

CONFERENCE ON “TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM”

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Title of the conference paper:

Nelson Mandela's contribution to constitutionalism and the rule of law in South Africa

1. Background

Born in a Thembu royal family as the First World War (1914-1918) was ending on 18 July 1918 at Mvezo, a small village in the district of Umtata, the then capital city of Transkei (currently Province of the Eastern Cape), Nelson Mandela was really a “troublemaker”, probably the greatest troublemaker in South African history, as his Xhosa name “Rolihlahla” indicated.

As he recounted himself in his famous “Long Walk to Freedom”, his father Gadla Henry Mphakanyiswa was “a chief both by blood and custom”,¹ and “not only an adviser to kings but a kingmaker”² and his mother Nosekeni Fanny, the daughter of Nkedama from the amaMpemvu clan of the Xhosa was one of the four Mphakanyiswa’s wives. Mandela was therefore born in a royal family. On Friday 5 December 2013, the man who became a “global icon”, “the icon of the icons”, the greatest figure in contemporary Africa and one of the greatest world leaders of all times also passed away as a king. His memorial held at Johannesburg Soccer City Stadium on Tuesday 10 December 2013 and continued when his body was lying in state at the Union Buildings on Friday 13 December up to his burial in Qunu in Eastern Cape on Sunday 15 December 2013 attracted to South Africa and Africa the largest number of world leaders outside New York, the head quarter of the United Nations (UN) that already making history in 2009 by establishing an international “Mandela Day” to honour Madiba’s outstanding contribution humanity and the values embodied by the world body. The man who fought against the evil of Apartheid and spent 27 years in prisons before becoming the first black and democratically elected South African president had become a global idol and even a myth in his lifetime, venerated in all countries and continents, compared to other leaders like Ghandi in India. The figures that only came close in the American history were Reverend King and Abraham Lincoln who inspired him or American Founding Fathers like George Washington.

As a lawyer and a freedom fighter who led the African National Congress (ANC), he played a critical role in bringing the nearly fifty years of the unjust and barbaric system of Apartheid that was declared a “crime against humanity”³. He combated the apartheid system that only recognised rights to the white minority at the expense of the majority of Black people but in 1955, he was one of the drafters of the Freedom Charter that intended to protect the rights of all South Africans without any form of discrimination. He taught his people forgiveness. He was instrumental in the establishment of a Truth and Reconciliation Commission and in the transformation of a deeply divided society into a “Rainbow Nation” that belongs to all who live in it, Black, White, Indian or Coloured people.

¹ Mandela, N., *Long Walk to Freedom*, London: Abacus, 1995, 4.

² Idem 6.

³In 1966, the United Nations General Assembly adopted a resolution (Resolution 2202 A (XXI) of 16 December 1966 declaring Apartheid a crime against humanity. The Security Council endorsed this determination by its Resolution 556(1984) of 23 October 1984. The Apartheid Convention was the ultimate step in the condemnation of Apartheid adopted by the General Assembly on 30 November 1973, by 91 votes in favour, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976. As of August 2008, it has been ratified by 107 States.

Since his release from prison after 27 years of imprisonment, the former “volunteer-on-chief” in the Defiance Campaign against Apartheid laws contributed to establishing a society based on democratic values, social justice and fundamental rights and laying the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law. Like George Washington and others in the American history, he and his comrades were the Founding Fathers of Democratic South Africa, which is based on values such as “human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, universal adult suffrage, a national common voters roll, regular election’s and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.⁴ Mandela’s spirit lives in the Constitution that entrenches the founding values of the Democratic South Africa. The Kempton Park Negotiations between the Apartheid government and anti-Apartheid movements that were inaugurated at the Convention for Democratic South Africa (CODESA) and culminated in the adoption of the 1993 Constitution⁵ and succeeded mainly because of his exceptional leadership.

The 1996 Constitution that replaced the 1993 Constitution and currently governs the country was also adopted under his presidency. This Constitution is the supreme law of the Republic.⁶ It protects the rights of all the people in the country.⁷ It provides for the separation of powers between the executive, the legislature and the judiciary, which is independent and impartial and should administer justice without fear, favour or prejudice.⁸ The Constitutional Court is the highest court of the land and is the guardian and watchdog of the Constitution.⁹ A number of institutions were also established to support democracy. These institutions include the public protector,¹⁰ the Electoral Commission,¹¹ the South African Human Rights Commission,¹² the Independent Authority to Regulate Broadcasting,¹³ and the Commission for Gender Equality¹⁴.

⁴ Section 1 of the 1996 Constitution. This constitution was adopted as Act 108 of 1996 on 8 May 1996. It was amended on 11 October 1996 by the Constitutional Assembly. It was assented to on 16 December 1996. Promulgated on 18 December 1996, it came into force on 4 February 1997. To date, it has been amended 17 times, the last amendment being the Constitution of South Africa Seventeenth Amendment Act of 2012

⁵ Constitution of the Republic of South Africa, Act 200 of 1993.

⁶ Section 2 of the 1996 Constitution.

⁷ Section 7 (1).

⁸ Section 165(2).

⁹ Section 167.

¹⁰ Sections 182 and 183.

¹¹ Sections 190 and 191.

¹² Section 184.

¹³ Section 192.

¹⁴ Section 187.

Mandela was the key architect of the South African constitutional and democratic order and his contribution to constitutionalism and democracy is unparalleled in South African history. Under Mandela's leadership and presidency, South Africa developed as one of the shining examples of constitutionalism and democracy in Africa and its Constitution has inspired several others on the continent.

2014 marked the second decade of constitutionalism and democracy in South Africa since the first post-apartheid constitution came into force and multiparty general elections were held in April 1994. It also marked the second anniversary of Nelson Mandela's death.

Amidst all the praises that have been given to Nelson Mandela, there is one area in which his contribution to humanity has not been sufficiently highlighted and that is highly challenging for constitutional law experts and students across the world. It concerns Mandela's contribution to constitutionalism and democratic rule of law. The New York Law School conference on Twenty Years of South African constitutionalism provides constitutional lawyers with a golden opportunity to fill this gap.

Against this background and as yet another tribute to Madiba¹⁵, this paper therefore reflects on Nelson Mandela's leadership and contribution to South African constitutionalism and democracy. A few weeks ahead of the first anniversary of the passing of Nelson Mandela, this paper will strive to answer the following questions:

- What was the place of law, the rule of law and constitutionalism in Nelson Mandela's training, thought and life?
- How and why did Nelson Mandela, himself a lawyer, initiated the Defiance Campaign and became the chief violator and the "volunteer-in-chief" during the Defiance Campaign against Apartheid laws in the 1950s?
- As a lawyer, why did he still respect the judiciary and used the Apartheid laws he was combatting to defend his people before his own conviction to life imprisonment during the Rivonia Trial that ended in 1964?
- What was Nelson Mandela's contribution as ANC leader to constitutionalism, the rule of law and democracy from his liberation in 1990 towards the end of apartheid in 1994 and later as the first democratically elected South African President from 1994 to his retirement in 1999?
- Is there any relationship between the quality of leadership and the promotion of constitutionalism and democracy in any particular country?
- What are the challenges and prospects for constitutionalism and democracy in South Africa after Nelson Mandela's departure?

¹⁵ See my recent book Mangu Mbata B, *Hommages à Nelson Mandela*, Kinshasa: IDGPA, 2014.

Prior to striving to answer these questions and looking at the theme of this New York Law School Conference, which refers to twenty years of “South African constitutionalism”, one might have to answer two important questions.

2. Do constitutionalism matter and what is “South African constitutionalism”?

In an interesting contribution to the debate on constitutionalism in Africa, Okoth-Ogendo asked a few decades ago: “Do constitutionalism matter” and “what price constitutionalism?”¹⁶ Ihonvbere also lamented:

Why should one waste time studying this problem when there is such a gap between the idea of the democratic system, such as practiced in the United States or Western Union and Africa political reality? This divorce between reality and ideal moves us wonder why we are engaging in the debate on constitutionalism”.¹⁷

The second question, which is mine, is whether one should speak of and pontificating “South African constitutionalism” instead of “constitutionalism in South Africa” as if constitutionalism in this country was unique, different from other forms of constitutionalism practiced in other parts of the world. The first question found a right answer from the very same scholars who raised it. As Okoth-Ogendo pointed out:

The dilemma is whether to abandon the study of constitutions altogether on the ground that no body of constitutional law or principles of constitutionalism appears to be developing, and might, in all probability fail to do soor to continue teaching and pontificating upon those liberal democratic values in the hope that state elites in Africa will eventually internalise and live by them. The paradox is what appears, nonetheless, from that same scenario as a commitment to the idea of the Constitution and an equally rejection of the classical notion of constitutionalism.¹⁸

Okoth-Ogendo came to the conclusion that the “dilemma” was “inconsequential, even false”.¹⁹ As I also stressed somewhere, “the fact the Constitution does not exist or is regularly violated or that authoritarianism prevails over democratic rule should not bar us from investigating constitutionalism and democracy in post-colonial Africa”.²⁰

Despite their poor record on the ground, they remain solidly entrenched in the minds of African people. The fact that they never did and survived autocratic leaders and the people never stopped fighting for them is enough for constitutionalism and democracy in Africa to take pride of place on the African intellectual agenda.²¹

¹⁶ See Okoth-Ogendo, HWO, “Constitutions Without Constitutionalism: Reflections on an African Political Phenomenon”, in Shivji, I.G. (ed), *State and Constitutionalism : An African Debate on Democracy*, Harare: SAPES, 1991, 20; Mangu Mbata, A, *The Road to Constitutionalism and Democracy in Postcolonial Africa: The Case of the Democratic Republic of Congo* (LLD Thesis), Pretoria: UNISA, 2002 24

¹⁷ See Ihonvbere, J.O., *Towards a New Constitutionalism in Africa*, London: CDD Occasional Papers, 2000, 11; Mangu op. cit. 24.

¹⁸ Okoth-Ogendo op.cit. 4-5.

¹⁹ Idem 5.

²⁰ Mangu op.cit. 26.

²¹ Idem.

In Bourdieu's view, we should not undermine the "weigh of the law".²² Sindjoun added that "the possible disrespect for a rule is not a decisive condition for an altogether rejection of public law". He referred to a Weberian example according to which "the thief does not nullify the validity of a criminal law rule prohibiting theft because ...he hides himself".²³

Constitutionalism does therefore matter. Whether in America, United Kingdom, France, Germany, India and other old constitutional and democratic countries and because constitutionalism is afterwards an ideal type of government, a gap has always existed and will continue to exist between the idea and the practice or reality of constitutionalism. The divorce between the reality and the ideal of constitutionalism is not therefore a typically African phenomenon to complain of or African people should be blamed for. The problem is not so much whether there is a gap or not between reality and the ideal, between the practice and the rules and principles, but rather about the scope of the gap. It is relatively smaller in constitutional and democratic countries than in young democratic countries and wider in authoritarian countries.

Given the importance of constitutionalism for a democratic government, there is no waste of time studying constitutionalism despite the existence of the gap between reality and the ideal. It is even because of this gap in African countries that we need to focus more on constitutionalism to reflect on the causes of this gap and how it may be reduced further in order to promote constitutionalism in those countries.

As far as the theme of the conference is concerned, the focus on "Twenty years of South Africa constitutionalism" is important in two ways. Firstly, it is an implicit recognition that despite all the arguments to the contrary, constitutionalism did not exist under the Apartheid regime that denied human rights to the Black people who constitute the overwhelming majority of the population. Like the colonial rule, the apartheid rule was an authoritarian rule and a negation of constitutionalism. This is why Nelson Mandela and the African people fought against it and thought Apartheid could only be dismantled and not reformed. In *Makwanyane case*,²⁴ despite his narrow conception reduced to human rights, Justice Akermann is also of the view that constitutionalism did not exist in Apartheid South Africa:

Constitutionalism in our country arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. When reviewing the past, the framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate, and those that brutalised us as people and diminished our respect for life.²⁵

²² Bourdieu, P., "La force du droit. Éléments pour une sociologie du champ juridique", Actes de la recherche en sciences sociales, 81, 86-96.

²³ See Sindjoun, L., "Politics in Central Africa: A Reflective Introduction to the Experience of States and Region", *African Journal of Political Science*, Vol. 4, No 2, 1999, 7-8; Mangu op cit. 89.

²⁴ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

²⁵ Idem para 391.

Secondly, stressing on “South African constitutionalism” implies that contrary to what has been held in the West-dominated conventional social scientist discourse,²⁶ constitutionalism is not an American or a European invention.²⁷ Constitutionalism is part and parcel of human cultural legacy and no people can claim their monopoly or paternity.²⁸ It therefore also matters for Africans. It is as good for Americans, Europeans, and Asians, as it is for Africans.²⁹

The struggle against Apartheid in South Africa and against the colonial rule in the rest of the continent was ultimately a struggle for constitutionalism and democracy.³⁰ Constitutionalism also belongs to Africa and is feasible on the African continent³¹, including in South Africa.

Constitutionalism was the *terminus ad quem* of Nelson Mandela and South Africans’ “Long Walk to Freedom”. Despite the peculiarities of the struggle for constitutionalism and the local forms it may take and that may defer from one country to another, the fundamentals of constitutionalism are the same everywhere. As for democracy, constitutionalism is a universal concept and this is why “Constitutionalism in South Africa” would have been preferable to “South African constitutionalism” as the theme of this conference that is held in the United States, far away from South Africa and the African continent. Chafe also prefers dealing with “democracy in Africa” rather than “African” constitutionalism and democracy.³²

According to Nzongola-Ntalaja, democratic norms and principles are of universal value. Therefore, “there is no question of Africanizing democracy. The key demand of the moment is rather to democratize Africa, This is to say that we cannot import or Africanize democracy because the latter is something that is universal”.³³ To argue that constitutionalism or democracy is universal does not deny any contribution that South Africans have made to its promotion in their struggle against Apartheid.

²⁶ Huntington, for instance, denounced the unreceptivity to democracy of several major cultural traditions, including African traditions. See Sklar, RL, “Developmental Democracy”, in Nyang’oro, JE, (ed), *Discourses on Democracy: Africa in Comparative Perspective*, Dar-es-Salaam: Dar-es-Salaam University Press, 1996, 2; Ibrahim, J., “Transition démocratique en Afrique: le défi d’un nouveau programme”, in Chole, E & Ibrahim, J., (eds), *Processus de démocratisation en Afrique: Problèmes et perspectives*, Dakar: CODESRIA, 1995, 124; Mangu op.cit. 237.

²⁷ See Ake, Cl., *Democracy and Development in Africa*, Washington, DC: The Brookings Institution 1996, 130; Kaba, L., “Power and Democracy in African Tradition: The Case of Songhay, 1464-1591”, in Ronen, D., (ed), *Democracy and Pluralism in Africa*, Boulder: Lynne Rienner Publishers, 1986, 101; Mangu op.cit. 242; Nzongola-Ntalaja, G., “The State and Democracy”, in Nzongola-Ntalaja, G & Lee, M., (eds), *The State and Democracy in Africa*, Harare: AAPS Books, 1997, 10-12.

²⁸ See Banock, M., *Le processus de démocratisation en Afrique. Le cas camerounais*, Paris : L’Harmattan, 1993, 8; Ghali, BB., “Les Nations Unies et l’Afrique”, *Afrique 2000*, No 14, 1993, 15; Gonidec, P.-F., “Démocratie et développement en Afrique : Perspectives internationales pi nationales”, *Afrique 2000*, No 14, 56-57. Nzongola-Ntalaja op.cit. 10

²⁹ See Ronen, D., “The State and Democracy in Africa”, in Ronen op.cit. 202.

³⁰ Mangu op.cit. 288.

³¹ See Ake op.cit. 129-159; Mangu op.cit. 252-255.

³² Chafe, KS. “The Problematic of African Democracy. Experiences from the Political Transition in Nigeria”, *Afrika Zamani*, No 2, 1994, 140.

³³ Nzongola-Ntalaja op. cit.10.

As a concept legal and political, constitutionalism needs to be revisited briefly prior to assessing Nelson Mandela's contribution to promoting constitutionalism, democracy and respect for the rule of law South Africa.

3. Constitutionalism revisited

Gallie contended that constitutionalism was an "essentially contested concept".³⁴ Schochet held that the veneration of constitutionalism is among the enduring and justified vanities of liberal democratic theory.³⁵ However, its definition is controversial.³⁶ According to Henkin, constitutionalism is nowhere defined, "We speak of it as of its meaning is self-evident, or that we know it when we see it".³⁷

Chandler, Enslin and Renstrom are of the view that "Precise language is a basic requirement of every intellectual discipline. This is particularly true in the field of law".³⁸ However, constitutionalism transcends the field of law to extend to other social sciences disciplines such as political science and philosophy. It is perceived as a legal principle, a set of rules aimed at achieving a specific end or a body of values underlying the government of a society.³⁹

The common denominator of the different approaches or conceptions of constitutionalism consists of the three pillars constitutionalism rests on, namely the rule of law, the limitation of government and human rights.⁴⁰ In Rosenfeld's view, constitutionalism is "a three-faceted concept"⁴¹. It requires adherence to the rule of law, imposing limits on the powers of government and the protection of human rights.⁴²

³⁴ See Schochet, GJ, "Introduction: Constitutionalism, Liberalism, and the Study of Politics", in Pennock, JR & Chapman, JW, (eds), *Constitutionalism*, New York: New York University Press, 1979, 98.

³⁵ Schochet op.cit. 1.

³⁶ See Ihonvbere op.cit. 13; Shivji, IG, "Contradictory Class Perspectives in the Debate on Democracy", in Shivji op.cit. 249, 255; Grey, TC, "Constitutionalism: An Analysis Framework", in Pennock & Chapman op.cit.189.

³⁷ Henkin, L., "A New Birth of Constitutionalism", in Rosenfeld, M., (ed), *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*. Durham & London: Duke University Press, 1994, 40; Mangu op.cit. 103.

³⁸ Chandler, Enslin & Renstrom op.cit. XIV.

³⁹ Mangu op.cit.104.

⁴⁰ See Ihonvbere op.cit.13; Shivji "State and Constitutionalism" op.cit. 28.

⁴¹ Rosenfeld, M., "Modern Constitutionalism as Interplay between Identity and Diversity", in Rosenfeld op.cit. 3-5, 28.

⁴² See Rosenfeld op.cit. 3; Mangu op.cit.105.

Constitutionalism first entails the rule of law and not “a government of men” as once favoured by Tushnet.⁴³ According to Armour, constitutionalism entails that men may safely be left free provided they agree to conduct themselves within the limits of certain rules.⁴⁴ Constitutionalism therefore refers to the rules of law, especially to the Constitution which is the supreme law in most countries despite the fact that there are countries such as Britain, New Zealand and Israel that do not have written and supreme constitutions and despite the paradox stressed by Okoth-Ogendo⁴⁵ that constitutions may go without constitutionalism as the case is in many African countries.

Closely related to the first, the limitation of governmental power is the second pillar constitutionalism. Schochet stresses that “the hallmark of modern constitutionalism is its reliance upon formal limitations on political power that are directly tied to popular sovereignty”.⁴⁶ McIlwain considers “the limitation of government by law” the most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism.⁴⁷ As for Andrew, “If one were to attempt a description of this complex concept in two words, we might call it ‘limited government’”.⁴⁸

Mojekwu also viewed constitutionalism as “a main-made device to limit the arbitrariness of governments”.⁴⁹ According to Zoethout and Boon, constitutionalism expresses the conviction that no government should ever have unlimited power to do whatever it wants, since every political system is likely to relapse into arbitrary rule, unless precautions are being taken.⁵⁰ Rosenbaum also found that “Constitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relationship to citizens”.⁵¹ This is also in line with Carl Friedrich’s classic “Friedrichian” definition of constitutionalism, which is “an institutionalized system of effective regularized restraints on governmental action”.⁵²

⁴³ Tushnet, M., “Constitutionalism and Critical Legal Studies”, in Rosenbaum, AS, (ed), *Constitutionalism: The Philosophical Dimension*, New York, Westport, Connecticut, London: Greenwood Press, 1988, 150, 164.

⁴⁴ See Armour, L., “John Locke and American Constitutionalism”, in Rosenbaum op.cit.10; Mangu op.cit.102.

⁴⁵ Okoth-Ogendo op.cit. 3-20.

⁴⁶ See Schochet op.ct. 4; Mangu op.cit. 105.

⁴⁷ See McIlwain, CH., *Constitutionalism: Ancient and Modern*, New York: Cornell University Press, 1947, 22; Mangu op.cit.105.

⁴⁸ See Vile, MJC., *Constitutionalism and the Separation of Powers*, Oxford: Clarendon Press, 1967, 11 , Mangu op.cit. 105.

⁴⁹ See Mojekwu, CC., “Nigerian Constitutionalism”, in Pennock & Chapman op.cit. 184; Mangu op.cit. 105.

⁵⁰ See “Defining constitutionalism and democracy: An introduction”, in Zoethout, CM *et al* (eds), *Constitutionalism in Africa. A quest for autochthonous principles*, Gouda Quint-Deventer, 1996, 1, 11; Mangu op.cit.105.

⁵¹ Rosenbaum, AS, “Introduction”, in Rosenbaum op.cit. 4; Mangu op.cit.105.

⁵² Friedrich, CJ., *Man and His Government*, New York: McGraw-Will, 1963, 271; Sigmund 34; Mangu op.cit.106.

McIlwain and Schochet note that in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.⁵³ Constitutionalism expresses the idea of the limitation of the arbitrariness of political power.⁵⁴ This is close to the principle of the separation of powers as developed by Locke in his *Second Treatise of Government* and systematized by Montesquieu in his famous *The Spirit of Laws*.⁵⁵

According to Montesquieu,⁵⁶ “constant experience shows us that every man invested with power is apt to abuse it, and carry his authority as far as it will go”. The end result of concentration of powers is despotic government, tyranny or suppression of all form of liberty”.⁵⁷ In his view, “it is necessary from the very nature of things that power should be a check to power”⁵⁸ or, as Madison⁵⁹ urged later, “ambition (of one power should) be made to counteract ambition (of another power)”. He recommended the separation of powers or what is known as the *trias politica* consisting of the distribution of powers between the legislature, the executive and the judiciary since:

All would be in vain of the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws; that of executing public resolutions; that of judging crimes and disputes of individuals.⁶⁰

According to Rosenfeld, this is the third general feature or pillar of modern constitutionalism is the protection and the promotion of human rights.⁶¹ The final objective of the rule of law and the limitation of powers is the protection of human rights. Carl Friedrich⁶² argued that the protection of individual rights against the tyranny of the government was “central to genuine constitutionalism”. Sigmund even considers “the guarantee of the protection of individual freedom ... the overall purpose of constitutionalism”.⁶³ However, these should not be only individual, civil, and political rights as generally favoured in Western thought and theory, but also collective, social, economic and cultural rights as enshrined in the African Charter on Human and People’s Rights.⁶⁴

⁵³ See McIlwain op.cit. 21-22; also quoted by Grey op.cit. 189; Schochet op.cit. 5; Mangu op.cit.106.

⁵⁴ See Zoethout & Boon op.cit. 1; Mwabueze quoted by Mojekwu 164; Mangu op.cit.106.

⁵⁵ Quoted by Mangu op.cit. 119-120.

⁵⁶ Idem 121.

⁵⁷ Idem.

⁵⁸ Idem.

⁵⁹ Quoted by Levi, EH., “Some aspects of the Separation of Powers”, *Columbia Law Review*, 1976, Vol 76, 378.

⁶⁰ Montesquieu cited by Vile op.cit, 85; Levi op.cit. 373-374; Mangu op.cit.121; Van der Vyver, JD., “The Separation of Powers”, *SAPR/PL*, 1993, 177-178.

⁶¹ See Rosenfeld op.cit. 3-4, 13; Mangu op.cit.144.

⁶² Quoted by Chandler, Enslin and Renstrom op.cit.35; Mangu op.cit.144.

⁶³ Sigmund, P., “Carl Friedrich’s Contribution to the Theory of Constitutionalism – Comparative Government”, in Pennock & Chapman op. cit.39.

⁶⁴ The African Charter on Human and Peoples’ Rights was adopted in Nairobi, Kenya, on 27 June 1981, and entered into force on 21 October 1986.

As the Constitutional Court of South Africa ruled in a number of cases, especially in *Government of RSA and Others v Grootboom*,⁶⁵ the so-called three generations of rights are intertwined and should not be insulated from each other.

Constitutionalism encapsulated all the values that Nelson Mandela and the overwhelming majority of the South African people fought for. They wanted the rule of law and not an “empire of man”.⁶⁶ Since the rule of law can also be authoritarian, they were more preoccupied with the “democratic” rule of law or the law adopted by the majority of the people but that also protects the minorities and which applied to all without any distinction. They fought for a government with limited powers, representative of the people, working for the people and accountable to them. They demanded the recognition and the protection of the rights of all the people, White, Black, Indians or Coloured, and all the rights, civil, political, individual social, economic, cultural and collective or people’s rights.⁶⁷

Nelson Mandela and the South African people fought for democracy, which is also related to constitutionalism. Sandbrook defined democracy as:

a political system characterised by regular and free elections on which politicians organized into political parties compete to form the government, by the right of virtually all adult citizens to vote, and by guarantees of a range of familiar political and civil rights.⁶⁸

According to Hinden, democracy is a set of three essential institutions: a representative body, fundamental freedoms, and the rule of law. He insisted:

Clothe these three institutions in what shape you like; invent whatever devices you like for safeguarding them; but they must be there. Without them there is no democracy...Without these three indispensable limitations on the powers of the government...we cross the dividing line which separates the variety of political forms which may be called “democratic” from the territory of dictatorships, autocracies, oligarchies and tyrannies.⁶⁹

Minimalist scholars define democracy as a process and a set of institutions and focus on political democracy while maximalist scholars concentrate on the substance and values of democracy the most prominent among them being social equality, and on socio-economic rights. Maximalist conceptions are built on criticisms against liberal and Western democracy. Maximalist scholars advocate a social democracy that places emphasis on concrete, social and economic rights, as opposed to a liberal democracy that emphasises abstract political rights; a democracy that puts emphasis on collective rights as it does on individual rights.⁷⁰

⁶⁵ Mangu op.cit. 146

⁶⁶ Mandela, M., “Address of Nelson Mandela at his Investiture as doctor of Laws” 1 August 1993, Soochow University, Taiwan (at <http://www.anc.org.za/show.php?id+4094> (accessed on 9 November 2014).

⁶⁷ Mangu op.cit.145-147.

⁶⁸ Sandbrook, R., “Liberal Democracy in Africa: A Socialist-Revisionist Perspective;”, in Nyang’oro op.cit. 177/

⁶⁹ Hinden, R., *Africa and Democracy*, Encounter, 1963, 9.

⁷⁰ On minimalist and maximalist conceptions of democracy, see Mangu op.cit. 175-184.

This should be a popular, participative and social democracy. This type of democracy was also advocated in the African Charter for Popular Participation.⁷¹

The different conceptions of democracy revolve around democracy as defined by US President Abraham Lincoln in his famous Gettysburg speech of 19 November 1863 when he referred to “the government of the people, by the people and for the people”.⁷²

In as much a democracy requires respect for human rights, the rule of law, and the limitation of the government that is elected by the people and is accountable to them, democracy and constitutionalism are interrelated. Constitutionalism and democracy are mutually dependent and reinforcing despite the fact they may appear to be at some times antagonist.⁷³

As Sejersted also contented, “the common experience is likely to be stronger that democracy has after all been the best guarantee for limited government and the rule of law”.⁷⁴ The final phase of modern constitutionalism was its democratization. Genuine and sustainable democracy is impossible without constitutionalism which is also a prerequisite for democratic survival.⁷⁵ This is why, in Africa as elsewhere, several democratic struggles started with demands for new constitutions. This also happened in South Africa with the end of Apartheid that was characterised by the adoption of a new constitution, the 1993 Constitution or “interim Constitution”.

One of the major discussions about the relationship between constitutionalism and democracy concerns the so-called “counter-majoritarian dilemma” which is the discord between majoritarian politics and constitutional anchored restraints. Constitutionalism is sometimes perceived as a useful limit on democracy or an unnecessary nuisance.⁷⁶ The question is why a democratic government should be limited at all and how justifiable can be a system that thwarts the will of the majority in democracy.⁷⁷ Constitutional scholars, particularly in the US, have long struggled with the “counter-majoritarian difficulty”.⁷⁸ The debate mostly revolves around the legitimacy of judicial review: why can unelected judges be allowed to strike down decisions made by duly elected people’s representatives in Parliament?

⁷¹ See Ake op.cit. 132-134; Mangu op.cit. 181.

⁷² Lincoln, A., “The Gettysburg Address” ; Mangu op.cit. 187.

⁷³ See Rosenfeld op.cit. 27.

⁷⁴ Sejersted, F., “Democracy and the Rule of Law: some historical experiences of contradictions in the striving for good government”, in Elster, J. & Slagstad, R., (eds), *Constitutionalism and Democracy*, New York-New Rochelle-Melbourne-Sydney: Cambridge University Press, 1988, 139.

⁷⁵ See Chandler, Enslin & Renstrom op.cit. 18, Elster, J., “Introduction”, in Elster & Slagstad op.cit.9; Conac, G., “Etat de droit et démocratie”, in Conac, G., (ed), *L’Afrique en transition vers le pluralisme politique*, Paris : Economica, 1993, 485; Mangu op.cit. 202.

⁷⁶ Hayek and Shapiro as quoted by Holmes, S., “Precommitment and the paradox of democracy”, in Elster & Slagstad op.cit. 196-197; Mangu op.cit. 204

⁷⁷ Laurence Tribe as quoted by Holmes op.cit. 195.

⁷⁸ Davis, D., Chaskalson, M. & De Waal, J., “Democracy and Constitutionalism: The Role of Constitutional Interpretation”, in Van Wyk, D., (eds), *Rights and Constitutionalism. The New South African Legal Order*, Johannesburg: Juta, 1994, 5-8.

There is, indeed, a tension that defenders of the counter-majoritarian-debate or dilemma such as Holmes found it to be “as paradox”, an “irreconcilable tension”, “a marriage of opposites”, “a contradiction in terms”, or “an oxymoron”.⁷⁹

In the US, in the face of the silence of the Constitution, the answer came from the judiciary in *Marbury versus Madison*.⁸⁰ Parliament is not the only institution to represent the people and there are checks and balances which also prevent the concentration of powers in the end of people’s representatives. Gordon Wood⁸¹ held that abuse of power by any branch of government, even the traditional representatives of the people, was a “tyranny”. Jefferson⁸² held that abuse of power by people’ representatives was “elective despotism” and “elective despotism was not the government we fought for”. Americans settled it their way but Africans did not want to reinvent the wheel by rather providing for judicial review of legislation in the Constitution.

Constitutionalism and democracy played an important role in the struggle against the colonial and the apartheid rule in Africa, which were authoritarian and inherently and obviously undemocratic.⁸³ According to Romdhane, constitutionalism was “the means of combating occupation”, “the leaven in the fight against colonisation” and “the vehicle of the national movement”.⁸⁴ Anyang’ Nyong’o⁸⁵ also stressed that democracy was one of the determinant ideas of the movement for independence. This is well expressed in the Freedom Charter adopted in 1955. As Mandela revealed, this Charter laid out the foundations for a free and democratic South Africa.⁸⁶ In this historic document that resembles other enduring political documents like the American Declaration of Independence, the French Declaration of the Rights of Man and the Communist Manifesto, the representatives of all people of South Africa – Black, White, Indian, and coloured – declared that “only a democratic state, based on the will of the people, can secure to all their birth right without distinction of colour, race, sex or belief”.⁸⁷ The Charter was in fact a revolutionary document precisely because the changes it envisioned could not be achieved without altering the economic and political structures of South Africa and without destroying apartheid itself, for it was the very embodiment of injustice and authoritarianism like the colonial regime.⁸⁸

⁷⁹ Holmes op.cit. 195, 197, 198;s 205

⁸⁰ *Malbury v Madison* 5 US 137, 2 LED (60) 1803.

⁸¹ Quoted by Levi op.cit. 375; Mangu op.cit.121.

⁸² Idem.

⁸³ See Sandbrook op.cit. 150 ; Ihonvbere op.cit. 16-17; Mangu op.cit.287.

⁸⁴ Romdhane, MB., “Constitutionalism and Social Movements in Tunisia”, in Shivji op.cit. 220, 235.

⁸⁵ Anyang Nyong’o, “Discours sur la démocratie en Afrique”, in Chole & Ibrahim op.cit. 28 ; Mangu op.cit. 289.

⁸⁶ Mandela op.cit. 204.

⁸⁷ Idem 203. Preamble of the Freedom Charter.

⁸⁸ Mandela op.cit. 206.

Nelson Mandela's contribution to constitutionalism and the rule of law has to be assessed in two important periods of his life. The first is the period of apartheid during which he grew up, was schooled and practiced law while combating the apartheid rule and succumbing to it. The second period started with his liberation after 27 years of imprisonment by the Apartheid regime up to his retirement from politics as South Africa's first black and democratically elected president.

4. Nelson Mandela : The Lawyer, The “Volunteer-in-chief”, The Accused and The Prisoner against The Apartheid Rule of Law

Nelson Mandela was a lawyer by training and calling. He studied and practiced law. However, as a freedom fighter he engaged in the struggle against the Apartheid rule, he became the “volunteer-in-chief” during the Defiance campaign against the Apartheid laws prior to succumbing under the same laws as accused and prisoner.

4.1 Nelson Mandela : The Law and The Lawyer

According to Sitze, “For a long time now, it has been impossible to hear the name ‘Nelson Mandela’ without also thinking of the law”.⁸⁹ Derrida took the name “Mandela” to mean “a man of the law (*un homme de loi*)”: a lawyer who respects the law and inspires respect for the law in any reader who reflects upon his writings”.⁹⁰ There is another relation between Mandela and the law:

Between 1939, when Mandela began studying administrative law at the University of Fort Hare, and 1989, when Mandela finally received his LLB through correspondence from the University of South Africa (UNISA), Mandela would enrol in no fewer than fifty courses in law at four different universities. For fully half a century, Nelson Mandela was, in a sense we yet have fully to comprehend, a student of law...Fifty years of legal studies...Mandela persisted in his pursuit of a law degree, giving a new meaning to UNISA's Latin motto, *spes in arduis* (hope through diversity).⁹¹

After his high school, Mandela registered for a Bachelor of Arts degree at the University College of Fort Hare. As he recalled himself in his *Long Walk to Freedom*, he studied English, Anthropology, Politics, Native Administration and Roman Dutch law. Although he was advised to study law, he had his heart set on being an interpreter or a clerk in the Native Affairs department.⁹² An interpreter on the magistrate's office was considered second only in importance to the magistrate himself.

⁸⁹ Sitze, A., “Mandela and the Law”, in Barnard, R., (ed), *The Cambridge Companion to Nelson Mandela*, Cambridge: Cambridge University Press, 2014, 134, 151.

⁹⁰ Idem 134.

⁹¹ Idem 134-135.

⁹² Idem 136.

In his second year, he studied an interpreting course taught by a distinguished retired court interpreter, Tyamzashe.⁹³ Professors Z.K Matthews and D.D. T Jabavu taught him jurisprudence and Latin respectively.⁹⁴ However, Mandela never completed his BA at Fort Hare. He was expelled in his second year for resigning from SRC against the will of the Vice-Chancellor and then moved to Johannesburg in 1942. Still determined to complete his BA and become a qualified attorney, he studied at night through correspondence at UNISA.⁹⁵

Meantime, on Walter Sisulu's recommendation, he was accepted as a clerk on a law firm named Witkin, Sidelsky and Eidelman on 8 March 1943. In early 1943, after passing examination through UNISA, Mandela returned to Fort Hare for his graduation.⁹⁶ When he returned to Johannesburg, he enrolled at the University of the Witwatersrand for a Bachelor of Law degree (LLB) to become a lawyer. He was the only African student in the Law Faculty at Wits.⁹⁷ US-born and German-educated Professor Herman Robert Hahlo taught him the Law of Persons and Corporations, a course that Mandela ended up retaking thrice.⁹⁸

In 1947, Mandela completed the required period of three years for articles and left Witkin, Sidelsky and Eidelman came to an end. He resolved to become a full-time student in order to pass his LLB so that he could go out on his own and practice as an attorney. He took a loan from the Bantu Welfare Trust at the South African Institute of Race Relations to achieve this aim.⁹⁹

In 1949, he submitted an application to the Faculty of Law for "supplementary examinations" in Jurisprudence, Law of Delict, and Law of Evidence, all three of which he needed to pass to receive his LLB. His application was rejected by a committee chaired by Professor Hahlo who had been dean of the law faculty since 1946. He was excluded. This deprived Mandela of the chance to pursue the LLB degree to practice as an advocate, but he could still become an attorney.¹⁰⁰ He then went to work for the law firm of Terblanche & Briggish in 1951. When he completed his articles, he was not yet a fully-fledged attorney, but was in a position to draw court pleadings, send out summonses and interview witnesses – all of which an attorney must do before a case goes to court.

⁹³ See Mandela op.cit. 52-56; Sitze op.cit.136-137.

⁹⁴ Sitze op.cit. 143-144.

⁹⁵ Mandela op.cit. 81.

⁹⁶ Idem 101-102.

⁹⁷ Idem 103.

⁹⁸ Sitze op.cit. 143-144.

⁹⁹ Mandela op.cit. 122.

¹⁰⁰ Sitze op.cit. 144.

After working for Terblanche & Briggish, he joined Helman and Michel, a liberal firm and one of the few law firms that charged Africans on a reasonable scale. In addition, it prided itself on its devotion to African education, towards which it donated handsomely.¹⁰¹ Mandela stayed at Helman and Michel for a number of months while studying for his qualification exam, which would establish him as a fully-fledged attorney who could practise on his own and begin to earn enough money to support his family. He passed his Attorneys' Admission Examination in 1951.

On 27 March 1952, he was admitted as a fully-fledged attorney of the Court of Transvaal Provincial Division.¹⁰² He went on to work at H.M. Basner, a firm that was passionate a supporter of African rights. For the months he worked there, he was often in court representing the firm's many African clients.

In August 1952, Mandela opened his own law office. Later, he invited his friend Oliver Tambo who was working for Kovalsky and Tuch to join him and they established the first black law firm named "Mandela and Tambo" in Chancellor House, in Johannesburg.¹⁰³ They were not only the only African lawyers in South Africa, but their firm was also the only firm of African lawyers. This explains why they were from the beginning besieged with (African) clients who were desperate for legal help for they could be charged with crimes anywhere and anytime.¹⁰⁴ As Mandela himself recounted, it was a crime to walk through a "Whites Only" door, a crime to ride a "Whites Only" bus, a crime to use a "Whites Only" drinking fountain, a crime to walk on a "Whites Only" beach, a crime to be on the streets after 11 p.m., a crime not to have a pass book and a crime to have the wrong signature in that book, a crime to be unemployed and a crime to be employed in the wrong place, a crime to live in certain places and a crime to have no place to live.¹⁰⁵ For ordinary Africans, "Mandela and Tambo" meant

a place where they could come and find a sympathetic ear and a competent ally, a place where they would not be either turned away or cheated, and a place where they might actually feel proud to be represented by men of their own skin colour. This was the reason I had become a lawyer in the first place, and my work often made me feel I had made the right decision.¹⁰⁶

Despite being a lawyer and having been taught respect for the rule of law by Professors Z.K. Matthews and Jabavu at Fort Hare, Mandela had however to combat the law of apartheid.

¹⁰¹ Mandela op.cit. 170.

¹⁰² Sitze op.cit. 145.

¹⁰³ See Mandela op.cit. 171-172 ; Sitze op.cit. 145.

¹⁰⁴ See Mandela op.cit. 172; Sitze op.cit. 146.

¹⁰⁵ Mandela op.cit. 173.

¹⁰⁶ Idem 173.

Unlike Hoernle who argued that “the law was the law” and “demanded obedience no matter how repugnant to the liberal spirit its particular provisions might be”,¹⁰⁷ thereby rejecting any theory of disobedience, Mandela’s earliest legal studies would have pointed out toward a different conclusion.

Mandela learned from his Fort Hare’s professors that law in the Union of South Africa was defined by “an irreducible incoherence: it not only *coexisted with* but also *demande*d the very arbitrary violence” that the “rule of Law was supposed to constrain”.¹⁰⁸

Sitze described the Apartheid system as a negation of the rule of law:

Instead of the rule of law, it was governed by dictatorship; instead of peacetime norms, it was ordered according to the exceptions of martial law; instead of health, welfare, and safety, its administrative apparatus produced conditions for the extermination of Africa populations”.¹⁰⁹

Mandela had to use the same law to combat it in order to achieve a “higher law”, the democratic rule of law that would emanate from the majority of African people while securing the white minority. He had been inspired by Jabavu and Matthews who were committed to the idea that constitutional change ought to be accomplished within the limits of the existing constitutional order.¹¹⁰ As a lawyer, he used the courtroom to defend people or to defend himself during the trials. He fought for a higher law, “the law of the truth”¹¹¹ and worked therefore to uproot the Apartheid law. The court room was also used as “a political theatre”.

Mandela explained how Tambo and himself how as lawyers they were received:

In some courts, we were treated with courtesy, in others with contempt. But even as we practised and fought and won cases, we always knew that no matter how well we pursued our careers as attorneys, we could never become a prosecutor, a magistrate, and a judge. Although we were dealing with officials whose competence was no greater than our own, their authority was founded on and protected by the colour of their skin.¹¹²

Sometimes, white witnesses refused to be cross-examined. Mandela routinely put policemen on the stand and interrogated them but he only remained in their eyes a “kaffir lawyer”.¹¹³ He frequently encountered prejudice in court, even asked to show his certificate or face eviction by a court officer.¹¹⁴

¹⁰⁷ Sitze op.cit.148.

¹⁰⁸ Idem.

¹⁰⁹ Sitze op.cit. 148.

¹¹⁰ Idem.

¹¹¹ Idem 134, 150.

¹¹² Mandela op.cit. 173.

¹¹³ Idem 174.

¹¹⁴ Idem 173-174.

Working as a lawyer in South Africa meant operating under a debased system of justice, a code of law that did not enshrine equality but its opposite.¹¹⁵ As an attorney, Mandela could be rather flamboyant in court. He did not act as though he were a black man in a white man's court, but as if everyone else – white and black – was a guest in the court.¹¹⁶

When required to represent a Coloured who fought during the Second World War in North Africa and Italy and on his return was classified African under the Population Registration Act, Mandela found himself before a case that offered a “moral jigsaw puzzle”. He had to represent his clients even though he did not support or recognize the principles in the Population Registration Act that offered the Coloured unlike Africans the advantage that they were not required to carry passes.¹¹⁷ This was part of the “strange alchemy of life and law” that former Constitutional Law Court Judge Albie Sachs referred to in his book.¹¹⁸

In 1989, while in the last months of his imprisonment, Mandela obtained an LLB through UNISA. He graduated in *absentia* at a ceremony in Cape Town. However, he could not enjoy the degree he fought for more than fifty years to be admitted and practice as an advocate.

4.2 Nelson Mandela : The Lawyer, The Militant, The Volunteer-in-chief and The Accused

After his admission as an attorney in the early 1950s, Mandela who had joined the ANC since the mid -1940s was involved in the Defiance Campaign. In July 1951, the ANC leadership concluded an agreement with the Indian Congress to launch joint mass campaigns against discriminatory laws. At the end of the year, the ANC announced that the Defiance Campaign against Unjust Laws was to be launched in April 1952. The Defiance Campaign officially started on 26 June 1952 with Mandela as “the volunteer-in-chief”.¹¹⁹

¹¹⁵ Idem 175.

¹¹⁶ Idem 176.

¹¹⁷ Mandela op.cit. 175.

¹¹⁸ Sachs, A., *The Strange Alchemy of Life and Law*, Oxford University Press, 2009.

¹¹⁹ Max du Preez, *The Rough Guide to Nelson Mandela*, New York: Rough Guides, 2011, 56.

Following on the example of Ghandi, who had also been a lawyer, protestors from different racial groups demonstrated by disobeying apartheid laws, and by refusing to pay fines when they were arrested and even released, they vowed that would not bow down and would continue to protest until the discretionary laws were repealed.¹²⁰

Mandela, the lawyer who was to assist in the enforcement of the rule of law and abide by it was appointed and accepted to be the “Volunteer-in-chief” in this Defiance Campaign, becoming simultaneously “a lawyer and an outlaw”.¹²¹ Later, throughout the Treason Trial, Mandela was simultaneously a practising attorney and “Accused No 6”. During the Rivonia Trial, the attorney was also “Accused No 1”.¹²²

As Albie Sachs¹²³ pointed out, this “strange alchemy of life and law” or “split psyche” was Mandela’s life. He would at the same time respect and combat the laws of Apartheid. He had to represent his clients and defend himself. During the Treason and Rivonia trials, by respect for the court despite the manifestly unjust laws and the Apartheid system that they represented, Mandela would wear a suit and a tie and call the presiding officer “My Lord” or “Your Worship”. Yet during the Defiance Campaign, as the “volunteer-in-chief”, he could himself break apartheid laws and encourage people to do the same.

At times, he was in front of the dock, as a lawyer and an officer of the court. At other times, he was in the dock as an accused. In 1952, he was arrested during the Defiance Campaign on a charge of violating the Suppression of Communism Act, but the sentence was suspended. On 5 December 1955, he was arrested on high treason charges with one hundred and fifty-six other leaders of the Congress Alliance. They were formally charged on 6 December 1956.¹²⁴ There were one hundred and five Africans, twenty-one Indians, twenty-three whites and seven coloured and sent to Johannesburg Prison for conspiracy to use violence to overthrow the government and replace it with a communist state. Almost the entire executive leadership of the ANC, both banned and unbanned, had been arrested.¹²⁵

¹²⁰ Lecture: “Nelson Mandela’s Contribution to the Rule of Law” at <http://www.hc.org.za/other-news/3140/lecture-nelson-mandela-s-contribution-to-the-rule-of-law> (accessed on 9 November 2014).

¹²¹ Rabkin, F., “Mandela respected the law in the fight for freedom” at <http://www.bdlive.co.za/national/law/mandela-respected-the-law-in-fight-for-freedom> (accessed on 9 November 2014).

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¹²³ Rabkin, F., “Mandela respected the law in the fight for freedom” at <http://www.bdlive.co.za/national/law/mandela-respected-the-law-in-fight-for-freedom> (accessed on 9 November 2014).

¹²⁴ Mandela op.cit. 231-233.

¹²⁵ Idem.

On the other hand, in April 1954, the Law Society of the Transvaal applied to the Supreme Court for Mandela's name to be struck off the roll of accredited attorneys on the ground that political activities for which he was convicted in the Defiance case amounted to unprofessional and dishonourable conduct. This occurred when the firm "Mandela and Tambo" was flourishing.¹²⁶

Mandela received support even from well-known Afrikaners and white lawyers. Their response suggested to Mandela that even in racist South Africa professional solidarity could sometimes transcend colour, and that there were still attorneys and judges who refused to be the rubber-stamp of an immoral regime.¹²⁷

Mandela's case was defended by Advocate Walter Pollak, Chairman of the Johannesburg Bar Council, and William Aarnsohn being an instructing attorney. They argued that the application was an affront to the idea of justice and that Mandela had an inherent right to fight for his political beliefs, which was the right of all men in a state where the rule of law applied.

Judge Ramsbottom, who heard the case, was an example of a judge who refused to be a mouthpiece for the Nationalists and upheld the independence of the judiciary. His judgement upheld Mandela's claim that he had a right to campaign for his political beliefs even though they were opposed to the government. He dismissed the Law Society's application, and in an unusual move, he ordered the Law Society to pay its own costs.¹²⁸ Fifty years after the Law Society failed to get his name struck off the roll of attorneys, the Black Lawyers Association felt privileged to nominate Mandela as their president of honour in 1999.

4.3 Nelson Mandela: Accused's Speeches from the Dock, The Prisoner and Continuation of the Struggle against Apartheid

Mandela was arrested several times and spent nights in prisons. As he put it, "It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones – and South Africa treated its imprisoned African citizens like animals".¹²⁹ Mandela and his comrades as accused went regularly on trials, the famous being the Treason Trial and the Rivonia Trial.

¹²⁶ Mandela op.cit. 190.

¹²⁷ Idem.

¹²⁸ Idem 191.

¹²⁹ Idem 233.

The Treason Trial was based on the indictment that covered the period from 1 October 1952 to 13 December 1956 including the Defiance Campaign, the Sophiatown removal (1954) and the Congress of the People's adoption of the Freedom Charter.¹³⁰

After two weeks, they appeared for their preparatory examination on 19 December 1956 at the Drill Hall in Johannesburg. The preparatory examination lasted for the whole of 1957.¹³¹ The purpose of a preparatory examination was to determine whether the government's charges were sufficient to put them on trial in the Supreme Court.¹³² The verdict on the Treason Trial came on 29 March 1961, declaring them not guilty.¹³³

Mandela praised the judges who decided the case, but not the Apartheid judicial system:

I did not regard the verdict as a vindication of the legal system or evidence that a black man could get a fair trial in a white man's court. It was the right verdict and a just one, but it was largely a result of a superior defence team and the fair-mindedness of the panel of these three particular judges. The court system, however, was perhaps the only place in South Africa where an African could possibly receive a fair hearing and where the rule of law might still apply. This was particularly true in courts presided over by enlightened judges who had been appointed by the United party. Many of these men still stood by the rule of law".¹³⁴

He added:

As a student, I had been taught that South Africa was a place where the rule of law was paramount and applied to all persons, regardless of their social status or official position. I sincerely believed this and planned my life based on that assumption. But my career as a lawyer and activist removed the scales from my eyes. I saw that there was a wide difference between what I had been taught in the lecturer room and what I learned in the courtroom. I went from having an idealistic view of the law as a sword of justice to a perception of the law as a tool used by the ruling class to shape society in a way favourable to itself. I never expected justice in court, however much I fought for it, and though I sometimes received it.¹³⁵

In the case of the Treason Trial, the three judges rose above their prejudices, their education and their background. According to Mandela, "There is a streak of goodness in men that can be buried or hidden and then emerge unexpectedly".¹³⁶

¹³⁰ Mandela op.cit. 236.

¹³¹ Idem 247.

¹³² Idem 236.

¹³³ Idem 307-308.

¹³⁴ Idem 308.

¹³⁵ Idem 309.

¹³⁶ Idem 309.

Mandela went underground after the court's ruling in the Treason Trial. He became the "Volunteer-in-chief" during the Defiance Campaign and other ANC leaders created *Umkhonto we Sizwe* (MK) as the military wing of the ANC. He was promoted MK's commander-in-chief. On 16 December 1961, MK launches its sabotage campaign. In early 1962, Mandela travelled widely in Africa and England to organise the ANC. On 5 August 1962, the "Black Pimpernel", as Mandela was called, was arrested outside Pietermaritzburg after he returned from a trip overseas and charged with inciting a general strike and for leaving South Africa without a passport. The trial started on 13 October 1962. The initial hearing was set for Monday 15 October 1962.¹³⁷ Mandela conducted his defence.

On 7 November 1962, Mandela delivered a first speech from the dock, in which he declared himself under no obligation to obey the law of the Apartheid state, speaking in ringing terms about the "conflict" that "any thinking African in this country" experienced between "his conscience on the one hand and the law on the other".¹³⁸ He then wore a leopard skin "kaross" instead of a suit and tie as he normally did.¹³⁹ This was a gesture to show "contempt for the niceties of white justice" and equally demonstrate "the contempt in which South African justice held law itself".¹⁴⁰ Mandela was sentenced for five-year imprisonment at Pretoria Central Prison and later transferred to Robben Island.

On 12 July 1963, while serving his sentence at Robben Island and studying the history of English law through correspondence at the University of London, Mandela was brought back to Pretoria after police raid on Liliesleaf Farm, Rivonia, where other MK leaders were captured and incriminating documents seized. They were put on trial yet again, this time for retroactively violating the "Sabotage Act" (Act 37 of 1962), which had been passed by the all-white parliament while Mandela had been imprisoned, and for attempting to overthrow the government and establish a communist state.¹⁴¹

The Rivonia Trial or the case *State versus Nelson Mandela and Others* opened on 9 October 1963 before the Supreme Court in the Palace of Justice in Pretoria.¹⁴² Justice de Wet gave a three-week adjournment until 29 October 1963.¹⁴³

¹³⁷ Mandela op.cit. 384.

¹³⁸ Sitze op.cit. 150-151.

¹³⁹ Idem 151.

¹⁴⁰ See Mandela op.cit. 325; Sitze op.cit. 151.

¹⁴¹ Sitze op.cit. 150.

¹⁴² Mandela op.cit. 417.

¹⁴³ Idem 419.

When asked to plead guilty or not guilty, Mandela “Accused No.1”, rose and said: “My Lord, it is not I, but the government that should be in the dock. I plead not guilty”.¹⁴⁴ Accused No, 2 Walter Sisulu also said: “The government is responsible for what has happened in this country. I plead not guilty”. So did all the accused persons who pleaded not guilty and therefore suggested that it was the government that was a criminal.¹⁴⁵

The Rivonia Trial provided Mandela with the opportunity to deliver from the dock a second statement that Albie Sachs¹⁴⁶ considered “the most comprehensive and widely reported critique of the administration of justice ever made in South Africa”. The final words of Mandela’s four-hour long statement made on 20 April 1964 at the very opening of the trial read as follows:

During my lifetime, I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.¹⁴⁷

The verdict came on 11 June 1964. All the accused were found guilty.¹⁴⁸ On Friday 12 June 1964, Justice de Wet sentenced them to life imprisonment.¹⁴⁹ Mandela spent 27 years in prison. While in prison, Nelson Mandela remained the political and moral leader of the ANC that continued the struggle against Apartheid. He could well undermine the struggle by making concessions to the white regime, especially in the 1980s when they engaged in secret talks far away from his comrades in the movement.

However, Nelson Mandela rejected all offers of conditional release. He wanted freedom not just for himself, but for his entire people. As he indicated in a letter he addressed from prison to his people, “Only free man can negotiate. Prisoners cannot enter into contracts...I cannot and will not give any undertaking at a time when I and you, the people, are not free. Your freedom and mine cannot be separated”.¹⁵⁰

¹⁴⁴ Mandela op.cit.422.

¹⁴⁵ Idem.

¹⁴⁶ Quoted by Sitze op.cit. 150.

¹⁴⁷ Mandela op.cit. 438.

¹⁴⁸ Idem 443-444.

¹⁴⁹ Idem 446.

¹⁵⁰ Idem 623.

For Nelson Mandela, his own freedom was indivisible of inseparable from the freedom of his people and this people were not only the Black people, but all also the White, Indian and Coloured people who were also part of the “rainbow nation” since the oppressed recruited in all the spheres of society:

I am no more virtuous or self-sacrificing than the next man, but I found that I could not even enjoy the poor and limited freedoms I was allowed when I knew my people were not free. Freedom is indivisible; the chains on any one of my people were the chains on all of them; the chains on all of my people were the chains on me.¹⁵¹

And Mandela went on:

It was during those long and lonely years that my hunger for the freedom of my own people became a hunger for the freedom of all people, white and black. I knew as well as I knew anything that the oppressor must be liberated just as surely as the oppressed. A man who takes away another man's freedom is a prisoner of hatred; he is locked behind the bars of prejudice and narrow-mindedness. I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me. The oppressed and the oppressor alike are robbed of their humanity...For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others...with freedom come responsibilities.¹⁵²

Finally, the Apartheid regime collapsed under tremendous external and internal pressure and unconditionally released him in February 1990. However, the struggle was not over. Nevertheless, Mandela's release inaugurated a new phase of the struggle that would lead to the complete demise of the Apartheid regime.

5. Nelson Mandela : The Free Man, the Political Leader, and the President

Nelson Mandela's contribution to constitutionalism and the rule of law can be assessed during two periods. The first is the period from his release from prison to the first general democratic elections while the second period covers his presidency.

5.1 Nelson Mandela's Role during the Negotiations for the Foundation of a Constitutional and Democratic South Africa

The release of Nelson Mandela and other political leaders and the unbanning of all anti-apartheid organisations in the early 1990s paved the way for negotiations with the apartheid regime in order to establish the foundations of a constitutional and democratic South Africa.

¹⁵¹ Mandela op.cit. 750-751.

¹⁵² Idem 751.

Negotiations were indispensable to peace and as Nelson Mandela emphasised, “To make peace with an enemy, one must work with that enemy, and that enemy becomes your partner”.¹⁵³ After his release from prison, he found himself on a mission to reconcile a deeply divided society that cultivated hatred and racial discrimination under Apartheid. He was convinced that human beings could transcend their divisions and the good could prevail over the evil and love over hatred.

I always knew that deep down in every human heart, there was mercy and generosity. No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can also be taught to love, for love comes more naturally to the human heart than its opposite...Man’s goodness is a flame that can be hidden but never extinguished. We took up the struggle with our eyes wide open, under no illusion that the path would be an easy one.¹⁵⁴

Mandela played a crucial role during the negotiations that were on many occasions on the brink of collapse and would not have been successfully completed without Mandela’s leadership.

On 3 June 1993, after months of negotiations at the World Trade Centre, the multi-party forum voted to set a date for the country’s first national, non-racial, one-person-one-vote election: 27 April 1994.¹⁵⁵ Around five months later, on 18 November 1993, an interim constitution¹⁵⁶ was approved by a plenary session of the multiparty conference.¹⁵⁷ Mandela was the key architect of the post-apartheid and current constitutional and democratic order during the Negotiations.

5.2 Nelson Mandela: President, the Constitution, the Rule of Law, and the Independence of the Judiciary

When he was elected president in April and inaugurated in May 1994, Nelson Mandela actually demonstrated a great respect for the constitution, the separation of powers, human rights, the rule of law and the independence of the judiciary.

One of the lessons learned from Africa’s post-colonial history is that once in power, many political leaders who sacrificed their lives in the struggle for constitutionalism, democracy and the rule of law showed little respect for the constitutions of their countries and ended up establishing “presidential monarchies”.

¹⁵³ Mandela op.cit. 734-735.

¹⁵⁴ Idem 749.

¹⁵⁵ Idem 732.

¹⁵⁶ Act 200 of 1993.

¹⁵⁷ Mandela op.cit. 733

Presidential monarchies may be defined as those regimes that are characterised by the concentration of powers in the hands of the president and the rejection of any limits on the powers and the terms of office of the president to secure a *de facto* or *de jure* life presidency with the succession being reserved for president's relatives.¹⁵⁸ This happened not only with less-educated leaders, but even with the highly educated ones. This is the case of Abdoulaye Wade, former Senegalese President, and a lawyer like Mandela.

Abdoulaye Wade studied law and obtained a Bachelor degree, a Master's degree and doctoral degrees in France. He became a lawyer in 1955 at the time when Mandela was standing trial and charged with high treason in South Africa. He taught law in France and in Senegal where he was even appointed Dean of the Law Faculty at the University of Dakar in the early 1970s. As a political leader, he challenged President Senghor's *de facto* one party, the Socialist Senegalese Party (PSS), by establishing his own Democratic Senegalese Party (PDS), the first opposition party in the country. From 1970 to his election at the presidency in 2000, Mr Wade had spent around 30 years in the opposition. Advocate Wade was first elected president in 2000 for 7 years. In 2001, the Senegalese National Assembly dominated by his party passed a constitutional amendment reducing the presidential term of office from 7 to 5 years to come into operation in 2007. Wade therefore wanted a short term for his successor as he had vowed he would not run again. However, he did run again in 2007 and was re-elected for 5 years.

In 2008, a year after his re-election, the Constitution was amended again to extend the mandate to 7 years after the 2012 presidential election. During Wade's second term of office as president, his son Karim Wade became the most powerful cabinet minister being groomed to succeed his father after his retirement as we saw in Chad, Egypt, Democratic Republic of Congo (DRC), Gabon, Libya, and Togo. Equatorial Guinea and Uganda can also be considered presidential monarchies where *de facto* presidents for life Nguema and Museveni are allegedly grooming their sons to take over from them. In 2012, Wade changed his mind and ran for re-election to the presidency after pushing the Constitutional Council to rule in his favour. And yet, this is a man who held during the 1961 Lagos African Conference on the Rule of Law when he summed up the discussions of one of the panels:

The problem with which we were basically concerned was the question of democratic power and personal power. Our belief was that ...it is essential to avoid personal power, endeavouring rather to canalise power through institutions and put as many limits on the Executive as possible.¹⁵⁹

¹⁵⁸ Mangu Mbata, A., « Monarchies présidentielles et révisions constitutionnelles : le syndrome du troisième mandat ou d'une présidence à vie dans les Etats-membres de l'Union africaine, Revue africaine de la démocratie et de la gouvernance, Vol 1, No 1, 48-51.

¹⁵⁹ Abdoulaye Wade quoted by Hinden op.cit. 5.

Once in power, Wade rather strove to established a personal power and concentrate the powers in his hands. He lost to his former prime minister Macky Sall who was elected president in 2012 and Karim Wade, now in prison for illicit enrichment, failed to succeed his father.

What is true of Wade in faraway Senegal is also true of several other African leaders, including President Robert Mugabe in neighbouring Zimbabwe where the former freedom fighter who has been in power since independence has consistently changed the Constitution to remain in power indefinitely and his currently preparing his wife to succeed him.

President Mandela chose to follow a different path. He did not think his people owed him for the sacrifices he endured during his long struggle against apartheid. Nor did he consider his long walk to freedom a justification for him to “own” the country and his people, to concentrate powers in his hands, to establish a presidential monarchy or become a present for life by amending the Constitution and removing any checks and balances of his presidential powers. However, his presidency was characterised by the greatest respect for the Constitution, the rule of law, human rights, the separation of powers and the independence of the judiciary. A few cases may highlight Mandela’s highest respect for the principles of constitutionalism, democracy and the rule of law. The first relates to the duration of the terms of office of the president; the second to the independence of the judiciary and state institutions supporting democracy.

First, the 1996 Constitution provides that the President of the Republic is elected by the National Assembly among its members. This means that membership of the National Assembly is a requirement to be elected a president.¹⁶⁰ The National Assembly is elected for a term of five years, which therefore corresponds to a term of the President.¹⁶¹ However, the Constitution provides that “No person may hold office as President for more than two terms”.¹⁶² Having been elected in April and inaugurated on 10 May 1994, President Nelson Mandela’s first term ran up to April 1999. He could also be elected for a second and final term that would have ended April 2004.

¹⁶⁰ Section 86(1) of the 1996 Constitution.

¹⁶¹ Section 49(1).

¹⁶² Section 88 (2).

Over the past decades, the trend has been for African presidents to amend the constitution or replace it with a new one, which would extend their terms of office and even remove any limitation for them to run indefinitely. As a result, a number of “presidential monarchies” have been established on the continent and many presidents have become *de facto* presidents for life. This is what recently happened in Burkina Faso where President Blaise Compaore tried to get the constitution amended to give him a third term. In many African countries, including Burundi, Benin, Congo, Rwanda and the Democratic Republic of Congo, incumbent presidents are also planning to change their constitutions to give themselves a third term or to run indefinitely.

However, Nelson Mandela led by example. He did not interfere with the Constitution. Nor did he try to manipulate it. He did not listen to sycophants who would have expected him to rule for ever. He decided to abide by the Constitution of his country. More significantly, he even accepted to forfeit a second term as there is no doubt that he would have been re-elected had he decided to run.

During his presidency, Nelson Mandela also demonstrated a great respect for Parliament, the judiciary and state institutions supporting constitutional democracy. Arguably, Parliament was more effective and the judiciary and Chapter 9 institutions enjoyed more independence under Mandela’s presidency than under any of his immediate successors. This may be demonstrated by recent attacks on the judiciary and inappropriate criticism against Chapter 9 institutions, especially the Public Protector. The tendency of the ANC under President Zuma has been to consider Parliament a section of the party receiving instructions from Luthuli House (ANC headquarters).

The *Nkandla case*¹⁶³ where the Public Protector accused the President of unduly benefitting from the tax payer money has revealed how less effective Parliament has become under Zuma and how Chapters 9 institutions are held in contempt by the President and his party. In the National Assembly, the Members of Parliament (MPs) from Malema-led Economic Freedom Front were silenced and charged for criticising the President. ANC MPs even went ahead debating on the matter without being embarrassed by the absence of the opposition parties. The Public Protector has herself come under fire for finding against the President.

¹⁶³ Nkandla is President Jacob Zuma’s homestead in Kwa-Zulu Natal. Public Protector Thuli Madonsela found that South African taxpayers’ money had been unnecessary paid and the president should pay. The president, the ANC-dominated National Assembly denied any wrongdoing while the opposition argued the contrary. As a result of her findings, Ms Madonsela and her office came under serious attacks and criticism from the ruling party that accused her for undermining the office of the president.

President Mandela's attitude and that of the ANC under his leadership towards institutions supporting democracy was rather different. This is clear from the manner he conducted vis-à-vis the Truth and Reconciliation Commission (TRC) which was established by the 1993 or interim Constitution. In 1997, he himself appeared before the TRC. He did not acknowledge personal wrongdoing or request amnesty. However, when the TRC Report was delivered in 1998 and stressed wrongdoing by the ANC, Mandela accepted it despite ANC President Thabo Mbeki challenging it for criticizing the ANC's human rights record.

The Constitution provides that "no person or organ of state may interfere with the functioning of the courts. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts".¹⁶⁴

President Nelson Mandela did nothing to interfere with the courts. He appointed Chaskalson president of the Constitutional Court. Other judges were appointed according to the Constitution. These appointments were based on merits and not on their loyalty to the ANC. These judges produced an impressive case law that has inspired many jurisdictions in the world.

The Constitutional Court first demonstrated its independence vis-à-vis the Executive and Parliament when it was required to certify the text of the 1996 Constitution, which had first to comply with the principles set down in the 1993 Constitution and all aimed at promoting constitutionalism and the rule of law. In its first judgement, the Court held that the text did not comply and could not therefore become the supreme law of the land.¹⁶⁵ It is only in a second judgement that the text was certified.¹⁶⁶

Three landmark judgements were handed down by the Constitutional Court in the *Makwanyane*, *Grootboom* and *SARFU* cases and his attitude in these cases can be highlighted to further demonstrate President Mandela's respect for constitutionalism and the rule of law in South Africa.

The *Makwanyane* case¹⁶⁷ was the second case decided by the Constitutional Court after it was established by the 1993 Constitution. In this case, Makwanyane and another accused had been sentenced to death under the previous constitutional law order by the Witwatersrand Local Division of the Supreme Court on counts of murder, attempted murder and robbery with aggravating circumstances.

¹⁶⁴ Section 165 of the 1996 Constitution.

¹⁶⁵ *Certification of the Constitution of the Republic of South Africa* 1996 (ZACC) 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification Case*). Judgement delivered on 6 September 1996.

¹⁶⁶ *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 (ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (*Second Certification Case*). Judgement delivered on 4 December 1996.

¹⁶⁷ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

The judgment was upheld the Appellate Division of the Supreme Court. The issue that was raised and came before the Constitutional Court was the constitutionality of several paragraphs of section 277(1) (a) of the Criminal Procedure Act that allowed the death sentence. These provisions and all corresponding provisions of other legislation sanctioning capital punishment were declared to be inconsistent with the Constitution and, accordingly, to be invalid.¹⁶⁸ The State was and all its organs forbidden to execute any person and the death penalty was abolished as it violated human rights, especially the right to life, human dignity and the right not to be subject to torture, cruel and inhuman treatment.

President Chaskalson, who wrote the main judgement, was aware that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. However, he held that the question before the Court was not what the majority of South Africans believed a proper sentence for murder should be, but whether the Constitution allowed the sentence or not.¹⁶⁹ He added that public opinion could have some relevance to the enquiry, but in itself, it was no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour and if public opinion were to be decisive there would be no need for constitutional adjudication.¹⁷⁰ Despite the majority of South Africans who voted them favouring the death sentence, President Mandela and the ANC under his leadership accepted the Court's ruling in a move that demonstrate his commitment to the principles of constitutionalism and the rule of law embedded in the Constitution. The *Makwanyane* case still remains a jewel of human rights jurisprudence on the continent.¹⁷¹

The *Grootboom* case¹⁷² dealt with socio-economic rights, especially the right to access to adequate housing. In this case, the Constitutional Court made yet an important contribution to the development of human rights jurisprudence so much dominated by civil and political or first-generation rights when it dealt with the enforcement of socio-economic rights, particularly problematic in underdeveloped countries that lack the necessary resources. Mrs Grootboom was part of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement in the Western Cape Province. The illegally occupied nearby land earmarked for low-cost housing and were forcible evicted their shacks bulldozed and burnt and their possessions destroyed. In desperation, they settled on sports field and in an adjacent community hall.

¹⁶⁸ *S v Makwanyane* at 149-151.

¹⁶⁹ *Idem* at 87.

¹⁷⁰ *Idem* 88

¹⁷¹ Mangu Mbata, *The Road to Constitutionalism and Democracy ...*146.

¹⁷² *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46.

They approached the Cape High Court that found that the children and their parents were entitled to shelter under Section 28 (1) of the Constitution and ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality immediately to provide them with tents, portable latrine and a regular supply of water by way of minimal shelter. The Constitutional Court later issued a declaratory order requiring the state to devise and implement a programme that included measures to provide relief for these desperate people who had not been catered for in the Cape Metropolitan area before the introduction of the Accelerated Managed Land Settlement Programme. The court stressed that socio-economic rights were justiciable and all the rights in the Bill of Rights were inter-related, indivisible and mutually supporting.

*South African Rugby Football Association (SARFU) case*¹⁷³ demonstrated further Mandela's commitment to constitutionalism, the separation of powers principle, the rule of law and the independence of the judiciary.¹⁷⁴ In 1998, 80-year old President Nelson Mandela submitted himself to the court when summoned to defend his decision to set up a commission of enquiry to investigate alleged racism, corruption and nepotism in the South African rugby. Mandela declined the offer of a seat when giving evidence. He found himself in the witness box being subjected to prolonged cross-examination. When the Court found against him and established the important principle that presidential powers too had to be exercised lawfully and rationally, Mandela was unhesitatingly in his acceptance.¹⁷⁵ What happened in the *SARFU* case was unprecedented in the world, including in old constitutional democracies like the US, UK, France and others.

Mandela's attitude in this case was a lesson on respect for constitutionalism and the rule of law to all the world leaders, including African leaders and his successors. Unfortunately, the standard he set seems to be too high even in his home country. Regular attacks we have witnessed against the judiciary and Chapter 9 institutions from the ruling ANC, its government, cadres and even its militants and their attitude to subject them to the law of the party as under the one-party system as we have noted under Mbeki's and mostly Zuma's presidency are rather insulting to Mandela's memory or legacy.¹⁷⁶

¹⁷³ See *President of the Republic of South Africa v South African Rugby Football Association (SARFU)* 1999 ZACC 11; 1999 (10) BCLR 1059; 2000 (1) SA 1.

¹⁷⁴ <http://www.issafrica.org/about-us/press-releases/nelson-mandela-remembered-for-his-contribution-to-human-security> (accessed on 9 November 2014).

¹⁷⁵ Lawson, N & Calland, R., "Mandela's respect for the rule of law put in action", at <http://www.bdlive.co.za/opinion/2013/12/13/mandelas-respect-for-rule-of-law-put-in-action> (accessed on 9 November 2014).

¹⁷⁶ Idem.

Unfortunately, his successors have proved to be unequivocal in their attitude to court decisions and those of state institutions supporting democracy. Their understanding of the Constitution and its supremacy and respect cannot be compared to that of Mandela. He was, and remains, the standard that they and subsequent governments and presidents, must match. Mandela's departure need not be the end of the story. Instead, it can be the start of a new chapter, in which the Constitution is given renewed vigour. To do anything else would be an abrogation of responsibility and an insult to Mandela's memory.¹⁷⁷ Unfortunately, this is not what we have seen happening.

6. Conclusion

Nelson Mandela made a tremendous contribution to humanity. Tributes poured in when he passed away on 5 December 2013. UN Secretary-General Ban Ki-moon declared that: "no one did more in our life time to advance the values and aspirations of the United Nations".¹⁷⁸ The United Nations already honoured him by establishing the "Mandela Day" (18 July) in 2009. He was the greatest "champion of human rights"¹⁷⁹ in our time, an exceptional and visionary leader who fought for freedom, dignity, peace, national reconciliation, equality and non-discrimination. Mandela has been so far the first and only human being on whom such honour has been bestowed by the UN. He was "the icon of all icons"¹⁸⁰ and also the "father of the current democratic South Africa".¹⁸¹

¹⁷⁷ Lawson, N & Calland, R., "Mandela's respect for the rule of law put in action", at <http://www.bdlive.co.za/opinion/2013/12/13/mandelas-respect-for-rule-of-law-put-in-action> (accessed on 9 November 2014).

¹⁷⁸ <http://www.un.org/apps/news/story.asp?NewsID=46672> (accessed on 9 November 2014). Also see Mangu Mbata *Hommages* ...37-38.

¹⁷⁹ See <http://www.humanrights.com/voices-for-human-rights/champions-human-rights.html>; <http://www.youthforhumanrights.org/voices-for-human-rights/champions/nelson-mandela.html>; <http://www.un.org/press/en/2013/ga11476.doc.htm>; <http://www.buffalonews.com/associated-press/ap-world-news/nelson-mandela-who-ennobled-the-world-is-mourned-as-champion-of-human-rights-symbol-of-freedom-20131205> (accessed on 9 November 2014); Mangu Mbata *Hommages* ...37, 40, 47, 61.

¹⁸⁰ <http://www.irishexaminer.com/ireland/nelson-mandela-the-icon-of-all-icons-251843.html> (accessed on 9 November 2014); Mangu Mbata *Hommages* ...62.

¹⁸¹ Campbell, J., "How Mandela Changed South Africa" at <http://www.cfr.org/south-africa/mandela-changed-south-africa/p32016> (accessed on 9 November 2014).

Probably because he is himself a lawyer, Barack Obama, who also made history by becoming the first Black American to be elected US President¹⁸² and paid one of the most stirring tributes to Madiba¹⁸³ was among the few leaders who also celebrated his exceptional contribution to constitutionalism, democracy and the rule of law in the world and not just in the country where the inhuman system of Apartheid was invented and prospered before its condemnation as a crime against humanity. Obama went as far as comparing Mandela with American Founding Fathers¹⁸⁴ although his contribution to humanity even went further.

The paper attempted to revisit Mandela's "long walk to freedom" from his days as a student at the University College of Fort Hare in his native province of Eastern Cape to the presidency through his first encounter and then his love with law and politics as a lifetime UNISA student, a lawyer, a political leader, the "volunteer-in-chief" during the Defiance Campaign against Apartheid laws, an outlaw and a prisoner.

From the time when Nelson Mandela first registered for a law course in 1939 to his graduation for an LLB at our university, UNISA, in 1989, after taking law subjects at the University of Fort Hare, the University of Witwatersrand, and the University of London, Mandela spent almost fifty years as a student.

Mandela was as much a lawyer as a political leader and a freedom fighter. It would not be enough to speak of Mandela without referring to him as a lawyer and to his close relationship with law. He knew that the Apartheid system was primarily a legal system and law could also be used to combat it both at the domestic and the international level.

In association with other African leaders like Tambo but more than any of them, Mandela used law to fight Apartheid by defending those whose human rights were denied before defending himself when the lawyer became an outlaw. He was instrumental in the organisation of the Defiance Campaign and in the drafting of the Freedom Charter. His defiance against Apartheid laws or rule of laws was in no way a betrayal since he fought for the promotion of a "higher law" or a better rule of law, a democratic one which was denied by Apartheid.

¹⁸² See Mangu, Mbata B, *Barack Obama's election and change: Lessons for the World, Africa, and US foreign policy*, Lambert Academic Publishing, Saarbrücken (Germany) 2011; Idem, *Barack Obama et les défis du changement global*, Paris: L'Harmattan, 2012.

¹⁸³ <http://mg.co.za/article/2013-12-10-obamas-tribute-to-mandela-the-full-speech> (accessed on 9 November 2014).

¹⁸⁴ Idem. See also Mangu Mbata, *Hommages* ...54-55.

Accordingly, he transformed his major trials, namely the Treason and mostly the Rivonia Trial into trials of Apartheid itself through the historic speeches that Accused No 6 (Treason Trial) and later Accused No 1 (Rivonia Trial) delivered from the dock. Instead of deterring him, his sentencing to life imprisonment and the 27 years he actually spent in Apartheid jails rather reinforced his commitment to constitutionalism and democratic rule of law. He revived the struggle against Apartheid after his release from prison in 1990. He led the anti-apartheid movements during the negotiations with the minority government in the Convention for a Democratic South Africa (CODESA) from 1990 to 1993 when a constitution was finally adopted that protected the rights of all the people in the country and provided for a government of national unity to achieve the transition from Apartheid to a democratic rule.

For many South Africans, 27 April 1994 was an Independence Day as the Black people who represent the overwhelming majority of people were entitled to vote for the first time. Mandela became the first black and democratically elected president of South Africa. He led the transition to an end as the Constitution of 1996 was finally approved and all democratic institutions provided by it established. Mandela was undoubtedly the father of the nation and of the new constitutional and democratic South Africa.

The question which was outside the scope of this paper and on which we need to reflect briefly is why Mandela succeeded where so many other leaders, freedom fighters and independence fathers so dismally failed to achieve after independence and their election to preside over their countries. The answer seems to lie in the quality of Mandela's leadership that has positively influenced the developments of constitutionalism and democracy in South Africa despite the challenges they face as in many other and mostly young constitutional democracies across the world.

Arguably, bad and undemocratic political leadership would favour authoritarianism and the rule of a man instead of the rule of law while good and democratic political leadership would promote constitutionalism and democracy. Good and legitimate leadership is therefore critical for the establishment of constitutionalism and democracy as well as for their consolidation.¹⁸⁵

¹⁸⁵ See Southall, R., "Troubled visionary: Nyerere as a former president", in Southall, R. & Melber, H., (eds), *Legacies of Power. Leadership and Former Presidents in African Politics*, Nordiska Afrikainstitutet & HSRC, 2006; Diamond, L., "Introduction: Persistence, Erosion, Breakdown, and Renewal", in Diamond, L. *et al.*, (eds.), *Democracy in Developing Countries: Africa*, Vol 2, Boulder: Lynne Rienner Publishers, 1988, 1-52; Krishna, S., "Constitutionalism, Democracy, and Political Culture in India", in Franklin, D.P. & Baun, M.J., (eds.), *Political Culture and Constitutionalism. A Comparative Approach*, Armonk, New York, London: ME Sharpe, 1994, 161-183; Nwabueze, B.O., *Constitutionalism in the Emergent States*, London: C. Hurt & Co, 1973, 139, 301-302; Wiseman, J.A., *The New Struggle for Democracy in Africa*, Avebury: Aldershot and Vermont, 1996, 165-186; Idem, "Two Leadership Styles and Patterns of Political Liberalization", *African Studies Review*, Vol.37, No.1,

Accordingly, political leadership does matter.¹⁸⁶ As Krishna pointed out in the case of India,

The relatively protected and democratic nature of the anti-imperialist movement, the gradual transfer of power ...and finally the genuine commitment to a liberal democratic policy by the first generation of leaders, especially the first Prime Minister Jawaharlal Nehru...must be regarded as the key factors in the emergence and persistence of democracy in India.¹⁸⁷

In the words of James Manor:¹⁸⁸

Nehru might ...have sought a radical centralization of power in his own hands, at the expense of the party and of formal political institutions. He might have employed populist slogans and programs as a substitute...for such institutions. Plenty of other leaders in Africa and Asia did so and they and their countries often paid a heavy price for it. He chose not to and as a consequence the liberal representative order took root and acquired enough substance to endure into the 1970s and 1980s.

With regard to Africa, Wiseman also held:

The characteristics of individual leaders are extremely relevant in determining the political outcomes and this holds as true in relation to democratization as it does to any other political developments.... The evidence from the relatively limited number of examples of cases where democracy has survived for long periods in Africa suggests that the question of political leadership was extremely important. The role of Seretse Khama (Botswana), Dawda Jawara (The Gambia), and Sir Woosagun Rangoolam (Mauritius) in sustaining democratic political systems during periods when democracy was on the wane in Africa was of a crucial importance.¹⁸⁹

While some political leaders promoted change (Khama, Masire [Botswana], Rangoolam [Mauritius], De Klerk, Mandela [South Africa], Senghor, Diouf [Senegal], Touré, Konaré [Mali], Aboubakar [Nigeria]), many other African leaders have been, and remain, the major obstacles to any real effort at political reform in their countries.¹⁹⁰

April 1994, 151-174; idem, "Leadership and Personal Danger in African Politics", *Journal of Modern African Studies*, Vo.31, No.4, 1993, 657-660; Clapham, C. & Wiseman, J.A., "Conclusion: assessing the prospects for the consolidation of democracy in Africa", in Wiseman, J.A., (ed.), *Democracy and political Change in Sub-Saharan Africa*, London & New York: Routledge, 1995, 225-226; Suberu, R., "Institutions, Political Culture and Constitutionalism in Nigeria", in Franklin & Baun op.cit. 215; Gordon, D.F., "On Promoting democracy in Africa: The International Dimension", in Ottaway, M., (ed.), *Democracy in Africa. The Hard Road Ahead*, London: Lynne Rienner Publishers, 1997, 153.

¹⁸⁶ See Blondel J *Political leadership: towards a general analysis*, London & Beverly Hills: Sage, 1987, 80-81; Idem *Comparative government: an introduction*, New York & London: Philip Allan 1990, 300-301.

¹⁸⁷ Krishna, S. op cit 166.

¹⁸⁸ Manor J, quoted by Krishna op cit 170-171.

¹⁸⁹ Wiseman *The New Struggle* ...186.

¹⁹⁰ Gordon op.cit. 153.

Clapham and Wiseman argue that “democratic consolidation is most likely to take place when a new leadership emerges, seeking to organise politics in a different way from those adopted by discredited parties and leaders in the past, but within the context of non-violent opposition and the acceptance of basic state institutions.”¹⁹¹

Although “political leadership” is not a common subject of reflection among lawyers who tend to focus on rules, procedures and principles, it is nevertheless important for social scientists and should therefore also be taken seriously among constitutional lawyers. On the other hand, luck, accident and chaos unfortunately also have their say in the process, as envisaged by the “chaos theory” borrowed from James Gleick.¹⁹²

The “chaos theory” was developed by the physicist James Gleick and used by the historian Taylor to explain the origins of the First and Second World Wars.¹⁹³ Nwabueze¹⁹⁴ also reflected on luck, chance or chaos as agents of constitutionalism and democracy in Africa.

Wiseman imagined a purely hypothetical scenario where Mandela and Buthelezi were to be assassinated prior to, during the negotiations or the transition in South Africa.¹⁹⁵ One can also imagine what could have happened if President Botha did not suffer from a stroke that paved the way for FW de Klerk’s accession to the presidency.

Despite the fact that an authoritarian leader can easily succeed another and it would be cynical to celebrate death, illness, political assassination or *coup d’état* and to pay tribute to criminals as agents for change in Africa, the death or disability of some authoritarian leaders may constitute an unexpected opportunity offered by nature to end with authoritarianism by allowing the coming to power of leaders likely to promote constitutionalism and democracy.

¹⁹¹ Clapham & Wiseman op.cit. 166.

¹⁹² See Gleick, J., *Chaos: Making a New Science*, London: Cardinal, 1989.

¹⁹³ See Taylor, A.J.P., *The Origins of the Second World War*, London, Hamish Hamilton, 1961; Idem, *The First World War*, London, Hamish Hamilton, 1963.

¹⁹⁴ Nwabueze op.cit. 301-303.

¹⁹⁵ Wiseman *The New Struggle ...* Note 23, 176-177.

For dedicated structuralists (even lawyers) with their focus on the deterministic nature of macroeconomic and social forces, any discussion of luck or accident comes close to heresy. As a body, professional social scientists tend to be very uneasy when dealing with phenomena such as luck and accident in their attempt to analyse occurrences in human societies.¹⁹⁶ Yet, as Wiseman pointed out, there is nothing inherently “unscientific” about suggesting that in many ways luck and accident will most likely have a role to play in shaping the success and the failure of democracy in some African states.¹⁹⁷

As we reflect on twenty years of constitutionalism in South Africa, considering what has happened so far with his successors and the ruling ANC after his death, constitutionalism and democracy in South Africa would not have developed without Nelson Mandela’s leadership.

Nelson Mandela was a blessing not only to South Africa, but also to Africa and the world. This explains his veneration across the world. The question how such leaders emerge or are trained is also among the most difficult ones to answer and we certainly do not have an answer to it. Nelson Mandela’s long walk to freedom through the struggle, multiple prosecutions, arrests and his 27-years imprisonment seems to have been his best school of leadership.

The leaders and the people of South Africa and the world should continue to learn from Nelson Mandela to promote constitutionalism and build more democratic societies where everyone can enjoy his or her rights without any form of discrimination. This would be the best way to pay tribute to a man who made an exceptional contribution to making our world more human in many different ways, including through his contribution to the promotion of constitutionalism, democracy, respect for human rights and the rule of law.

¹⁹⁶ Idem 172.

¹⁹⁷ Idem.

We should strive to follow in his footsteps although after admitting that “he achieved more than could be expected of any man”, Barack Obama pessimistically prophesied that “we will not likely see the likes of Nelson Mandela again”.¹⁹⁸

Mandela tribute song entitled “No one is like you Mandela: You are unique” should also be sung during this conference as Mandela is the father of constitutionalism we are celebrating during this conference.

¹⁹⁸ See Barack Obama’s tribute to Nelson Mandela (<http://www.bbc.com/news/world-africa-25250278> accessed on 9 November 2014); Mangu Mbata, A, *Hommages* ...55.