

## South Africa as a „Diceyan Rechtsstaat“

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*In the scholarly and judicial culture of South Africa of the past three centuries, two distinct strains have been in evidence: early Dutch and English colonial dominance gave way in the late 20<sup>th</sup> Century to modern constitutionalism. Against the historical background some lawyers continued to be inclined to seek juridical enlightenment in the Dutch- and German-speaking civil law jurisdictions of Europe, while others were more disposed to study and rely on sources from the English, Commonwealth and North American systems. In the technical development of the current constitutional dispensation both these strains of legal culture were influential.*

*An analysis of the jurisprudence of the Constitution Court shows that the South African constitutional state may be defined as a state in which the Constitution prevails over all law and all actions of the state, where fundamental rights are acknowledged and protected through the independent authority of the judiciary to enforce the Bill of Rights and the Constitution, a separation of powers is maintained, all government action is required to be legally justified, the state has a duty to protect fundamental rights, legal certainty is promoted, democracy and the rule of law are maintained, where a specific set of legal principles apply and an objective normative system of values guides the executive, legislature and the judiciary.*

### 1. The South African history of the Rule of Law and Rechtsstaatlichkeit

For the obvious reason that the state known as "South Africa" since 1910 was created from British colonies in 1910, and continued to be a British dominion in the subsequent decades, South African public law hardly contained any elements drawn from the civil law systems of continental Europe. Add to this the essential incompatibility of the dominant pre-constitutional charac-

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teristic of South African law, parliamentary sovereignty, thoroughly absorbed from the English example, with notions such as the *Rechtsstaat*.

German and Dutch academic accounts of *Rechtsstaatlichkeit* did however begin drawing the attention of South African lawyers since the late 1960's, both because of exposure to the idea during studies abroad and during visits of European scholars to South Africa.

## 2. *The language of two Constitutions*

The constitution-writing process of South Africa, which took place mostly in 2003-2005 reflected the fact that it was characterized by oppositional political negotiation. This explains why the two phases of the process produced two full constitutions: the first was adopted at the end of 1993 by the pre-constitutional Parliament, but it required the adoption within two years of a "final" constitution by the new legislature established after the first inclusive democratic general election. The 1993 Constitution also prescribed, in detail, the parameters within which the "final" constitution was to be adopted. Since the first constitution was itself drafted within the parameters it set for its successor, it is not surprising that the 1996 Constitution contains very little not already provided for in 1993.

For the purposes of the development of a new South African doctrine regarding constitutionalism, the mention in the preamble of the 1993 Constitution of *Rechtsstaat* (translated into English as "constitutional state"), and in the foundational section 1 of the 1996 Constitution of the rule of law, has proven to be highly significant.

## 3. *Judicial merger of English and German doctrine*

Right from the outset the Constitutional Court, dispensing constitutional justice for three crucial years under the 1993 Constitution, utilized the mention of *Rechtsstaatlichkeit* (the "constitutional state") in the preamble to give it concrete meaning. In this process the Court turned in more than one instance to the established teachings of German constitutional law. When the rule of law appeared in the 1996 Constitution as a foundational value, the Court went on to extract the meaning and implications of these two historically disconnected, though conceptually related ideas and to incorporate them into the new and pervasive constitutional doctrine of the country.

An analysis of the jurisprudence of the Constitutional Court shows that ten distinct elements characterize the South African constitutional state:

### 3.1 Supremacy of the Constitution

Not only because of the express constitutional provisions to that effect, but also from the perspective of what the nature of the "new order" was and what the role of the judiciary should be in such an order, the primacy of the Constitution was relied upon from the outset to give content to the idea of the constitutional state (*S v Makwanyane* 1995 3 SA 391 (CC) para [7], and para [61] of *Executive Council, Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC)). Many a *dictum* of the Constitutional Court confirms that the constitutional state is characterized by the fact that the Constitution is the supreme law and that all law and state conduct is subject thereto. Thus again in *Law Society of South Africa v Minister of Transport* 2011 (1) SA 417 CC para [36] the Court stated: "Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights."

### 3.2 Independence of the judiciary

The Constitution provides expressly in section 165(2) for the independence of the judiciary. This was stated forcefully in 1996 in *Bernstein v Bester* 1996 2 SA 751 (CC) para [51] with reference to civil procedure:

In all democratic societies the state has the duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons charged with having committed crimes. In a constitutional state that obligation is of fundamental importance and it is clearly recognised as such in our Constitution.

At the same time the Court clearly pointed out in para [105] of the judgment how the Rule of Law and *Rechtsstaatlichkeit* were related:

Section 22 achieves this by ensuring that the courts and other *fora* which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the "regstaatidee", for it prevents legislatures, at whatever level, from turning themselves by acts of *legerdemain* into "courts".

### 3.3 Separation of powers

Not surprisingly, the matter of the separation of powers arose early in the consideration of the constitutional position of the judiciary in the new constitutional dispensation. In 1998 the Court stated:

It [the right not to be detained without trial] is the pre-eminent, if not the only, guarantee against arbitrary administrative detention and is indispensable for the upholding of the rule of law and the separation of powers in a constitutional state.

For a recent discussion of the separation of powers, see *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

### 3.4 Legal justification of government action

In a constitutional state, government conduct must be legally justifiable, and this was emphasized from the outset by the Constitutional Court.

In *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC) para [110] the Court expressed itself as follows:

... far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.

### 3.5 Duty of the state to protect fundamental rights

In *De Lange v Smuts* 1998 (3) SA 785 (CC) para 31 the Court emphasized that the state and its organs are obliged to protect fundamental rights, not threaten them:

In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights.

The duty and function of the state to acknowledge and protect fundamental rights is considered to be a basic tenet of the constitutional state. The President of the Constitutional Court, Justice Chaskalson stated (in para [130]) of the *Makwanyane* judgment):

The Constitution is premised on the assumption that ours will be a constitutional state founded on the recognition of human rights.

### 3.6 Legal certainty

In more than one instance the Court has pointed out that legal certainty was a central consideration in a constitutional state.

In *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), paras [47], [76] and [84] concerning the balancing of customary (tribal) law with the values of the Constitution, legal certainty was in itself referred to as a "value":

... courts must be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.

In *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC), para [62] the Court stated with reference to the binding effect of its judgments:

... precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot "rule" unless it is reasonably predictable.

Legal certainty also requires that legal norms should be clear and accessible. In *De Reuck v Director of Public Prosecutions* 2004 (1) SA 405 (CC) para[57] the Court referred to this as –

... an important principle of the rule of law, namely that 'rules be stated in a clear and accessible manner'.

### 3.7 Democracy

Democracy is often mentioned in connection with the constitutional state and the Rule of Law, e.g. (in *Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) para [17]) "respect for the rule of law is crucial for a defensible and sustainable democracy," or more recently in *Offit Enterprises v Coega Development Corporation* 2011 (1) SA 293 (CC) para [36], "[i]n order for our rights-based constitutional democracy to thrive, the collection of rights and protections in the Bill of Rights may be seen as being interrelated and interdependent."

### 3.8 Rule of Law

The most concrete alignment by the Constitutional Court of the Rule of Law with the notion of the constitutional state is to be found in a parenthetical suggestion in para [31] of the De Lange judgment that the Rule of Law might be "entirely subsumed under the concept of the constitutional state." This suggestion was taken one express step further in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC), in which the Rule of Law was extensively relied upon, and where it was stated in para [56]:

In Germany, article 20(3) of the Basic Law confirms the *Rechtsstaatsprinzip* which is related to the concept of the rule of law.

At this juncture it becomes clear that the focus is upon the notion of the constitutional state rather than of the narrower Diceyan concept. In *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) the Court found occasion to set out the following doctrinal exposition of its understanding of the Rule of Law:

[65]The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
3. the legal protection of certain basic human rights.

[66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. ... it [also] excludes unpredictability. . . .

[68] A further postulate of the rule of law is the guarantee of equality before the law which is designed to advance the value that all persons be subject to equal demands and equal burdens of the law, and not to suffer any greater disability in the substance and application of the law than others. This to me is one of the basic precepts of the rule of law, so that no individual or group of individuals is to be treated more harshly than another under the law. ...

[69] South Africa is a constitutional democracy and as such will not countenance conduct where equality is denied when those who are similarly situated are differently treated.

[70] It is when the administration of justice is likely to fall into disrepute and when the foundational values of the Constitution and the rule of law are threatened that this Court's legitimate role as the protector of those values comes into play. As a society committed to equality we must show to people equal concern and respect.

Comparing these points to the characteristics that the Court has associated with the South African constitutional state, justifies the view that the Rule of Law has indeed been subsumed under the broader concept, without however discarding its Diceyan roots.

### 3.9 Specific legal principles

The notion of the constitutional state has clearly been established as a comprehensive expression of the ideal nature of the South African state and as an expression of the desirable constitutional attributes of the state.

As is the case with what is referred to by some as the material (as distinguished from the formal) aspects of the *Rechtsstaat*, some judgments have associated specific legal principles with the constitutional state. Thus, regarding the "principle against self help", the Court stated in para [17] of the *Lesapo* judgment:

In a modern constitutional state like ours, there is no room for legislation which, as in this case, is inimical to a fundamental principle such as that against self help. This is particularly so when the tendency for aggrieved persons to take the law into their own hands is a constant threat.

Similarly, proportionality, the striking of a balance between various interests, was described in para [43] of the judgment in *Carmichele v Minister of*

*Safety and Security* 2001 (4) SA 938 (CC) with reference to the constitutional state:

Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the 'spirit, purport and objects of the Bill of Rights' and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.

### 3.10 Objective normative system of values

Following the example of German doctrine regarding the "material" elements of *Rechtsstaatlichkeit*, the Constitutional Court has attached to the constitutional state the elevated pursuit of higher constitutional values. The foundation for this was laid in its inaugural *Makwanyane* judgment, para [156]:

In reaction to our past, the concept and values of the constitutional state, of the 'regstaat', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble.

The most direct and concrete articulation of this aspect of the constitutional state is to be found in para [54] of the *Carmichele* judgment:

Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.'

The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

That this view of the constitutional state is being perpetuated, emerges from the following *dictum* of the Court in *Thint v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions* 2009 (1) SA (CC) 1 para [375]:

What must be stressed here is that our Constitution embodies an objective, normative value system; it embodies 'fundamental constitutional value[s] for all areas of the law [which should act] as a guiding principle and stimulus for the Legislature, Executive and Judiciary'. These fundamental constitutional principles are explicitly set out in the founding provisions of our Constitution and are explicitly given effect to in the Bill of Rights. Such values are human dignity and the achievement of equality.

#### 4. Conclusion

Despite the fact that South African political practice does not consistently reflect a commitment to the principles and values underlying the rule of law and the *Rechtsstaat*, the long-term merits of a cogent doctrine developed authoritatively by the Constitutional Court regarding the constitutional state, are obvious: deviation by any organ of the state from the precepts of the doctrine will justify remedial action before a court of law.

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