Journal of African Law, 66, 3 (2022), 367–389 © The Author(s), 2022. Published by Cambridge University Press on behalf of SOAS University of London.
doi:10.1017/S0021855322000092 First published online 5 April 2022

Re-Conceptualizing the Rule of Law in Africa: Metaphors of the Tool and the Causeway

University of Nigeria, Enugu, Nigeria
uchechukwu.nwoke@unn.edu.ng

University of Nigeria, Enugu, Nigeria
festus.ukwueze@unn.edu.ng

Jirinwayo Jude Odinkonigbo***
University of Nigeria, Enugu, Nigeria
jude.odinkonigbo@unn.edu.ng

Clara C Obi-Ochiabutor****
University of Nigeria, Enugu, Nigeria
clara.obi-ochiabutor@unn.edu.ng

Abstract

The rule of law embodies two basic metaphors: the tool and the causeway. Under the tool metaphor, the rule of law is applied more as an instrument of power, while in the causeway metaphor, the law emphasizes a form of relationship between state and society where "ground rules" are established, not just for electoral politics but for the daily transactions and commercial necessities of individuals. The choice between these two metaphors has always been crucial for the legal and political development of democratic states. This article argues that in many African states, the rule of law is presently used as a tool, and contends that if this superficial perception is discarded, in favour of concentrating instead on the more expansive causeway metaphor, the continent will stand the chance of building more modern democratic states that can compare favourably with other consolidated democracies across the globe.

* BL, LLB (Nigeria), LLM (Wales, UK), PhD (Kent, UK). Senior lecturer and acting head, Department of Commercial and Corporate Law, Faculty of Law, University of Nigeria (Enugu Campus).

** LLB, LLM, PhD (Nigeria). Senior lecturer, Department of Commercial and Corporate Law, Faculty of Law, University of Nigeria, Nsukka.

*** LLB (BL), LLM (Yale), LLM (Dalhousie), PhD (Osgoode). Senior lecturer and head, Department of Property Law, University of Nigeria (Enugu Campus).

**** LLB (BL), LLM, PhD (Nigeria). Lecturer, Department of Private Law, Faculty of Law, University of Nigeria (Enugu Campus).

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

Keywords
Rule of law, rule by law, metaphor of the tool and the causeway, modern democracies, Africa

INTRODUCTION

Few concepts are as fascinating as the rule of law.[1] Its genius lies in the subordination of rulers to the law and due process,[2] and is one ideal in an array of values that dominates liberal political scholarship.[3] The most important demand of the rule of law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms, rather than in an arbitrary, ad hoc or purely discretionary manner on the basis of their own preferences or ideology. It insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorized action by those in power.[4]

A comprehensive analysis of the concept of the rule of law shows that it may be used in two different ways by the state: metaphorically, as a tool or as a causeway. A metaphor is a figure of speech that makes an implicit, implied or hidden comparison between two things that are unrelated but which share some common characteristics; metaphors matter because they frame the way we think about problems. When states rule by or through laws, by complying with formalistic and positivist standards for the law's adoption, the rule of law is merely a tool. However, law as a tool is not the only possible metaphor (in fact, this imagery is inimical to struggling democracies);[5] the rule of law can also be viewed as a causeway. In a defective governance system, in which reform is fragmentary, fractional and costly, this causeway metaphor is far better for theorizing the category of rule of law that is most important for states to achieve their avowed objectives as emerging democracies. This metaphor emphasizes the essentials of a new form of relationship between state and society, compared to the hierarchical system of a country's authoritarian past (and possibly present). It establishes ground rules, not just for electoral politics but for the daily transactions and commercial necessities of individuals. It promotes civil and economic societies in which citizens can

1 BZ Tamanaha *On the Rule of Law: History, Politics, Theory* (2004, Cambridge University Press) at 3.

2 M Mutua "Africa and the rule of law" (2016) 13/23 *SUR: International Journal on Human Rights* 159 at 160, available at: <https://sur.conectas.org/en/africa-rule-law/> (last accessed 29 July 2021).

3 Other ideals include democracy, human rights, social justice and economic freedom.

4 J Waldron "The rule of law" in EN Zalta (ed) *Stanford Encyclopedia of Philosophy* (Summer 2020 edition), available at: <https://plato.stanford.edu/entries/rule-of-law/> (last accessed 24 April 2020).

5 J Kahn "The search for the rule of law in Russia" (2006) 37 *Georgetown Journal of International Law* 353 at 373.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

be secure in their knowledge of which activities are legitimate and which are proscribed. Crucially, it fixes clear standards for law beyond its adoption by a majority in parliament.[6]

In recent times, there appears to be an increasing interest in the application of the rule of law in Africa and a broad consensus that it is essential to a consolidated modern democracy.[7] Nevertheless, while accepting that the concept is as integral to effectively functioning modern democratic systems[8] as electoral politics and a robust civil society, the concept has not been subjected to the same rigorous study as those other, more popular social-science variables.[9] Analysts in Africa usually limit their interest in the rule of law to its effect on partisan elites negotiating the "rules of the game" in political institutions (executive, legislature and judiciary). This reductionism (where the concept is seen only as a tool for governance) also manifests itself in the willingness to proclaim the existence of the rule of law merely on the positivist evidence of the adoption of new laws and codes and the establishment of judicial institutions. Nevertheless, the rule of law is not the sort of institution that can be established simply by "putting pen to paper or setting bricks on mortar".[10]

This article looks at the value of the rule of law as an institution in a continent that asserts itself, in most of the constitutions of the constituent states, to be a democratic, rule-of-law region. Exactly what kind of institution is the rule of law? What is the extent of its value in an African continent which, politically, is apparently wobbling? How can we measure the existence, let alone the efficacy, of the rule of law in such a region? While it appears plausible to think that there is generally strong (even if conjectural) backing for rule-of-law principles in Africa, legal and political elites on the continent seem to restrict themselves to debilitated perceptions of the full strictures of this institution.

6 Ibid.

7 See for example, Mutua "Africa and the rule of law", above at note 2 at 160; V Bunce "Comparative democratization: Big and bounded generalizations" (2000) 33 *Comparative Political Studies* 703 at 714 ("Without rule of law, democracy cannot be fully realized"); T Carothers "The rule of law revival" (1998) 77 *Foreign Affairs* 95 at 99 ("In many countries, people still argue over the appropriateness of various models of democracy or capitalism. But hardly anyone these days will admit to being against the idea of law.").

8 For the purpose of this article, a modern democracy (as opposed to the ancient democracy of the Greek city states, for instance) is taken to mean a state where there is representation; free and fair elections; a multi-party system; separation of power; rule of law; and protection of human rights. In this democratic state, there must be a constitution, equality before the law and respect for individual rights and liberties. The government must be transparent and accountable, and there must be institutions of democracy outside the government, such as a free and independent news media and widespread participation in labour unions. See B Barr "The 5 defining features of a modern democracy" (2020) *Dialogue and Discourse*, available at <https://medium.com/discourse/the-5-defining-features-of-a-modern-democracy-d7cd1e6a4b72> (last accessed 18 March 2021).

9 J Kahn "The rule-of-law factor" in J Newton and W Tompson (eds) *Institutions, Ideas and Leadership in Russian Politics* (2010, Palgrave Macmillan) 1 at 161–62.

10 Ibid.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

To many of these leaders, the only metaphor is law as a tool, whereby the value of law depends upon who wields the tool and for what purpose.[11] In the words of Berman, "this instrumentalist metaphor typically takes the form of either sword or shield; or the shaft of a wagon – wielded by or turned against the state".[12]

We focus here on ways through which the rule of law can build a legal causeway for Africa and its citizens. We argue that if the hitherto superficial perception of the rule of law as a tool is discarded, in favour of concentrating on the more expansive and better-suited metaphor of the rule of law as a causeway, the African continent will stand a chance of building more modern and democratic societies that can compare with the developed countries of the world. From this perspective, this intervention contends (consistently with the submissions of McFaul regarding Russian democracy[13]) that for Africa to transform into a viable rule-of-law continent, then political elites, individual judges, lawyers and citizens must embrace an essentially innovative affiliation with the law and make it an instrument of protection that proceeds from society rather than being a tool of control in the hands of the state.

In this context, the article begins with a conceptual analysis of the concept of the rule of law and its application in Africa. It then analyses the two metaphors of the rule of law and contends that Africa mainly applies the metaphor of the tool. The article concludes with the suggestion that there is a need for African states to fully adopt the causeway metaphor if they are to compare favourably with other modern, consolidated democracies.

CONCEPTUALIZING THE RULE OF LAW

Experts and analysts alike frequently use the term "rule of law" without seriously attempting to define it.[14] Undoubtedly, defining the full scope of the term is not that easy, and successive legal scholars have debated its theoretical foundations from every perspective.[15] Professor William Butler observed that the phrase was first devised by AV Dicey in his magisterial treatise *Introduction to the Study of the Law of the Constitution*.[16] That does not mean that Dicey invented the idea; he

11 JM Maravall and A Przeworski "Introduction" in JM Maravall and A Przeworski (eds) *Democracy and the Rule of Law* (2003, Cambridge University Press) 1 at 3.

12 HJ Berman *Law and Revolution: The Formation of the Western Legal Tradition* (1983, Harvard University Press) at 38–39.

13 M McFaul *Russia's Unfinished Revolution: Political Change from Gorbachev to Putin* (2002, Cornell University Press) at 328.

14 V Gel'man "Regime transition, uncertainty and prospects for democratisation: The politics of Russia's regions in a comparative perspective" (1999) 51 *Europe-Asia Studies* 939 at 939; MS Fish "The travails of liberalism" (1996) 7/2 *Journal of Democracy* 105 at 113.

15 HLA Hart *The Concept of Law* (1961, Oxford University Press) at 38; G Marshall "The analysis of British political institutions" in J Hayward, B Barry and A Brown (eds) *The British Study of Politics in the Twentieth Century* (1999, Oxford University Press) 258 at 276–278.

16 WE Butler "Jus and lex in Russian law: A discussion agenda" in DJ Galligan and M Kurkchiyan (eds) *Law and Informal Practices* (2003, Oxford University Press) 61 at 63.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

observed that the principles behind the concept owed their establishment to the "labours of lawyers" from medieval England.[17] In terms of definition, therefore, it is practically impossible to provide an exhaustive treatment of the concept; nevertheless, a number of jurisprudential propositions can be offered in an attempt to understand it. It appears reasonable to think that these propositions have aided in the eventual postulation of the three principles essential to (if not exclusive to or exhaustive of) the meaning bound up in the phrase "the rule of law"; all three principles reinforce one essential meaning. These principles are (i) that the rule of law is supreme and is of a formal and procedural character, addressing the way in which a community is governed;[18] (ii) that all are equal before the law and that all people are equally subjected to the ordinary law of the land administered by the ordinary law courts;[19] (iii) that the general assumptions of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court and, accordingly, requires the existence of an independent and politically neutral judiciary that is broadly accessible to aggrieved individuals. By extension, the establishment of a judiciary by the state is not enough. Rights can be made available to citizens only when they are properly enforceable in the courts of law.[20] In a complex modern society, a class of legal professionals is necessary; so too, therefore, are supporting institutions like law schools, bar associations and other non-state organizations.[21]

17 AV Dicey *Introduction to the Study of the Law* (8th ed, 1982, Liberty Classics) at 114.

18 The formal principles concern the generality, clarity, publicity, stability and potentiality of the norms that govern a society. The procedural principles concern the processes by which these norms are administered and the institutions – such as courts and an independent judiciary – which their administration requires. According to this principle, the rule of law means the supremacy of law over government, or put differently, government under law; see Dicey *Introduction to the Study of the Law*, above at note 17 at 187. As Wade and Forsythe opine, the rule of law requires that government should be subject to the law, rather than the law subject to government; W Wade and C Forsythe *Administrative Law* (7th ed, 1994, Oxford University Press) at 3. This principle requires both citizens and governments to be subject to known and standing laws. The law is binding on the state itself, which remains constrained by it until the law is repealed or changed by some later, properly promulgated law; Berman *Law and Revolution*, above at note 12 at 9. It also means that there can be no offense – criminal, civil, political or administrative – without law. This concept has an ancient formulation: *nullum crimen sine lege, nulla poena sine lege* (no crime or punishment without a law).

19 Dicey *Introduction*, above at note 17 at 189.

20 Dicey *Introduction*, above at note 17 at 199; see also TA Thomas "Ubi jus, ibi remedium: The fundamental right to a remedy under due process" (2004) 41 *San Diego Law Review* 1633 at 1636.

21 On a general note, a serious criticism of these principles is that they make no room for the granting of discretionary powers to governments. According to the principles, creating room for arbitrariness may lead to serious threats to individual freedom. As presently constituted, however, governments operating with discretionary powers have become inevitable. Dicey's view in this regard appears to be outdated.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

The modern conception of the rule of law has drawn from its rich history and from diverse understandings of it at both national and international levels. In this context, the rule of law has become a central focus of domestic and international efforts to promote good governance. In today's world, economic development banks pay attention to the rule of law. For the World Bank, in the contemporary global system, the rule of law tends to cover at least four types of broad objective: the promotion of democracy; economic development and good governance; human rights and social development; and law enforcement.[22] For the United Nations Development Programme (UNDP), the rule of law is not only about guaranteeing rights but is an enabler of good governance and sustainable development.[23] According to the UN system, the rule of law is a norm of governance "in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".[24] It requires measures to guarantee the values of "supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency".[25]

Recent theorizations of the concept of the rule of law have drawn a distinction between "thin" and "thick" versions of it.[26] The "thin" rule of law connotes a mainly procedural interpretation of the notion in which the process of obtaining a "justice outcome" has to meet certain criteria in order to be considered "just" (thus being in harmony with the rule of law). For example, it should be public, impartial and accessible. As this approach says little about the substance of the law, it understandably leads to a focus on the systems, mechanisms and procedures at work at the different stages of the justice

22 L Bhansali "Defining our path to the 'rule of law'" (2012) *Governance and Development*, available at: <https://blogs.worldbank.org/governance/defining-our-path-to-the-rule-of-law> (last accessed 28 January 2022).

23 United Nations Development Programme "The rule of law and human rights – fundamentals for the 2030 agenda and sustaining peace" (2018), available at: <https://www.undp.org/content/undp/en/home/news-centre/news/2018/the-rule-of-law-and-human-rights—fundamentals-for-the-2030-age.html> (last accessed 28 January 2022).

24 United Nations "What is the rule of law" (2021), available at: <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last accessed 28 January 2022). Also see Report of the Secretary-General "The rule of law and transitional justice in conflict and post-conflict societies" (2004) para 6, available at: <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/> (last accessed 28 January 2022); see also CM Fombad "Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism" (2014) 14 *African Human Rights Law Journal* 417.

25 United Nations "What is the rule of law", above at note 24; Report of the Secretary-General "The rule of law and transitional justice", above at note 24.

26 E Van Veen "A shotgun marriage: Political contestation and the rule of law in fragile societies" (2017) *Clingendael*, available at: <https://www.clingendael.org/pub/2017/a_shotgun_marriage/> (last accessed 29 July 2021).

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

chain that ultimately lead to justice outcomes.[27] It also leads to a focus on the institutions involved in each step and their capabilities to ensure due process. This concept of the rule of law offers a practical lens for understanding and working with reality that is premised on procedural normativity. It is reflected in the organizational set-up of a number of international rule-of-law development programmes and international agencies, such as the United Nations Global Focal Point on Police, Justice and Corrections.[28] This theorization aligns more with the tool metaphor of the rule of law.

On the other hand, the "thick" description of the rule of law insists that correct procedure alone cannot bring about justice outcomes because the substance of those outcomes matters as much as how they are arrived at.[29] In this version, it is generally held that justice outcomes must be reflective of the rights and duties conveyed by existing international treaties and / or domestic entitlements and obligations related to human, political and social rights.[30] It is no surprise that this "thick" understanding of the rule of law resonates strongly in UN declarations and statements. In this regard, the 2017 World Development Report contends that "thin" versions of the rule of law have largely given way to "thicker" versions that move from a focus on procedure to a focus on substance, with greater attention to normative standards of rights, fairness and equity.[31] While this may be true at a declaratory level, the reality of much international rule-of-law promotion is that it uses "thin" approaches – meaning a focus on procedure, systems and institutions – to realise "thick" objectives.[32] In other words, activities that improve institutional performance, build capacity and increase access to justice are implicitly assumed or explicitly expected to contribute to bringing about normative change and to be adequate for ensuring the enforcement of this

27 Ibid.

28 One problematic issue here is that in the "thin" approach to the rule of law, justice institutions tend to be understood mostly in the formal sense, ie those that are part of the internationally recognized state. This excludes a significant number of institutions relevant to rule-of-law development, such as the hybrid forms of governance that characterize rule in fragile societies and customary institutions, and the even less tangible webs of relationships that connect state, hybrid and customary institutions. It exemplifies how the assumption of the existence of a universal meaning of the "rule of law" is equated with a particular institutional manifestation in the form of the western, Weberian state – which flies in the face of the evidence that governance in fragile societies will, for the foreseeable future, follow more hybrid trajectories, and may well feature a hybrid "end state" as well.

29 D Marshall (ed) *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (2014, Harvard University Press) at 15.

30 Id at 12.

31 World Bank *Governance and the Law* (2017, World Bank) at 21.

32 Ibid; see also E Van Veen "Improving security and justice programming in fragile situations: Better political engagement, more change management" (OECD Development Papers No 3, 2016) at 4.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

version of the rule of law in a procedurally correct manner.[33] In this context, while the "thin" version of the rule of law appears to mirror the tool metaphor, the "thick" version appears to be more in tune with the causeway metaphor of the rule of law, discussed below.

Crucially, it appears reasonable to think that the governments of many fragile societies (which many African states are) may have signed up to the internationally generated content of the "thick" version of the rule of law, but neither the nature of their political order nor their "state of justice" enables them to give significant meaning to such declaratory intent – even if they intended to comply with it. In turn, this means that international rule-of-law development interventions, such as aid programmes, must take a pragmatic, incremental approach in the realization that much of the international declaratory reality of the rule of law serves two chief purposes. In the first place, "it provides an aspirational dot on the far horizon without, however, having concrete programming value".[34] Secondly, "local actors can use declaratory reality to engage in domestic contestation for progressive rule of law development, sometimes with international support".[35]

Mutua sees the rule of law from the African perspective not simply as a totem of democracy, but as an integral element in every aspect of human development.[36] According to him, "the rule of law is indispensable for the realisation of economic, social, and cultural rights".[37] In this regard, the segregation of the two canons of human rights – civil and political rights, and economic and social rights – was not a labour of the intellect, but a necessity of politics. As a result, the gap between the two canons cannot be wide, and must be minimized in any true development initiative. This is particularly true for Africa where violations of civil and political rights are a direct result of the denial of economic and social rights.[38] A dynamic comprehension of the rule of law in Africa cannot be limited to legal formality and procedure; it must have as its core norm a rejection of oppressive and vested property and market interests that use the law to protect ill-gotten wealth and an unjust

33 The "thick" definition does not sufficiently allow for conceptualization of the rule of law as a gradual and lengthy process of the progressive expansion of rights and entitlements that might start from a decidedly limited, exclusionary and undemocratic basis, as well as featuring significant regression at times. A brief review of recent political-legal history makes it clear that the speed with which rights and entitlements have been encoded internationally has appreciably outpaced domestic processes of political contestation in a number of places, particularly in fragile societies. It is therefore fallacious to expect that the rights and entitlements so enshrined will create de facto, or even de jure, rights within all national legal orders at roughly the same time or that convergence can and should be realized in the near future.

34 T Ginsberg and T Moustafa *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008, Cambridge University Press) at 12.

35 Ibid.

36 M Mutua "Africa and the rule of law", above at note 2 at 166.

37 Ibid.

38 Ibid.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

economic order. Social and substantive justice must be the purpose of the rule of law.[39] Africa must identify and rethink many normative tenets of liberalism and thus the rule of law.[40]

According to Shivute, "apart from its enduring relevance in the promotion of 'government of laws and not of men', democracy, and political and civil rights, the rule of law must also be seen as an instrument for the promotion of social and economic development and social justice [in Africa] – which in themselves are conducive to peace and security".[41] In its social and economic role, the function of the rule of law is to ensure that the objective of development is to bring about sustained and meaningful improvement in the welfare of the individual and to bestow the wealth of the country on all members of society. Shivute says:

> "[T]o survive meaningfully, the values of the constitution and the rule of law must be emotionally internalised within the psyche of citizens. The active participation of the organs of civil society outside of the constitution in the articulation and dissemination of these values is a logistical necessity for the survival and perpetuation of the rule of law. Without it, the law and the ruler become alienated from the ruled."[42]

This understanding of the role and essence of the rule of law is considered germane in the sense that it aligns more with the understanding of the causeway metaphor of the rule of law espoused in the penultimate section of this article.

RULE OF LAW IN CONTEMPORARY AFRICA

At the heart of development lies a fundamental commitment by the state to improve the well-being of everyone within its jurisdiction, through the expansion of social, civil, political, cultural and economic rights.[43] Yet the African continent suffers from a reality in which millions continue to live in impoverished conditions within a surplus of global wealth and affluence.[44] The development barriers that African nations face are consequences of a legacy of historical injustice and structural disadvantages, including social exclusion, unemployment, poor service delivery, an ineffective rule-of-law regime

39 Ibid.

40 Ibid.

41 P Shivute "The rule of law in sub-Saharan Africa: An overview" (2017), available at: <https://www.kas.de/c/document_library/get_file?uuid=2528ba94-446b-ce48-a32d-fa34b630faf1&groupId=252038> (last accessed 28 January 2022).

42 Ibid.

43 E Edroma "Introduction" in E Edroma (ed) *Rethinking the Role of Law and Justice in Africa's Development* (2013, UNDP) xii.

44 This paper is by no means stating that poverty is only an African phenomenon; without doubt, it exists everywhere in the world. The statement here attempts to highlight the fact that many Africans live in poverty.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

and state incapacity, all of which continue to stifle the growth of communities.[45]

An overview of developments in Africa over the last two decades reveals a growing commitment by governments to the principles of human rights, the rule of law, the ideals of transparent, accountable and democratic governance, and to a properly functioning justice system – specifically to constitutionalism.[46] However, the pace of change has in practice been slow, and in the last few years there have been ominous indications of a reversal – a return to the gloomy age of dictatorship, with authoritarianism appearing on the horizon.[47]

CM Fombad suggests that the rule of law in Africa has gone through three main periods: the colonial period, the post-independence period and the period of a revolution in constitutional rights during the 1990s.[48] During the colonial period, the theory and practice of the rule of law were largely unknown in African colonies, regardless of whether they had been colonized by the Belgians, British, Germans, French, Portuguese or Spanish.[49] Any apparent differences in treatment were merely in degrees of harshness.[50] Since colonial rule was neither constitutional nor democratic, there were no restrictions, based on fundamental laws, on the exercise of legislative, judicial or executive powers.[51] While flagrant human-rights abuses were commonplace in all the colonies, some colonial regimes, such as the Germans in Namibia and the Belgians in present-day Democratic Republic of Congo, gained notoriety for the atrocities they committed.[52] Although the European colonizers can be

45 Edroma "Introduction", above at note 43.

46 Constitutionalism is an important aspect of the rule of law and implies that all actions of a state are derived from the constitution. Any action not authorized by the constitution has no validity. It is a doctrine that governs the legitimacy of government action and suggests something far more important than the idea of legality, which requires official conduct to be in accordance with pre-fixed legal rules. In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-determined in advance. The latter definition shows that having a constitution alone does not bring about or secure constitutionalism. Except for a few states which have unwritten constitutions, today almost all the nations in the world have constitutions. This does not, however, mean that all these states practise constitutionalism, which is why constitutionalism is far more important than a constitution. On this, see M Bazezew "Constitutionalism" (2009) 3/2 *Mizan Law Review* 358 at 358.

47 CM Fombad "The context of justice in Africa: Emerging trends and prospects" in E Edroma (ed) *Rethinking the Role of Law and Justice in Africa's Development* (2013, UNDP) 1 at 3.

48 Ibid.

49 Ibid.

50 For an example of colonial-era practices, see J Conrad *Heart of Darkness* (1990, Dover).

51 B Ibhawoh *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (2007, State University of New York Press) at 2–3; for an example of such rule, see F Fanon *The Wretched of the Earth* (1963, Grove Press).

52 See A Hochschild *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (1998, Houghton Mifflin).

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

credited with introducing the modern system of courts in Africa, the system of justice under the colonial powers was dual in nature: the modern courts introduced by the colonizers were reserved for the whites or assimilated blacks,[53] while ordinary Africans continued to be subjected to a much "tamed" system of customary or traditional justice.[54]

At independence, most African governments inherited constitutions containing provisions that protected human rights to varying degrees. There was, however, no reason to expect the new leaders, who had no knowledge or experience of democracy or constitutional rule, to quickly forget the lessons of authoritarianism and repression that they had learned from the colonizers.[55] It was therefore no surprise that the new rulers quickly abrogated the constitutions, or simply ignored their provisions, and perpetuated the colonial pattern of human-rights abuses. In this context, Jean-Bédel Bokassa of the Central African Republic,[56] Mobutu Sese Seko of Zaire[57] and Idi Amin's eight-year military dictatorship in Uganda (when agents of the state operated without recourse to the rule of law[58]) readily come to mind. Although post-independence constitutions provided for independent judiciaries, these were mainly reduced to the status of errand boys for the various dictatorial regimes, and were thus incapable of operating as either guardians of the constitution, protectors of human rights or impartial enforcers of the rule of law. Thus, before the 1990s, parts of Africa operated under a system of "constitutions without constitutionalism".[59] In the absence of constitutionalism

53 For example, the French in their colonies grouped Africans into two categories: those who had been granted the status of *citoyen* ("citizen", or assimilated French person) and the rest of the population who were classified as *sujet* or *indigène* ("subject" or "native"). The status of an assimilated French person was reserved to a few dozen Africans who had, in the view of the colonizers, evolved from the status of natives by attaining an acceptable level of French civilization and culture; see Fombad "The context of justice", above at note 47 at 3.

54 In anglophone Africa, the pre-existing traditional or customary law was only allowed provided it was not (in the view of the colonial authorities) repugnant to natural justice, equity and good conscience, nor incompatible either directly or by natural implication with any written law in force at the time. This so-called repugnancy test could be used to invalidate a rule of customary law. More generally, however, administrative officials had the last word on what was customary law during this period; see Fombad "The context of justice", above at note 47 at 3–4.

55 See A An-Na'im "The legal protection of human rights in Africa: How to do more with less", in A Sarat and TR Kearns (eds) *Human Rights Concepts, Contests and Contingencies* (2001, University of Michigan Press) 68.

56 See B Titley *Dark Age: The Political Odyssey of Emperor Bokassa* (1997, McGill-Queen's University Press).

57 See W Reno "Congo: From state collapse to 'absolutism', to state failure" (2006) 27/1 *Third World Quarterly* 43.

58 See AC Decker "'Sometime you may leave your husband in Karuma Falls or in the forest there': A gendered history of disappearance in Idi Amin's Uganda, 1971–79" (2013) 7/1 *Journal of Eastern African Studies* 125.

59 HWO Okoth-Ogendo "Constitutions without constitutionalism" in I Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991, SAPES Trust) 5 at 87.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

the administration of justice virtually collapsed, and there was little respect for the rule of law or the protection of human rights. The economic decline, political instability, civil wars, famine, disease and other ills caused by decades of authoritarian and incompetent dictatorship were all factors leading to dramatic changes in the 1990s.[60]

Apart from Botswana (independent since 1966) and Mauritius (1968), the constitutions that operate in contemporary Africa are either new or significantly modified adaptations of the pre-1990 constitutions.[61] In this context, since 1990 a number of African states have rewritten their constitutions twice;[62] Egypt has also replaced the constitution of 2012 with a new one. However, the record for new constitutions belongs to Niger, which has had five new constitutions since 1990 (in 1993, 1996, 1999, 2009 and 2010).[63] In terms of revisions and amendments of articles, Rwanda has amended 175 articles of its 2003 constitution; others also display high levels of amendments, such as Tanzania (with 100 articles changed), Nigeria (86 sections), Burkina Faso (71 articles) and South Africa (69 sections).[64] Insofar as human rights protection is concerned, a comprehensive study of the scope of rights covered by modern African constitutions suggests that the highest numbers of rights are recognized by the constitutions of the Democratic Republic of Congo and Uganda, each of which recognizes 25 rights, while Tunisia and Libya, with 10 rights each, recognize the lowest number.[65]

One of the most significant developments in the 1990s as regards these constitutions was the adoption by most of the states of constitutional provisions that purport to promote the rule of law.[66] In theory, these constitutions

60 Fombad "The context of justice", above at note 47 at 5.

61 It should be noted that these constitutional changes were brought about for different reasons; some countries changed constitutions to enhance checks and balances while others did so to enhance the power of the executive, leading to autocratic governments.

62 This includes Angola in 1991 and 2010, Central African Republic in 1994 and 2004, Guinea in 1990 and 2010, Republic of Congo in 1992 and 2002, DR Congo in 1994 and 2006, Rwanda in 1991 and 2003, and Zambia in 2001 and 2016. See E Goldring and M Wahman "Democracy in reverse: The 2016 general election in Zambia" (2016) 51/3 *Africa Spectrum* 107 at 111.

63 S Elischer and L Mueller "Briefing: Niger falls back off track" (2018) 118/471 *African Affairs* 392 at 394.

64 CM Fombad "Constitution-building in Africa: The never-ending story of the making, unmaking and remaking of constitutions" (2014) 13/4 *African and Asian Studies* 429 at 436.

65 See C Heyns and W Kaguongo "Constitutional human rights law in Africa" (2006) 22 *South African Journal of Human Rights* 673.

66 Most of these new constitutions contained elements of the rule of law. In Nigeria, for instance, section 1(1) of the 1999 Constitution (as amended) insists that this "constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". In South Africa, the 1996 Constitution says as much; its first section declares that among the founding values of the nation are "supremacy of the constitution and the rule of law". Arguably, only two African countries, Botswana and Mauritius, have had transparent and democratic multi-party

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

contain the idea that governments' powers should be sufficiently limited in a manner that protects citizens from arbitrary rule, and that governments should be able to operate efficiently in such a way that they can be effectively compelled to operate within their constitutional limitations. In practice, however, the story is different. In Libya during the Gaddafi regime, the state and its agencies systematically breached the rule of law in order to suppress those who were critical of or were perceived as posing a threat to the regime, whether inside or outside Libya.[67] Since the fall of Gaddafi in 2011 the situation seems to have deteriorated, and the pattern of rule-of-law breaches from the various militia groups has continued to be a widespread practice.[68] In Algeria, as a result of almost three decades of civil war which began in 1991, the people are still struggling to come to terms with the actual dictates of the rule of law.[69] In South Africa, one of the legacies of apartheid was the abuse of human rights and a penchant for disregarding the rule of law.[70] In Zimbabwe, during the reign of Mugabe, a major human-rights crisis developed as the authoritarian government used whatever methods it considered necessary to ensure its continued survival,[71] a method of governance which apparently has continued even after the fall of Mugabe.[72] This situation is replicated in other African states and is corroborated by a study by Heyns and Kaguongo; they observe that although there has been a tremendous expansion in the embedding of rule-of-law principles in Africa since the 1990s, most

contd

systems since independence. Interestingly, these countries have maintained their independence constitutions of 1966 and 1968 respectively, with few significant changes. Again, most countries in northern Africa maintained their pre-1990 constitutions with a small number of significant changes until the events of 2010–11 (the Arab Spring), which saw the removal of various long-serving dictators. As a result, Morocco adopted a new constitution in 2012, and Algeria, Egypt, Libya and Tunisia are in the process of drafting new constitutions. These are more likely to promote constitutionalism than the previous constitutions; see Fombad "The context of justice", above at note 47 at 2, note 7.

67 Lawyers for Justice in Libya "Enforced disappearances: Combating enforced disappearances in Libya" (2017) *LFJL*, available at: <https://www.libyanjustice.org/enforced-disappearances> (last accessed 1 May 2020).

68 Ibid.

69 J Howell "Investigating the enforced disappearances of Algeria's 'dark decade': Omar D's and Kamel Khélif's commemorative art projects" (2016) 21/2 *The Journal of North African Studies* 213 at 234.

70 S Ellmann "The struggle for the rule of law in South Africa (Symposium: Twenty years of South African constitutionalism: Constitutional rights, judicial independence and the transition to democracy)" (2015/2016) 60 *New York Law School Law Review* 57 at 59. While abuse of human rights and disrespect for the rule of law was the case during the apartheid regime, it appears there is an improvement in the respect given to the rule of law by the post-apartheid government in South Africa.

71 L Davidson and R Purohit "The Zimbabwean human rights crisis: A collaborative approach to international advocacy" (2004) 7 *Yale Human Rights & Development Law Journal* 108 at 109.

72 A Magaisa "Zimbabwe: An opportunity lost" (2019) 30/1 *Journal of Democracy* 143 at 147.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

international indicators point to a decline in the actual practice of the concept in the same period.[73]

As regards the independence of the judiciary, almost all post-1990 African constitutions recognize and sometimes purport to protect the independence of the judiciary.[74] However, because of the substantial scope for political interference, the prospect of effective judicial independence in most African countries is virtually non-existent.[75] In addition, Heyns and Kaguongo show that the prospects of obtaining fair judgments have been declining, and that this has contributed to the recent deterioration in human-rights protection in Africa.[76] The main causes of this decline have been the increasing politicization of the judiciary, judicial corruption, a lack of resources and judicial conservatism.[77] The deficiency in judicial independence makes empty promises of many basic procedural rights of citizens in the legal process, especially in politically sensitive cases.

Effective judicial independence in many African states, as a corollary to the rule of law, is often overshadowed by the powerful presence of the president intervening directly or indirectly in the appointment process.[78] In anglophone Africa, judges are appointed by the president, usually based on the recommendations of a judicial service commission. In this context, for example, under section 174(3) of the South African Constitution, the president appoints the head and deputy head of the Constitutional Court, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, but appoints the chief justice and deputy chief justice after consulting the Judicial Service Commission only. The other judges, including those of the Constitutional Court, are also appointed by the

73 Heyns and Kaguongo "Constitutional human rights law" above at note 65 at 674; CM Fombad "African bill of rights in a comparative perspective" (2011) 17/1 *Fundamina* 33 at 34.

74 CM Fombad "A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions" (2007) 2 *Public Law* 233 at 244.

75 The scope for judicial independence in francophone and lusophone countries is diminished by the fact that the constitutional provisions that are supposed to promote such independence are usually formulated in vague terms, leaving too many critical determinants of judicial independence to be governed by ordinary regulations. Perhaps the most serious concern in these countries is the decisive role that the executive plays in appointing, disciplining and promoting judges; for further elucidation on this point, see CM Fombad "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa" (2007) 55/1 *American Journal of Comparative Law* 1 at 15–17.

76 Heyns and Kaguongo "Constitutional human rights law" above at note 65.

77 CM Fombad "The expansion of judicial power in Africa and democratic consolidation: Opportunities, challenges and future prospects" (paper presented at the Institute for African Development Spring Symposium: Elections, Accountability and Democratic Governance in Africa, at the Institute for African Development, Mario Einaudi Center for International Studies, Cornell University, Ithaca, New York, 19–21 April 2012).

78 CM Fombad and E Nwauche "Africa's imperial presidents: Immunity, impunity and accountability" (2012) 5/2 *African Journal of Legal Studies* 91 at 97.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

president after consultations with the leaders of parties represented in the National Assembly, following an elaborate procedure in which s/he is required to select the judges from a list of nominees submitted by the commission.[79] In Nigeria, the appointment of federal judges is also made by the president, who acts on the recommendations of the National Judicial Council, but this is subject to confirmation by the Senate.[80] In Botswana, there is less scope for judicial independence because judges are appointed by the president, acting on the advice of the Judicial Service Commission, whose membership is dominated by presidential appointees;[81] more worrying is the fact that in appointing the chief justice, who is head of the judiciary and the president of the Court of Appeal, the highest court in the country, the president acts alone.[82] In Kenya, the president appoints the chief justice on the recommendation of the Judicial Service Commission, subject to the approval of the National Assembly. S/he also appoints other judges of the high court in accordance with the advice of the judicial commission.[83] From the foregoing, it is clear that there is some latitude for presidential interference.[84]

In contrast, the scope for judicial independence in francophone and lusophone Africa is even more limited, as a result of the dominant part the president plays not only in the process of appointment but also in the promotion and disciplining of judges. Under this model (traceable to France) the president is the guardian of the independence of the judiciary, clearly suggesting that the judiciary is not on the same level as the executive but, rather, is below it. This conclusion is reinforced by the powers given to the president to appoint, promote, transfer and dismiss judicial personnel, which effectively compromises their independence.[85] Apart from this de facto capture of the judiciary by the executive, many of the constitutions merely pay lip service to the principle of the separation of powers. This has resulted in a situation where domineering and "imperial" presidents are left to control and overshadow parliaments.[86] Executive "arrest" of parliament has become very common in many African countries, including Cameroon,[87]

79 Sec 174(4) of the South African Constitution.

80 See sec 231 to sec 269 of the 1999 Nigerian Constitution (as amended).

81 See the Botswana Constitution (as amended in 2002), secs 96(2) and (3), 100(2).

82 Sec 96(1) and sec 100(1) of the Botswana Constitution (as amended).

83 See sec 61(2), part I, cap IV of the Kenyan Constitution.

84 Fombad and Nwauche "Africa's imperial presidents", above at note 78 at 93; we suggest that when it comes to the appointment of judges, the executive arm of a government should have no input at all. The judges should be nominated by a national judicial council (created by the Constitution and whose members comprise retired and senior serving justices) and confirmed by the congress.

85 See, for instance, the Cameroon Constitution, art 37(3); the Constitution of Gabon, art 69; the Constitution of Mauritania, art 89(1); and the Constitution of Niger, art 100.

86 Fombad and Nwauche "Africa's imperial presidents", above at note 78 at 93.

87 GEK Kanga "The political (in) dependence of the judiciary in Cameroon: Fact or fiction?" (2019) 11/1 *Africa Review* 46 at 62.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

DR Congo,[88] Ethiopia,[89] Nigeria[90] and Zimbabwe.[91] In Kenya, the story is no different; while there may be recent improvements regarding respect for the rule of law, Mbaku argues that contemporary governments have also engaged in activities that have undermined the country's democratic institutions, including raising allegations of bias against the judiciary, exhibiting poor leadership qualities in issues of respect for the law, and acting with impunity.[92]

As a result of these serious challenges, the rule of law under these constitutions is far from being real, operative or meaningful. Executive domination of parliament is often exacerbated by the hegemonic manipulation of the leading parties, which are usually managed by the president and a small inner circle of associates. In this context, the legislature, controlled by one party,[93] merely rubber stamps laws put before it by the executive, in much the same way as was done by the one-party parliaments before 1990.

TWO METAPHORS OF THE RULE OF LAW

At the climax of Robert Bolt's play *A Man for All Seasons*, Oliver Cromwell plays the part of prosecutor at the show trial of Sir Thomas More. "I put it to the Court," Cromwell says, "that the prisoner is perverting the law – making smoky what should be a clear light to discover to the Court his own wrongdoing!"[94] To this attack, More impassively responds, "[t]he law is not a 'light' for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely."[95] From this standpoint, one can construe two metaphors of the rule of law: the rule of law as a tool (or instrument) and the rule of law as a

88 H Haider "Political economy and governance in the Democratic Republic of Congo (DRC)" (2015) *GSDRC Help Desk Research Project*, available at: <https://assets.publishing.service.gov.uk/media/57a08966e5274a31e0000070/HDQ1252.pdf> (last accessed 27 April 2020).

89 A Agegnehu and W Dibu "Ethiopian human rights system: An overview" (2015) 9 *Journal of Culture, Society and Development* 26 at 26.

90 DA Yagboyaju and AO Akinola "Nigerian state and the crisis of governance: A critical exposition" (2019) 9/3 *Sage Open* 1 at 10; Y Baba "Executive dominance and hyper-presidentialism in Nigeria" in C Levan and P Ukata (eds) *The Oxford Handbook of Nigerian Politics* (2018, Oxford University Press) 13.

91 J Hatchard, M Ndulo and P Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004, Cambridge University Press) at 59.

92 JM Mbaku "Kenyan democracy and the rule of law" (2018) *Georgetown Journal of International Affairs*, available at: <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/3/28/kenyan-democracy-and-the-rule-of-law> (last accessed 28 January 2022).

93 As is the case with South Africa and the African National Congress (ANC); see Ellmann "The struggle", above at note 70 at 59.

94 R Bolt *A Man for All Seasons: A Play in Two Acts* (1990, Vintage) at 3.

95 Ibid.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

causeway.[96] The choice between these two metaphors is, and has always been, a crucial one for most countries' political development.[97]

In many legal systems, the instrumentalist metaphor is frequently deployed; the law is a sword, shield or tool to advance democratic ends, by which the law's utility can be measured. Instrumentalist metaphors of the rule of law, even when they are most benevolent, foster a combative relationship between the state and the individual. The state is intrinsically suspicious, and the citizens' defence against its essentially adverse motivations lies in the law. Law as an instrument envisages a hard-line and uncompromising struggle between state and individual: the former for the law's power and the latter for the law's protection. The state's loss is, therefore, the individual's gain. The influence of the law as an instrument or weapon may not be recognized beforehand; its capacity, similar to its boundaries, is also likely to be unknown until the moment the instrument is tried in some legal dispute. The principle that the law applies universally to all is also confused by the notion implicit in this aggressive metaphor that some individuals seem to have more right to wield the sword of law than others. Thus the law-as-weapon metaphor (the rule of law as a tool) necessarily renders suspect the state's capacity to establish a "neutral judiciary" for the resolution of disputes.[98] On the other hand, the causeway metaphor ensures the existence and effective functioning of the institutional attributes believed necessary to stimulate the rule of law (such as comprehensive laws, well-functioning courts and trained law-enforcement agencies).[99]

Unfortunately, history shows that with few exceptions African leaders have chosen the instrumentalist metaphor. For these leaders, in adopting this metaphor, the law is used like the shaft of a wagon; it goes wherever they turn it. Most of the freedoms associated with citizens' ability to criticize laws and question the justice of government actions and policies are virtually non-existent in these states. Yet the rights to receive information and to exchange and debate ideas, whenever such information and ideas concern the content of the laws and the nature of government action and policies, are integral features of the constitutional interpretation of the rule of

96 Nevertheless, these metaphors, as a matter of course, are not mutually exclusive. In an entrenched, consolidated democracy, it may be desirable to expect the rule of law to function as a causeway in some instances and as a sword or shield (tool) in other circumstances. Our contention is essentially that the constructive ramifications for the rule of law in an emerging democracy are better met by those aspects of the concept captured by the causeway metaphor and are hindered by those aspects captured by instrumentalist metaphors of sword, shield or tool.

97 Kahn "The search", above at note 5 at 372.

98 Ibid.

99 BR Kleinfeld "Competing definitions of the rule of law: Implications for practitioners" (2005) 55 *Carnegie Papers*, available at: <https://carnegieendowment.org/files/CP55.Belton.FINAL.pdf> (last accessed 28 January 2022).

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

law.[100] These African states appear to follow to the letter all the procedural dictates of a formal rule-of-law regime and yet have failed to establish, in the words of Charlow, "a truly just government or to provide a meaningful check on the arbitrary imposition of government authority".[101] Rule of law in these states is used more as an instrument of power.

The application of law as an instrument of power and coercion leads to what Hayek identified as the rule of legislation (rule by law or through law). In this governance hegemony, the enactment of legislation appears patently and undeniably to represent the rule of powerful officials. In this system, the political system is one in which statutes and other legislation are the supreme authority in the state by virtue of adherence to a formal legislative process of passing statutes and other legal acts. In this context, legislation is a matter of will.[102] The legislative process produces law simply by virtue of a group of people in an assembly deciding that a given law is to be enacted. Usually, this is performed by the very people – powerful politicians – to whose authority the actual rule of law is supposed to be an alternative. The consequence of this is a system where the rule of law is akin to the evolutionary development of the common law, but is less constructive and less susceptible to deliberate control.[103] The problem with this system of governance is that legislation can sometimes undermine the rule of law, by purporting, for instance, to remove legal accountability from a range of official actions or to preclude the possibility of judicial review of executive action.[104] This appears to be the reality in Africa; Africa's rule-of-law trajectory (as was shown above) indicates that the idea of the rule of law is applied only on paper.

In most African states, the cost of attaining justice using the formal adversarial process is so prohibitively expensive that the ordinary person would choose to forego their rights rather than dream of suing to secure such rights, especially in civil matters. Technicalities, delays, endless adjournments and gimmicks by lawyers are factors that discourage the ordinary citizen. This condition is compounded where politically powerful governmental officials are excused from the application of the law. The fact that they have means indicates that they can buy their way out or can afford the almost-prohibitive expenses of going to court, paying for lawyers and short-circuiting the unduly prolonged time it can take for decisions to be handed down. The level of official corruption on the continent also suggests that the realization of the core

100 TRS Allan "The rule of law as the rule of reason: Consent and constitutionalism" (1999) 115 *Law Quarterly Review* 225 at 238.

101 R Charlow "American constitutional analysis and a substantive understanding of the rule of law" in JR Silkenat, JE Hickey (Jr) and PD Barenboim (eds) *The Legal Doctrines of the Rule of Law and the Legal State* (2014, Springer) 253 at 254.

102 FA Hayek *Law, Legislation and Liberty* (vol 1, 1973, University of Chicago Press) at 72.

103 Ibid.

104 J Waldron "Is the rule of law an essentially contested concept (in Florida)?" (2002) 21 *Law and Philosophy* 137 at 142–43 and 147–48.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

ideal of the rule of law may in practice remain a myth for most citizens for generations to come.[105]

The judiciary and law enforcement are among the institutions most affected by corruption. In many African states, governments have rushed through judicial reforms reinforcing the executive's strong influence on the judiciary, seriously undermining the latter's independence, weakening judicial oversight of the executive, and in turn lessening its capacity to fight corruption. Corruption in law enforcement is particularly dangerous, as it has an impact on the safety of citizens and on their pursuit of justice, including in cases of political corruption and police misconduct.[106] Corruption jeopardizes the good functioning of public institutions and diverts public action from their purpose, which is to satisfy the public interest. Where they are not properly addressed, corrupt practices, like money laundering and other illicit acts through dubious financial instruments and institutions, weaken the rule of law and respect for human rights "by allowing certain wealthy and politically powerful elites to take and self-deal amongst themselves – to the detriment of the people – at will and often with impunity".[107] Nevertheless, when African states begin to avoid the instrumentalist metaphor and instead adopt the philosophy behind the causeway metaphor, its core ideal will be realized.

Unarguably, the causeway metaphor better expresses the conception of the rule of law as against the instrumentalist metaphor of sword or shield. More importantly, it is precisely this conception that should be the focus of a state in which ruling elites seek to establish a consolidated democracy. According to Kahn:

> "The value of this causeway lies first in the free movement of citizens that it facilitates among state and non-state institutions in daily life, commerce, and politics. The law is what enables the citizen to know what actions he is permitted to take and what constitutes a transgressive behavior of the law. If the citizen strays from this known path, choosing not to make use of the protections of the law or engaging in unlawful activity, that peril is known, too. These two aspects of the law as a causeway – establishing secure avenues for social interaction and identifiable paths of licit conduct – are of tremendous value to citizens in a state emerging from authoritarian rule into, perhaps, the early stages of democratic government. This conception of the rule of law shifts the initial conception of the state from a gendarme to a traffic policeman."[108]

105 BA Haruna and AM Yusuf "Conceptual analysis of the rule of law in Nigeria" (2016) 1/1 *Bayero Journal of International Law & Jurisprudence* 101 at 121.

106 Council of Europe "Corruption undermines human rights and the rule of law" (2021), available at: <https://www.coe.int/en/web/commissioner/-/corruption-undermines-human-rights-and-the-rule-of-law> (last accessed 18 March 2021).

107 Council of Europe Committee on Legal Affairs and Human Rights "Corruption as a threat to the rule of law" (2013), available at http://assembly.coe.int/CommitteeDocs/2013/NYFf%C4%B1nalpressfjdoc1e.pdf (last accessed 3 February 2022).

108 Kahn "The search", above at note 5 at 374.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

Debates and dialogues over the creation of this legal causeway accurately capture the type of action political leaders should concern themselves with, especially in the early, critical period of a new or struggling democracy. Development of a legal causeway is an additional means of ensuring that leaders are engaged in constructing the boundaries of state power: where they begin, how far they extend and where they stop. Thus, viewing the rule of law as a causeway also makes clear that certain spheres of life are simply none of the state's business: there are many areas of private actions and decisions into which citizens would not want the law to encroach (for instance the choice to reproduce, the adoption of a religion or choice of assembly, amongst others). These are areas identified by Bernard Rudden as the "precious sphere of non-law".[109] These areas are easily recognized by the causeway metaphor: "it is what lies off the path in the bramble bush of human relations that are best left unencumbered by the state's legislation".[110]

The interface between the rule of law and individual liberty is also better articulated by the causeway metaphor than by imagery of the law as sword or shield.[111] By clearly delineating the activities to be protected and those to be forbidden, the state recognizes the parameters of its power and creates "a basis for legitimate expectations" for its citizens. In doing this, the state is also able to construct "grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled".[112] In the event that these claims are uncertain, so also will be the limits of citizen's liberties.[113] Accordingly, to embrace the words of Thomas More as expressed in *A Man for all Seasons*, the citizen keeps to the causeway and walks safely. No transgression against the state is concealed and the citizen's rights in relation to others are well defined.[114] John Rawls captures this relationship thus:

> "[I]f the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a legitimate fear of its exercise. The same sort of consequences follow if similar cases are not treated similarly, if the judicial process lacks its essential integrity, if the law does not recognize impossibility of performance as a defense, and so on … To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained."[115]

109 B Rudden "Civil society and civil law" in G Ginsburgs, DD Barry and WB Simons (eds) *The Revival of Private Law in Central and Eastern Europe: Essays in Honor of FJM Feldbrugge* (1996, Kluwer Law International) 17 at 21.
110 Kahn "The search", above at note 5 at 373.
111 Dicey *A Theory of Justice*, above at note 17 at 203.
112 Kahn "The search", above at note 5 at 374.
113 J Rawls *A Theory of Justice* (1999, Belknap Press) at 207.
114 See Bolt *A Man for all Seasons* above at note 94 at 152–53.
115 Rawls *A Theory of Justice*, above at note 113 at 210–11.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

This is indeed a valid and convincing assertion, because an established institutional environment authorizes the calculation of risk and provides a clear measure of consistency to the results of anticipated social relations. This is so not only between citizens but also for the citizen in relation to the state.[116] The metaphor of the causeway advances an understanding of the state that instrumentalist metaphors cannot; a state is imbued with the capacity to carry out what is clearly its responsibility, including "securing borders, promoting economic stability, and the like" – while its "power to employ its monopoly on the legitimate use of force against the individual in ways that deprive the individual of his established legal rights" is limited.[117]

In the causeway metaphor, the rule of law is transformed into a rich and multi-faceted concept that encompasses far more than electoralism, constitutionalism or codification. The rule of law extends far beyond the institutions required for elites to negotiate the functioning of high politics. In addition to state institutions (such as a legislature, judiciary or organs of law enforcement), the rule of law also requires a variety of non-state institutions: organized legal education, a professional bar, and a myriad of supporting professions (for instance, accountants and investigators) and organizations (newspapers, public registries and credit bureaus, amongst others). The causeway metaphor of the rule of law affects the development of mass attitudes and commercial behaviour; it implants itself in a country's political culture and in its civil society, and establishes expectations about the role and limits of state bureaucracy and the boundaries of commercial freedom and individual action.[118] Lastly, but more significantly, the causeway metaphor ensures some level of shared expectations by political elites, lawyers and laypeople about what counts as law, about what the limits of judicial power are, and about which spheres of life the law may not be permitted to intrude into. Through the causeway metaphor, the institutional strength of the rule of law, although difficult to measure, is best expressed as a continuum.[119]

In a consolidated democracy with extended experience of the rule of law, it is possible for the concept to be applied as causeway, sword or shield. Through continuous practice, the rule of law may become sufficiently embedded in the political culture and in the institutions and expectations of a society. In this regard, it is possible for such a society not only to tolerate the metaphor of the tool, but to also view it as occasionally necessary to correct democratic abuses (for example, the American Civil Rights Movement).[120] But in an unstable system reeling from governance deficits, as exemplified by many

116 Rudden "Civil society", above at note 109 at 17, 20–21.

117 Kahn "The search", above at note 5 at 374.

118 JJ Linz and A Stepan *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (1996, John Hopkins University Press) at 10.

119 K Hendley *Trying to Make Law Matter: Legal Reform and Labor Law in the Soviet Union* (1996, University of Michigan Press) at 12.

120 Kahn "The search", above at note 5 at 374.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

African states, the causeway metaphor should be favoured over any other conceptions of the rule of law.

CONCLUSION

The rule of law is a heterogeneous ideal; nevertheless, most understandings of the concept converge on the requirement that people in positions of authority (ie governments) should apply their power within a limited framework of public norms, instead of on the basis of their own preferences, ideologies or individual sense of right and wrong. As well as this, many conceptions of the notion stress the importance of legal certainty and predictability of the norms that are upheld in society and on the reliable character of their administration by governments. In this regard, the rule-of-law ideal refers to features that the law is meant to embody, mainly in order to ensure protection from monopolization of power and on the basis of some positive law that is factually and legally located beyond the reach of the head of state and his or her mere whim.[121]

However, the rule of law is not just about government actions or inaction. It also requires that citizens should respect and comply with legal norms even when they disagree with them. When their interests conflict with others, they should accept legal determinations of what their rights and duties are. The law should also be the same for everyone, so that no one is above it and everyone has access to its protection. The requirement of access is particularly important, in two senses. Firstly, law should be rationally accessible; it should be a body of norms promulgated as public knowledge so that people can study it, internalize it, figure out what it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others. Secondly, legal institutions and their procedures should be available to ordinary people to uphold their rights, settle their disputes and protect them against abuses of public and private power. All of these, in turn, require the independence of the judiciary, the accountability of government officials, the transparency of public business and the integrity of legal procedures.[122]

As has been argued in this article, a review of the position of the rule of law in Africa since the 1990s suggests that the early signs of progress (as a result of the spate of constitutional changes from that time) are fast giving way to despair as the forces of authoritarianism begin to re-emerge. Given that many African states suffer from a repressive and despotic history, it is not surprising that legal and political experts on the continent are more at home with the instrumentalist metaphor of law as a tool or weapon for citizens to protect their rights from an aggressive, invasive or unreliable state. Unfortunately, this metaphor of the rule of law is synonymous with the shaft of a wagon;

121 G Palombella "The rule of law beyond the state: Failures, promises, and theory" (2009) 7/3 *International Journal of Constitutional Law* 442 at 442.

122 Waldron "The rule of law", above at note 4.

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press

it turns wherever those in control turn it. From the analysis of the concept above, it appears reasonable to believe that the metaphor of law as a tool is the wrong one to use when arguing for the sort of rule of law needed for a consolidated African democracy. An instrumentalist conception of law is even less appropriate to describe the institutions and practices that are critically important to an aspiring democratic Africa, all the more so when the understanding of law as a tool is nearly pervasive among Africa's current leaders.

For African states with limited economic resources, severe institutional and attitudinal constraints, and a political legacy of authoritarianism, it is the rule of law envisioned in the causeway metaphor – and not in the metaphors of weaponry – that activists should strive to achieve. When the causeway metaphor is applied in Africa, the rule of law will then transcend the legal frameworks and international common standards in which it is so often embodied and will extend into an examination of the historical legacies which shape the rule of law and the context-specific values which inform it, and will apply to the individuals who stand to gain improved life chances from increased access to it. With this aspiration, we advocate a more holistic approach to the rule of law, epitomized by the causeway metaphor with its attendant access to justice and legal empowerment beyond the juridical lens.

CONFLICTS OF INTEREST

None

https://doi.org/10.1017/S0021855322000092 Published online by Cambridge University Press