, Rousseau, Locke, Montesquieu and Weber, converge on modern law as the most rational legal form that has been historically manifest. Outside of modern law is retrogression at best and a possible ultimate return to the ways of primitive man. This convergence on modern law as best practice for social ordering is regarded as applicable not only to a specific cultural setting but to mankind as a whole. Empirical validation of theory seems to have been borne out by the ever increasing power, authority and global hegemony of the Western model of law and social organisation since the Middle Ages.

When modern law does not travel well outside of its Western origins, the problem is usually thought to be with those foreign places it is visiting and not with law itself. To agree that the problem is modern law would mean that contrary to a long line of thinking from at least the Enlightenment onwards, what the West has achieved and become is not down to any unique dynamic which pre-destined Western man to be the harbinger and custodian of the universally rational and scientific, the best path to Truth. Rather, the pre-eminence of the West is down to chance and is only temporal. In that case, Western modernity is neither the inescapable destiny of mankind nor even certain of maintaining its hegemony into the future. Given the centuries' old self-assurance of Western science and philosophy in the inherent wisdom and superiority of their schemes of knowledge and constructions of reality, it is understandable that the prospect of such fundamental irruption would be met with considerable apprehension and fierce opposition.

9.3.4 Theory Exhaustion in Africa

Increasingly however, as the obduracy of Africa exhausts Western social theory on how modern law works and shapes society, fundamental assumptions grounding theory can no longer escape questioning. Where challenges from within could be dismissed by pointing to the predictability and uniformity of outcomes – the match of theory with result - in Western society, the situation outside the West does not lend itself to the same defence. The intractable problems of the Rule of Law in Africa seem to challenge the authority and legitimacy of modern law and any continuing claims that might be made as to its self-evident rationality and universal potential for utilitarianism. The challenges are not just to the necessity of modern law in the scheme of things but also to the rationalisations embedded in ‘settled’ theory of how it does what it is supposed to do.

The jurisprudence of coups in Africa belies the assumption that separating the triad of modern law – the executive, judiciary and legislature – and, in particular, ensuring autonomy of the judicial arm, is necessary for the Rule of Law. Support for falsifying the proposition that the Rule of Law rests on the separation of powers is even provided by some constitutional histories in the West, Britain’s being a notable example. The basis for certitude of the separation-of-powers doctrine has never been fully explained, except perhaps to hark to the limited (and easily falsifiable) empiricism of Western history and outcomes. Given the limited geography of observation grounding the doctrine’s genesis, its acceptance betrays the belief that how people relate to each other in a certain part of the world, given certain social

configurations, is either the way that others will do so in other places or is the most rational way that people can relate with each other.

If the same configurations exist in another part of the world and people there relate with each other differently, then that is not normalcy but deviant behaviour. Indeed, the allegation is that where deviance is manifest, then it cannot be the same social configurations in place or deviance would not have existed. As long as that deviant behaviour is still manifest in other parts of the world, then the social configurations have not become the same as those in the base of comparison. Efforts must then continue to ensure that the social configurations are made the same as in those parts of the world used as the base for comparison. Until deviance disappears, then social configurations cannot have been made the same notwithstanding any other evidence to the contrary. This is the sense behind the Rule of Law Orthodoxy.

It is not to be admitted by the Orthodoxy that recurrent coups and embedded corruption (and indeed the intractability of problems of the Rule of Law in Africa) challenge the universal rationality of the doctrines, institutions and structures impleaded as guarantors of the Rule of Law. Rather the insistence of the Orthodoxy is that those doctrines have not been applied, that the institutions do not exist and that the structures are not in place. Perhaps this is true to an extent but the more the Orthodoxy attempts, and fails, to have those doctrines apply and the institutions grow as expected, the more the case arises that their effectiveness rests on a particularity of rationality and culture. What works with the rationality and in the culture of the Same is found ineffective or counter-productive in the cultures and rationalities of the Other. In that event, it should make more sense to find something else – and there

must be something else – that works positively with the rationalities and cultures of the Other. The monumental obstacle to adopting that approach is that it would require giving up many of the categories of universality underpinning the science of humankind.

Despite renunciation in the social sciences of ‘totalising knowledges’ of the human experience, allowance is made for the Other only long enough to understand enough of it to enable its subjugation and forcing into the pre-set taxonomies of the Same. Thus the discourse of rationality is a homogenising discourse. Human rationality is one and the same. A significant plank of that discourse must be the fear that the bases for social order consolidated at great cost over the centuries will break down if vent is given to a plurality of rationality. There is not an inconsiderable amount of blackmail contained in the resulting proposition which contrives protection of familiar relations of power and seeks to secure them into the future. The coloniser says to the colonised: ‘Rationality must be one; otherwise if it is agreed that there are different rationalities, then we are right to say that yours is inferior; if it is not, how come it did not conquer ours?’ The questioning continues along these lines: ‘And if you have a different rationality, how come your rationality does not have the achievements in making and explaining things, curing diseases, controlling the environment – in short, mastering creation – that ours does?’ Thus rationality is one, only that certain peoples have to be taught how to use it in the same fashion as others who have, for whatever reason, been first able to use it to master the seen universe.

If for the purpose of argument, it is accepted that the problems of the Rule of Law in Africa suggest a plurality of rationalities and that modern law is antithetical to

prevalent rationalities in Africa, the question is whether there is another form or other forms apart from modern law that are more compatible with the prevalent rationalities in Africa. The enquiry accepts that the human condition and outcomes of social organisation in Africa currently leave a lot to be desired. There does not have to be a comparison with the West before it becomes clear that too much of Africa is beset by poverty of the human condition and a lack of those utilitarian outcomes now called the Rule of Law. If the Orthodoxy has not been able to tap into African rationalities with modern law, then the answer lies outside modern law. The paradox is that to have the Rule of Law in the event, we would have to dispense with 'law' properly so-called. The terror attending that prospect is immediately lessened if it is accepted that the reverence for what currently qualifies as 'law properly so-called' might rest on little more than a semiotic illusion.

9.3.5 Another Law for the Rule of Law

Even if some form or the other of something called 'law' is needed for the regulation of human conduct and the existence of society, it does not necessarily have to be 'law' in the modern legal form. At least one body of thought, anarchism, has countenanced the notion that social regulation does not require modern law – law properly so-called – and will probably be more effective without modern law. If modern law is a cultural or periodic contingency, then it cannot be transcendental either as the 'law' in the Rule of Law or the 'law' by which the Rule of Law must be achieved. Other forms might be more suitable, if not in time then in some places. The fact of African customary law serves notice that there can be another legal form.

Conventionally, African customary law is regarded as the law of the past – a law suitable in an earlier stage of social evolution but anachronistic in a modern world. It was not even law but the precursor of law, ‘law’ having certain characteristics that it did not. The subsistence of this precursor into modern times, as a separate and distinct system, raises questions about the conventional wisdom on its relationship with modern law. African customary law, invented, created or mutated, might not be a precursor of modern law; it might just be a parallel form of law. The logics of customary law can be demonstrated in many ways to be different from that of modern law. Those logics speak to not just a different role for law in society but also to a basis for organisation of the society that does not necessarily involve modern law (as we know it) and the modern state. Transfigurations of the modern state even in those places in the world in which it has been successful indicate that the state form is not the ultimate form of social organisation. Given that the modern legal form is inextricable from the modern state, there should be sufficient cause for suspicion that the modern legal form is neither the ultimate form of law nor what Africa currently needs.

Modernism’s encounter with new forms of social regulation in Africa’s dysfunctional and collapsed states can be likened to the colonial encounter with African customary law. Customary law and therefore, African modes of social regulation, were regarded as an aberration for the absence of an autonomous system of social regulation that was distinct from politics and religion and was administered by specialists. In the same manner, the new modes of social regulation that have managed to restore order in the statelessness of certain parts of Somalia are being looked upon as a temporary expedience and not sustainable in ‘proper conditions.’ Such new modes of social

regulation appear across Africa in varying degrees, even in areas in which the epiphenomena of the modern state still exist. They are said to be evidence of Africa's 're-traditionalisation', a term laden with negative connotations. If the traditional is backward, then re-traditionalisation is a return to backwardness and something to be worried about. Yet again, although examinations of re-traditionalisation are routinely prefaced by denunciations of social evolutionism, the worry at a perceived return to African traditional ways bespeaks the embedding of social-evolutionist understandings of the form that 'progress' takes.

Seeing emergent forms as retrogression prevents recognition of the possibility that this might actually be postcolonialism in practice and something to be celebrated not deplored. It might be Africans spontaneously reaching inwards, in reaction to the failures of colonial edifices of modernity, to find legitimate forms of governance that speak to African understandings of the world and how Africans want to run themselves. Characterising the emergence of non-conventional forms as a process of re-traditionalisation also obscures the fact that these forms represent a neo-culture rather than a return to pre-colonial traditions, many of which are unknown to a current generation of Africans who knew neither the pre-colonial nor the colonial. If Africans themselves regard what is happening as a 'return to tradition,' that would probably be the construction of a legitimising legend that constitutes emergent forms into direct descendants of Africa's indigenous forms and logics. There should be nothing wrong in that to the extent that it instils in the new forms of law and social organisation a legitimacy that is lacking in modern law.

The research question was whether the problems of the Rule of Law in much of Africa could be interpreted as the failure of modern legal form, rather than its insufficiency, in those areas. If a plausible argument can be made for an affirmative answer to that question, then the Rule of Law should be predicated on more suitable alternatives for the region. It should be possible by now to entertain the argument that it will take a form of law that is different from modern law to contend with the peculiar rationalities at the core of African social realities. If the neo-patrimonialism which constitutes those rationalities is the norm rather than the exception in Africa, and those rationalities are in conflict with the logics of modern law, then Africans must begin to find those forms of organisation and that model of law which will work with neo-patrimonialism to produce the Rule of Law. This is of course based on the supposition that Africans really do want a different life, inculcating the Rule of Law, and are not satisfied with the current results of the modern legal framework juxtaposed on a psychology of neo-patrimonialism.

9.3.6 Neo-traditionalisation of Law in Africa

Movement towards a form or forms of law of Africa which will work positively with African rationalities will be neo-traditionalisation rather than re-traditionalisation. Just as grudging recognition of traditional law challenged the conception of 'law' by exclusive reference to the Western norm, the neo-traditional legal forms might challenge the hegemony of the modern legal form. This time however, rather than existing on the margins of 'law' in theory and practice as customary law did, the neo-traditional legal forms should become the dominant legal forms by which the Rule of Law is sought to be established. In that way, actualisation would have been

achieved of what is currently little more than the rhetoric, in development practice, that Africa should look towards its indigenous norms for renaissance.

9.4 RESEARCH CONTRIBUTIONS

9.4.1 Theoretical Contributions

Theoretically, the dissertation has sought to make an original contribution to knowledge by introducing a novel baseline perspective to the Rule of Law in Africa. The perspective is that on current knowledge, the Rule of Law in Africa might profit from an Africa-centred alternative to modern law. The dissertation has held up modern law as not only a dispensable variable but also a fundamental problem in the search for the Rule of Law in Africa. This theoretical framework has been presented as credible *alternative* to current Orthodoxy which has constituted modern law a constant in Rule of Law practice. The dissertation does not seek so much to oust the Orthodoxy as to demonstrate the plausibility of an alternative argument.

It has not been attempted to provide the definitive answer to Africa's problems of law and development. No specific strategy for developing the Rule of Law has been outlined in the dissertation. No attempt is made to prescribe specific remedies, much less a cure-all one, for the problems of the Rule of Law in Africa or elsewhere. Rather, what has been contributed is a new theoretical framework in which innovative solutions to those problems can be sought.

9.4.2 Practical Contributions

The dissertation has implications for policy formulation and practice by seminally challenging the theoretical bases of current strategies for establishing the Rule of Law. Fundamental assumptions taken for granted in Rule of Law practice have been scrutinised in the dissertation and falsified. The dissertation should therefore give cause for pause to Rule of Law practitioners in Africa about the veracity of current reform strategies and possibly lead to a re-evaluation, if not outright abandonment, of some of the key approaches to Rule of Law reform.

9.4.3 Actualisation of Development Rhetoric

Even within the Orthodoxy, there has been long-standing rhetoric on the need for Africa to look inwards to its indigenous norms and practices for achieving development ends such as the Rule of Law. There has however scarcely been any attempt at developing a theoretical or process framework for actualising the rhetoric. The dissertation makes an original contribution in that regard by providing the building blocks of theory to justify the rhetoric and provide a framework within which realistic solutions can be formulated for the Rule of Law in Africa.

9.4.4 Contributions to African Socio-legal Research

A dearth of Africa-focused socio-legal research has also been identified in the dissertation. The dissertation contributes a quota (albeit a small one considering the paucity of the field) to plugging the gap in African socio-legal research. The dissertation integrates perspectives from law discourse with those from other

discourses in order to critique the Rule of Law Orthodoxy and suggest an alternative baseline perspective for approaching the Rule of Law in Africa. It provides a line of socio-legal research that is amenable to development by future research as explained in the following section.

9.5 LIMITATIONS AND FUTURE RESEARCH

The dissertation has been something of a one-sided argument: the stating of a case against the Rule of Law Orthodoxy. This is an accepted approach to theoretical research. Critical discourse analysis, the methodology adopted for critiquing the Rule of Law Orthodoxy, is implicitly one-sided so as to achieve the purpose of challenging a hegemonic discourse. Further research might however build on the foundations provided by the dissertation to investigate the theory in the dissertation, or particular aspects of it, in a comparatively more two-sided way.

Analysis of the Rule of Law has been conducted at a very broad level both in terms of theoretical concepts analysed and the geographical unit ('Africa') that formed the basis of analysis. Further research might isolate particular theoretical concepts for more detailed analysis. Research might also be conducted within specific countries or even smaller communities in Africa to test the broad theoretical positions taken in the dissertation. Within this further research, there is scope for investigation of how the theoretical positions might be translated into black-letter policy and practice initiatives.

The purpose of this dissertation has been to show that there is as much theoretical plausibility for working to consolidate the modern legal form in Rule of Law projects as there is for working in the opposite direction and looking for alternatives to modern law. The dissertation has sought the basis for a new trail of thought that is contrary to current Orthodoxy but the exploration of which might bring gain in the difficult task of establishing the Rule of Law. The theory that not only can there be workable alternatives to modern law but that this might be what the Rule of Law needs in Africa is mapped here on a broad level. Like the theory itself, the several interconnected dots in that map are amenable for further research, jointly or severally. Rather than the end of the research therefore, this is merely the end of a beginning.

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