

## South Africa: A Diceyan *Rechtsstaat*?

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### Article abstract

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Adopted in 1993, the first constitution introduced the notion of the “constitutional state” but being only a transitional document, it provided for the creation of a “final” constitution crafted in conformity with prescribed principles. The final constitution, adopted in 1996, made no mention of the “constitutional state”, including instead the expression “rule of law”. Since the constitutional principles laid down in 1993 referred to neither the German “*Rechtsstaat*”, nor Diceyan “rule of law”, the replacement of the former term by the latter was permissible.

The two constitutional texts did not, however, elaborate on these two terms. It was left to constitutional interpreters, especially the judiciary, to give meaning to these historically disconnected but conceptually related ideas. The result was a completely novel and pervasive constitutional doctrine. The judicial process of merging these notions may be described as “comparison by global assimilation”.

## SOUTH AFRICA: A DICEYAN *RECHTSSTAAT*?

*Francois Venter\**

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The two constitutional texts did not, however, elaborate on these two terms. It was left to constitutional interpreters, especially the judiciary, to give meaning to these historically disconnected but conceptually related ideas. The result was a completely novel and pervasive constitutional doctrine. The judicial process of merging these notions may be described as "comparison by global assimilation".

La transformation de l'Afrique du Sud vers le constitutionnalisme en 1994 a vu s'ajouter, à un système juridique mixte, une constitution suprême exigeant la conformité de toutes lois à ses dispositions, principes et valeurs. Cette nouvelle organisation constitutionnelle a été conçue en fonction du contexte et inspirée des constitutions démocratiques libérales existantes, les plus influentes étant celles du Canada et de l'Allemagne.

Adoptée en 1993, la première constitution introduit la notion d'« État constitutionnel », mais elle n'était qu'un document de transition, qui prévoyait la création d'une constitution finale, rédigée en conformité avec les principes prescrits. La constitution finale, adoptée en 1996, ne faisait aucune mention de l'« État constitutionnel », incluant plutôt l'expression « primauté du droit ». Puisque les principes constitutionnels établis en 1993 ne font référence ni au « *Rechtsstaat* » allemand ni à la « primauté du droit » de Dicey, le remplacement du premier terme par le second était acceptable.

Les deux textes constitutionnels n'ont cependant pas précisé le sens de ces deux termes. Les interprètes de la constitution, particulièrement le judiciaire, durent donner un sens à ces idées conceptuellement liées, mais historiquement éloignées. Le résultat fut une doctrine constitutionnelle complètement nouvelle et omniprésente. Le processus judiciaire fusionnant ces concepts peut être décrit comme une « comparaison par assimilation globale ».

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## Introduction

South Africa's transformation to constitutionalism in 1994 was characterized by the addition of a supreme constitution to the already mixed system containing indigenous, common law, and civil law elements. The circumstances allowed for the absorption into the new legal system of elements rooted in both English and European constitutional theory and practice.

This paper sketches the judicial construction of the nature of the constitutional state in South Africa in terms of the rule of law. It does so against the background of an historical outline of the development of the *Rechtsstaat* and the rule of law at their respective origins, their divergent theoretical meanings in their typical contexts of application, their pre-constitutional arrival in South African scholarly discourse, and the manner in which the Constitutional Court of South Africa has treated these notions. What emerges is a picture of a remarkable marriage of continental and common law ideas in a climate of constitutional innovation engendered by the profound transformation of a system historically dominated by British colonial doctrine into one which conforms to contemporary global thinking on constitutionalism.

The underlying thesis is that global constitutional comparison opens up opportunities for reciprocal enrichment of legal notions, such as the rule of law and the *Rechtsstaat*, that originate from historically divergent sources.

## I. The Historical "Mixedness" of South African Constitutional Law

Any history of the state known since 1910 as South Africa, told from a legal perspective, must take into account many influences including traditional tribal systems, Dutch colonial government, British imperial rule, Boer republicanism, a systematic emancipation from a Dominion of the Crown to a republic, and an unremitting political struggle between racial groups for power and dominance.

The dominant characteristic of South African constitutional law before 1994 was the English notion of parliamentary sovereignty, which survived the introduction of a republican state in 1961. The original intention of parliamentary sovereignty—which was to ensure popular control over the head of state and the executive—was however distorted in South Africa into a means of ensuring the retention of political power by the white inhabitants of the country. Only white people could obtain the franchise, thus excluding the majority of the population from the electorate.

The common-law-like South African public law operated in conjunction with a private law regime that was largely premised on civil (Roman-

Dutch) law foundations. The private law system was developed over more than a century by means of judicial precedent, statutory intervention, and scholarly writing.

Also existing within this mixed legal context were systems of indigenous laws and mores which had operated within black communities since time immemorial. Key components of these traditional systems were codified and had been employed to serve colonial administrative purposes since the nineteenth century. These mechanisms survived into the twentieth century, serving as tools of public and judicial administration of millions of black South Africans. In the private sphere, black people born into tribal systems in rural areas continued to have parts of their lives governed by traditional norms—either by association or, to a degree, by choice. These norms were to some extent aggregated into legislation for application by the ordinary courts or by traditional authorities.

Enter the *Constitution of the Republic of South Africa* of 1993 on 27 April 1994.<sup>1</sup> This novel document introduced a complete charter of fundamental rights and elevated itself to the status of “supreme law”. All preexisting law was transitionally and provisionally left intact, but became “subject to this Constitution.”<sup>2</sup> When the *Constitution, 1993* was replaced by the “final” (and still current) constitution, the preestablished constitutional supremacy and transitional arrangements were retained.<sup>3</sup>

These developments initiated the emergence of a new legal structure that progressively transformed from a highly mixed legal system to a consolidated, constitutionalized legal system replacing completely the former structure. In 2000, the Constitutional Court stated:

There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and

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<sup>1</sup> *Constitution of the Republic of South Africa, 1993*, No 200 of 1993, s 4(1): “This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency” s 4(1) [*Constitution, 1993*].

<sup>2</sup> *Ibid* s 229: “Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.”

<sup>3</sup> *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 2, Schedule 6 [*Constitution, 1996*].

all law, including the common law, derives its force from the Constitution and is subject to constitutional control.<sup>4</sup>

Remarkably, the introduction of the new South African legal structure arose not so much from a desire to renovate the former structure as such, but rather from an urge to eradicate those elements of the law that allowed for social and political abuse. The new system was crafted to respond to new circumstances with close attention to existing examples of liberal, democratic constitutions. The most influential of these examples were Canada and Germany. The product of this comparative process is a document which is generally recognized as an expression of globally endorsed constitutional thinking.

## II. The Journey to a *Rechtsstaat* and the Rule of Law

Constitutional literature is replete with expositions, and many an apology, regarding the doctrinal notions of the *Rechtsstaat* and the rule of law. The terminological and conceptual origins of the former may be traced back to the writings of Robert von Mohl in the first half of the nineteenth century, and those of the latter to A. V. Dicey at the end of the same century.<sup>5</sup>

### A. *The Original (Non-South African) Roots*

In contemporary German constitutional theory, one of the most authoritative and compact explications of *Rechtsstaatlichkeit* is provided by Klaus Stern. His explication is based on what he calls the “chain of ideas” or *constitution-law-human dignity-liberty-justice-legal certainty*: “*Rechtsstaatlichkeit* indicates the exercise of the power of the state on the basis of laws adopted according to the Constitution, with the purpose of guaran-

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<sup>4</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa*, [2000] 2 S Afr LR 674 at para 44, [2000] 3 B Const LR 241 (S Afr Const Ct) [*Pharmaceutical*].

<sup>5</sup> Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland* [The State Law of Germany], vol 1, 2d ed (Munich: CH Beck'sche Verlagsbuchhandlung, 1984) at 769 [Stern, *Das Staatsrecht*]. C.f. FA Hayek, *The Constitution of Liberty* (London, UK: Routledge, 1960) at 172-73 (noting that some credit Immanuel Kant for popularising the term, but Kant never actually employed the expression in his writings). AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 1st ed (London, UK: Macmillan, 1885) (Citations in this article refer to the book's tenth edition (AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan, 1965) [Dicey, 10th ed])).

teeing freedom, justice and legal certainty.”<sup>6</sup> Stern distinguishes the following elements of the *Rechtsstaat* principle:

- the *constitutional state* (*Verfassungsstaatlichkeit*), meaning the existence of a constitution as the foundational juridical order and supreme legal norm of the state;
- *human dignity, liberty and equality*, indicating the legal regulation of the relationship between citizens and the state by means of fundamental rights, whereby certain personal and political liberties as well as equality before the law are guaranteed;
- the *separation and control of government authority*, meaning the separation and reciprocal limitation of the authority and functions of the state;
- *legality* (*Rechtsgebundenheit*), indicating that law provides the foundation and limits for all actions of the state, referring specifically to the law of the constitution as the foundation for legislative acts and legislation as the foundation for the administrative and judiciary branches;
- *judicial protection*, meaning the guarantee of extensive and effective legal protection by independent courts following legislatively prescribed procedures, against, for example, actions of state authorities (including the legislature);
- a *system of reparation*, meaning the legal responsibility of the organs of the state towards citizens, including for damages caused by the state and for violations of rights by the state; and
- *prohibition of excessive use of government authority*, indicating the appropriateness, necessity, and proportionality of state actions.<sup>7</sup>

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<sup>6</sup> Stern, *Das Staatsrecht*, *supra* note 5 at 781 [translated by author] (“*Rechtsstaatlichkeit bedeutet, daß die Ausübung staatlicher Macht nur auf der Grundlage der Verfassung und von formell und materiell verfassungsmäßig erlassenen Gesetzen mit dem Ziel der Gewährleistung von Menschenwürde, Freiheit, Gerechtigkeit und Rechtssicherheit zulässig ist*”).

<sup>7</sup> *Ibid* at 784. See generally the detailed analysis of each of these elements (*ibid* at 787-867). This, and any similar list of components or attributes of the *Rechtsstaat*, is not to be understood as a *numerus clausus*: see e.g. the list of elements that has been extracted from the decisions of Germany’s *Bundesverfassungsgericht* by Karl Doebling (*Das Staatsrecht der Bundesrepublik Deutschland: Unter besonderer Berücksichtigung der Rechtsvergleichung und des Völkerrechts* [The Constitutional Law of the Federal Republic of Germany: With Special Reference to Comparative Law and International Law], 3d ed (Frankfurt: Alfred Metzner, 1984) at 235, n 10) and the twenty-five norms serving as elements of the *Rechtsstaat* dealt with by Katharina Sobota (*Das Prinzip Rechtsstaat: Verfassungs- und Verwaltungsrechtliche Aspekte* [The Principle of

The rule of law, on the other hand, was canonized in English law by Dicey in his seminal work *Introduction to the Study of the Constitution*, first published in 1885.<sup>8</sup> Dicey's rather parochial construction took parliamentary sovereignty as a point of departure:

[English political institutions are characterised by] the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. ... This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.<sup>9</sup>

From this principle, he went on to set out his three understandings of the rule of law:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. ...<sup>10</sup>

We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. ...<sup>11</sup>

There remains yet a third and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.<sup>12</sup>

Historical analyses of the rule of law can hardly ignore the fact that Dicey was the first to cast the essential English constitutional notions of the late

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*Rechtsstaat: Constitutional and Administrative Law Aspects*] (Tübingen: Mohr Siebeck, 1997) at 27-253), which she subdivides into 142 characteristics (*ibid* at 254-57).

<sup>8</sup> Dicey, 10th ed, *supra* note 6.

<sup>9</sup> *Ibid* at 183 [footnotes omitted].

<sup>10</sup> *Ibid* at 188.

<sup>11</sup> *Ibid* at 193 [footnotes omitted].

<sup>12</sup> *Ibid* at 195-96 [footnotes omitted].



nineteenth and early twentieth centuries in a form approaching that of an overarching dogma. Despite the conceptual appeal of the phrase “rule of law”, however, the width and vagueness of Dicey’s characterization combined with his conscious limitation of its relevance to English law hampered its development into a universal doctrine.

### ***B. Preconstitutional South African Notions***

Because South Africa was created from British colonies, and continued to be a British dominion after 1910, South African public law hardly contained any elements drawn from the civil law systems of continental Europe. Further, parliamentary sovereignty, the dominant characteristic of South African constitutional law, was essentially incompatible with notions such as the *Rechtsstaat*.

Beginning in the late 1960s, South African lawyers began to pay attention to German and Dutch academic accounts of *Rechtsstaatlichkeit* both because of their exposure to the idea during studies abroad and because of visits by European scholars to South Africa during that period.<sup>13</sup> Despite this exchange of ideas, the notion remained a mere theoretical construct in South Africa due to its incompatibility with established British colonial constitutional notions, such as the absence of a supreme, written constitution.

One common doctrinal element in both the rule of law and the *Rechtsstaat* is the recognition and protection of human rights. Preconstitutional South Africa had an international reputation as a major human rights offender.<sup>14</sup> Furthermore, in the public law of that country there was

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<sup>13</sup> See e.g. HJ van Eikema Hommes, “De materiële rechtsstaatsidee” [The Material *Rechtsstaat*] [1978] *Journal of South African Law* 42; DH van Wyk, “Suid-Afrika en die regstaatidee” [South Africa and the Notion of a *Rechtsstaat*] [1980] *Journal of South African Law* 152; Klaus Stern, “A Society Based on the Rule of Law and Social Justice: Constitutional Model of the Federal Republic of Germany” [1981] *Journal of South African Law* 241 (this contribution actually dealt with the *Rechtsstaat* and not the rule of law); VG Hiemstra, “Suid-Afrika terug in die wêreld langs die weg van die regstaatbeginsel” [South Africa Back into the World Along the Road of a Bill of Rights] [1985] 1 *Journal of South African Law* 1; Loammi C Blaauw “The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights” (1990) 107:1 *SALJ* 76. The concept also began appearing in some doctoral theses: see e.g. Pieter J van R Henning, *Oor die begrip diskresie in die administratiefreg* [On the Notion of Discretion in Administrative Law] (LLD Thesis, University of South Africa, 1967) [unpublished]; Dawid H van Wyk, *Persoonlike Status in die Suid-Afrikaanse Publiekreg: ‘n staats- en administratiefregtelike studie* [Personal Status in South African Public Law: A Constitutional and Administrative Law Study] (LLD thesis, University of South Africa, 1979) [unpublished].

<sup>14</sup> See e.g. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243, 13 ILM 50.

an absence of any positive recognition of human rights. This created a situation in which the doctrine of human rights was reduced to either an instrument of oppositional social and political commentary and mobilization, or an abstract academic and philosophical theme with undertones of wishful thinking about a better public law future.<sup>15</sup>

The radical constitutional transition occurring in the early 1990s, despite its sudden and unexpected arrival, did not emerge into a vacuum, however; leading lawyers, both among the members of the judiciary and the academe, were suitably prepared by preconstitutional writings and academic activity to undertake the task of remodelling the legal system around a dominant bill of rights. Some examples from the work of legal scholars and from anti-apartheid political activity demonstrate how the ground was prepared for the introduction of the new approach.

In his 1971 inaugural address as a professor of law at the University of Witwatersrand, Johannesburg, John Dugard pointed out the strong positivist tendencies in the judgments of South African courts in cases dealing with the enforcement of security legislation.<sup>16</sup> He argued that the legal values and principles embedded in the traditional foundations of Roman-Dutch law (i.e. the juridical postulates that form part of South Africa's legal heritage and are designed to foster the basic political and legal ideal of modern Western society) were not different from the entrenched liberties and rights found in the American Constitution.<sup>17</sup>

Also in 1971, Anthony Mathews, highly critical of the direction in which security considerations were driving South African law, developed a redefinition of the rule of law.<sup>18</sup> In later elaborating upon his description

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<sup>15</sup> See e.g. B Beinart, "The Rule of Law" [1962] *Acta Jur* (Cape Town) 99.

<sup>16</sup> John Dugard, "The Judicial Process, Positivism and Civil Liberty" (1971) 88:2 *SALJ* 181.

<sup>17</sup> *Ibid* at 197.

<sup>18</sup> Chapter 5 of his book, *Law, Order and Liberty in South Africa*, sets out the following definition:

[T]he Rule of Law, as a constitutional doctrine governing the state/subject relation, consists of the following distinct but interrelated principles:

1. The acts of the government towards the subject, particularly those affecting his right to freedoms of the person, speech and association, and the right of choosing representatives to make the laws, shall be in accordance with previously established general rules having a reasonably specific reference;
2. The rights enumerated in paragraph 1, being essential to the operation of law as an order designed to regulate human affairs according to reason, shall be maintained as part of the legal system but subject to
  - (a) well-recognized limits upon their exercise,

of the rule of law, Mathews explored different theories of the rule of law with reference to various scholars such as Raz, Fuller, and Finnis.<sup>19</sup> An interesting element of this exploration was Mathews's association of the "material justice approach" with, *inter alia*, the *Rechtsstaat* concept.<sup>20</sup>

The endeavour of investigating the merits of human rights for South African law in the 1970s was not limited to liberal English-speaking scholars. Johan van der Vyver produced a two-volume thesis in Afrikaans in 1974 on the juridical meaning of the doctrine of human rights.<sup>21</sup> The following year saw the publication of his book (also in Afrikaans) on the protection of human rights in South Africa<sup>22</sup> and, in 1976, he published his *Seven Lectures on Human Rights*.<sup>23</sup> Ignus Rautenbach wrote his doctoral thesis in a similar vein.<sup>24</sup>

Human rights were also the subject of conference papers delivered at a symposium organized by the University of Pretoria in 1986 on a bill of rights for South Africa, the transcripts for which were published in 1988.<sup>25</sup> Many of the participants in this conference contributed to the country's

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(b) limitations consequential upon the need to reconcile them with one another, and

(c) qualification of such rights in times of exceptional crisis;

3. The interpretation and application of the general rules referred to in paragraph 1, and adjudication upon the necessary limitations upon the rights referred to in paragraph 2, shall be under the control or supervision of an independent judicial body with effective remedial powers and acting according to fair trial procedures (or the requirements of procedural due process) ((Berkeley: University of California Press, 1972) at 31 [footnotes omitted]).

<sup>19</sup> Anthony S Mathews, *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (London, UK: Sweet & Maxwell, 1988) ch 2, 3.

<sup>20</sup> *Ibid*, ch 3. The Constitutional Court made mention of Mathews's work in *De Lange v. Smuts NO and Others* ([1998] 3 S Afr LR 785 at paras 46-47, [1998] 7 B Const LR 779 (S Afr Const Ct) [*De Lange*]).

<sup>21</sup> Johan David Van der Vyver, *Die juridiese sin van die leerstuk van menseregte* [The Juridical Meaning of the Human Rights Doctrine] (LLD Thesis, University of Pretoria, 1973 [unpublished]).

<sup>22</sup> Johan David Van der Vyver, *Die beskerming van menseregte in Suid-Afrika* [The Protection of Human Rights in South Africa] (Cape Town: Juta, 1975).

<sup>23</sup> Johan David Van der Vyver, *Seven Lectures on Human Rights* (Cape Town: Juta, 1976).

<sup>24</sup> Subsequently published as Ignus Rautenbach, "Die begrip menseregte as sistematiserende faktor in die Suid-Afrikaanse publiekreg" [The Concept of Human Rights as a Systematizing Factor in South African Public Law] [1976] *Journal of South African Law* 168.

<sup>25</sup> Johann van der Westhuizen & Henning Viljoen, eds, *A Bill of Rights for South Africa: Proceedings of Symposium held at the University of Pretoria on 1 and 2 May 1986* (Durban: Butterworths, 1988).

transformation to constitutionalism in the next decade. In one of these papers, Ignus Rautenbach accurately predicted that “[h]uman rights should and will most probably feature in some or other form in a new negotiated South African constitutional dispensation.”<sup>26</sup>

The doctrine of human rights was also used as a cudgel by activists in the propaganda war against discrimination and injustice in South African society. This form of human rights engagement manifested itself as a battle cry against oppression and for mobilisation to combat injustice. This approach was driven primarily by liberation movements striving for international support against apartheid and contained strong elements of socialist thinking. The most prominent example in this category was the *Freedom Charter* of 1955, which contained emotive headings such as “The People Shall Govern!”, “The People Shall Share in the Country’s Wealth!”, and “There Shall be Work and Security!”. The *Freedom Charter* called for, *inter alia*, inclusive democracy, equality among “all national groups”, freedom of speech, association, religion, and movement, and the right to privacy in the home. It also stated that “the national wealth of our country ... shall be restored to the people,” that the “mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole,” and that “the state shall help the peasants with implements, seed, tractors and dams to save the soil and assist the tillers.”<sup>27</sup>

In 1991, the South African Law Commission (the Commission), a government-funded institution, published the “Interim Report on Group and Human Rights.” Apart from producing a full draft-text for a South African bill of rights, the Commission presented an implementation plan, which included the purging of any legislation inconsistent with a future bill of rights, the launching of an educational program, and “the legitimisation, by referendum, of a new constitution which includes the bill of rights.”<sup>28</sup>

All of these intellectual and political manoeuvres had little effect on the reality of pre-1994 South African constitutional law. Before the *Constitution, 1993* came into operation, supporters of the liberation movements were not in a position to implement or practice constitutionalism, as they were not in government at the time. Moreover, the pre-

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<sup>26</sup> IM Rautenbach, “Menseregte-aktes: ‘n vergelykende oorsig” [Bills of Rights: A Comparative Survey] in van der Westhuizen & Henning, *supra* note 25, 35 at 35 (from the English summary).

<sup>27</sup> “Freedom Charter” (Document produced by/at the Congress of the Peoples, Kliptown, South Africa, 25-26 June 1955), online: Gandhi-Luthuli Documentation Centre <<http://scnc.ukzn.ac.za>>.

<sup>28</sup> South African Law Commission, *Summary of Interim Report on Group and Human Rights* (Pretoria: South African Law Commission, 1991) at 38, 41 ff.

constitutional South African governments all operated with “constitutions” bearing a status hardly above that of ordinary parliamentary statutes. Apartheid “constitutionalism” was therefore highly formal with little principled substance. It was based upon a highly positivist application of notions such as parliamentary sovereignty sourced from the common law and often perverted to serve sectional political purposes.

The ongoing influence of indigenous tribal law also had, and still has, to be considered. Indigenous law cannot justifiably be seen as an obstacle in the way of a human-rights-based legal system. At the same time, it is undeniable that traditional laws and institutions are embedded in a world view that has completely different origins and foundations from those that gave rise to the doctrine of human rights. Furthermore, colonial interventions, apartheid, and modernization introduced cultural distortions of traditional conceptions that were not conducive to the development of an individualistic, rights-based legal culture.<sup>29</sup>

The purpose of the new constitution was primarily to remedy the ills of the foregoing constitutional and political system and replace it with one that would ensure the emergence of a just society. The first paragraph of the preamble to the *Constitution, 1993* stated that:

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic *constitutional state* in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.<sup>30</sup>

The new constitutional arrangements required, however, that South African lawyers undergo a profound shift from a culture of Romanistic principle adapted, and sometimes contaminated, by statutory predominance and binding judicial interpretation, to a culture that places fundamental rights and constitutional values and principles over *all* law and legal doctrine.<sup>31</sup> When the new constitution came into effect on 27 April 1994, it had a very obvious transformative effect on South African public law. What was initially less obvious was the impact that it would have on all other parts of the country’s legal system. An early, graphic demonstration

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<sup>29</sup> TW Bennett, *Human Rights and African Customary Law: Under the South African Constitution* (Cape Town: Juta, 1995) at 1-10.

<sup>30</sup> *Constitution, 1993*, *supra* note 1 [emphasis added].

<sup>31</sup> This shift was achieved by the simple mechanism of the declaration in section 4 of the *Constitution, 1993* (*supra* note 1), continued in section 2 of the current *Constitution, 1996* (*supra* note 3), that the Constitution is “the supreme law of the Republic.”

of this effect is evident in the changes that the constitution brought to the law of property.<sup>32</sup>

### *C. The South African Constitution: Robert von Mohl or Albert Venn Dicey?*

The human-rights-oriented supreme constitution that was adopted in 1993 not only required all segments of South African society to revise their perceptions and understanding of the law as it applied to them, but it also sought to bring the divergent approaches to life characteristic of a pluralistic society under the discipline of one overarching set of entrenched legal norms. If one considers the course of the negotiation process leading to the introduction of these profound changes, it is remarkable that the potential impacts of the constitution on the legal system as a whole were not a matter of primary concern. This omission could be ascribed to the fact that the new dispensation was being developed in the course of adversarial political negotiations toward a solution that would be as unobjectionable as possible to as many people as possible.<sup>33</sup>

The main players in the multi-party negotiations that produced the *Constitution, 1993* were, on the one side, representatives from the socially-inclined liberation movements and, on the other side, representatives from an order that functioned according to a constitutional dispensation founded in English legal thinking. Neither of these groups was likely to have a natural intellectual affinity for the precepts of either the rule of law or the *Rechtsstaat*. Against this backdrop, it is not surprising that the idea of the constitutional state was introduced into the constitutional negotiation process by technical advisors rather than political players. These advisors drew on a foundation of comparative constitutional scholarship rooted in knowledge of European and Anglo-American constitutional doctrine to assist with the constitution-writing process.

When the drafters resolved to give expression to *Rechtsstaatlichkeit* in the text of the *Constitution, 1993*, they chose the term “constitutional state” in the absence of a direct, English equivalent for the term *Rechtsstaat*. Although the German concept *Verfassungsstaat* (which translates directly into “constitutional state”) is not a synonym for *Rechtsstaat*, the drafters considered the term to be sufficiently similar to indicate the

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<sup>32</sup> These changes are excellently shown by the work of André van der Walt and other property lawyers published over the past two decades: see e.g. AJ van der Walt, *Constitutional Property Law* (Cape Town: Juta, 2005).

<sup>33</sup> Francois Venter, “Liberal Democracy: The Unintended Consequence. South African Constitution-Writing Propelled by the Winds of Globalisation” (2010) 26:1 SAJHR 45 at 52-56.

more comprehensive concept in the preamble.<sup>34</sup> Requiring a new constitution to be formulated and adopted within two years, this transitional constitution contained the seeds of its own replacement.<sup>35</sup> It is clear, however, that the characteristics of the constitutional state were not only the basis of that first constitution but that they would also be prescribed elements of the new constitution. In addition, the 1993 text provided a launching pad for *Rechtsstaat* jurisprudence to take hold immediately.

While the term “constitutional state” did not reappear in the 1996 text of the final constitution, it was replaced by the rule of law as a founding constitutional “value”.<sup>36</sup> The Constitutional Assembly, which was charged with producing a final constitution, was not required to make explicit reference to *Rechtsstaatlichkeit* and so its replacement by the rule of law did not constitute a violation of the “Constitutional Principles”.<sup>37</sup>

Given this change in terminology, a legitimate question arises as to how the drafters of the South African constitution chose between Von Mohl and Dicey? In the absence of any clear evidence of substantive debate or justification from the *pouvoir constituant*, no definitive response to the question is possible. However, in view of the history of South African legal culture in the course of which English and continental ideas became intermingled, one may however assume that no conscious choice was made—a merger of the conceptions came about naturally.

Over the past three centuries, the colonial Dutch and English legal traditions that emerged in the twentieth century had given rise to two distinct strains in the scholarly and judicial culture of South Africa. First, there were the Afrikaans-speakers, who were more inclined to seek juridical enlightenment in the Dutch- and German-speaking civil law jurisdictions of Europe. Second, there were the English-speaking lawyers who were more disposed to study and rely on sources from the English, Commonwealth, and North American systems. Both strains of legal culture were influential in the technical development of the current constitutional arrangement. The continentally-orientated component was, however, less

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<sup>34</sup> *Constitution, 1993*, *supra* note 1 (this is confirmed by the use of the term “regstaat” in the Afrikaans version of the Preamble’s text).

<sup>35</sup> *Constitution, 1993*, *supra* note 1, s 73(1).

<sup>36</sup> *Constitution, 1996*, *supra* note 3, s 1(c).

<sup>37</sup> Section 71 of the *Constitution, 1993* (*supra* note 1) required the final constitution to comply with a set of thirty-four “Constitutional Principles” set out comprehensively in Schedule 4. The section also required that such compliance be certified by the Constitutional Court before a new constitutional text could come into force. This set of principles also guided the drafting of the *Constitution, 1993* (*ibid*, Preamble), thus causing the *Constitution, 1996* not to deviate in any significant manner from the foundations laid in 1993.

prominent in the drafting of the final constitution than in the preparation of the *Constitution, 1993*. At no point in time, neither during the writing of the constitutions, nor subsequently, can it be said that significant tension or confrontation arose between the two cultural elements.

The jurisprudence of the Constitutional Court of South Africa in the first few years following the establishment and development of the new order was foundational to its further evolution. Both historical varieties of South African legal culture were represented on the bench.

The initial work of the Court was done under the 1993 text.<sup>38</sup> From the Court's systematic amplification of the idea of the constitutional state and the consequent development of a home-grown understanding of constitutionalism, a remarkable marriage occurred on African soil between two notions sourced from English and Germanic doctrine.

### III. The Judicial Construction of a Constitutional State

The expressions "constitutional state" and "rule of law" appear only once in each of the two recent South African constitutions and the texts do not directly elaborate on them in any way. It was therefore left to constitutional interpreters, especially the judiciary (the Constitutional Court in particular), to extract the meaning and implications of these two historically disconnected, though conceptually related, ideas and incorporate them into the new and pervasive constitutional doctrine of the country. In this, the Constitutional Court was not found lacking. From the jurisprudence of the Court, it is possible to compile a cogent set of attributes of South African constitutionalism rooted in both *Rechtsstaatlichkeit* and the rule of law.

The Court did not intentionally craft an umbrella term giving expression to South Africa's Diceyan *Rechtsstaatlichkeit*. One might have hoped to find it in an expression like "constitutionalism" but that continues to be a word so pliable and generalized that it belongs to everyone and nobody at the same time, without a constant sense.<sup>39</sup> A better choice for an um-

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<sup>38</sup> See e.g. Iain Currie & Johan de Waal, *The Bill of Rights Handbook*, 5th ed (Cape Town, Juta: 2005) at 5-6:

in spite of its transitional status, the interim Constitution was nevertheless binding, supreme and fully justiciable. It contained, in Chapter 3, a comprehensive Bill of Rights. Because the interim Bill of Rights was for the most part similar to that in the 1996 Constitution, most of the judicial decisions on rights handed down under the interim Constitution remain authoritative.

<sup>39</sup> For a broader discussion, see Francois Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Cape Town: Juta, 2000) at 20-36 [Venter, *Comparison*].



brella term seems to be “constitutional state”. It is significant that the Constitutional Court currently continues to employ the term “constitutional state” in its jurisprudence but without reference to the preamble of the *Constitution, 1993*.<sup>40</sup> It appears justified to deduce from this that the notion of the constitutional state has developed its own autonomous (if not autochthonous) meaning in South African law. Be that as it may, the meaning that has been given to it demonstrates the marriage of *Rechtsstaatlichkeit* and the rule of law. An analysis of the Constitutional Court’s jurisprudence reveals that the South African constitutional state may be defined as a state in which: (a) the constitution prevails over all law and all actions of the state; (b) fundamental rights are acknowledged and protected through the independent authority of the judiciary to enforce the bill of rights and the constitution; (c) separation of powers is maintained; (d) all government action is required to be legally justified; (e) the state has a duty to protect fundamental rights; (f) legal certainty is promoted; (g) democracy and the rule of law are maintained; (h) a specific set of legal principles apply; and (i) an objective, normative system of values guides the executive, legislature, and the judiciary. Since 1995, a series of constitutional judgments have confirmed these elements.

### A. *Supremacy of the Constitution*

The primacy of the constitution was relied upon by the Constitutional Court from the outset to give content to the idea of the constitutional state, not only because there were express constitutional provisions to that effect, but also because of the judicial perception of what the nature of the “new order” was and what the role of the judiciary should be in such an order.<sup>41</sup> Many dicta of the Constitutional Court, including recent judgments, confirm that the constitutional state is characterized by the fact

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<sup>40</sup> See e.g. *The Citizen 1978 v McBride*, [2011] ZACC 11 at para 84, [2011] 4 S Afr LR 191 (S Afr Const Ct) (“In our constitutional State, comment on matters of public interest receives protection under the guarantee of freedom of expression”); *Thint (Pty) Ltd v National Director of Public Prosecutions*, [2008] ZACC 13 at para 283, [2009] 1 S Afr LR 1 (S Afr Const Ct) (“[T]he NPA Act expresses concern for constitutional rights. It does this out of recognition that South Africa is a constitutional State; a State founded on the respect for human dignity and dedicated to the pursuit of the achievement of human rights and freedom for all”).

<sup>41</sup> See e.g. *S v Makwanyane and Another*, [1995] 3 S Afr LR 391 at para 7, [1995] 6 B Const LR 665 (S Afr Const Ct) [*Makwanyane*]; *Executive Council, Western Cape Legislature v President of RSA*, [1995] 4 S Afr LR 877, [1995] 10 B Const LR 1289 (S Afr Const Ct) [*Western Cape* cited to S Afr LR] (Chaskalson P’s reference to “the need to create a new order” and the direct link to the “constitutional state” in the opinion of Ackermann J and O’Regan J at paras 61, 151).

that the constitution is the supreme law and that all law and state conduct is subject thereto.<sup>42</sup>

### ***B. Independence of the Judiciary***

The constitution expressly provides for the independence of the judiciary.<sup>43</sup> The Constitutional Court forcefully stated this principle with reference to civil procedure in 1996:

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.<sup>44</sup>

The Court has also pointed out how the rule of law and *Rechtsstaatlichkeit* were related through this concept:

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”.<sup>45</sup>

### ***C. Separation of Powers***

Not surprisingly, the doctrine of separation of powers arose early on in the consideration of the constitutional position of the judiciary under the new constitutional arrangement. In 1998, the Court stated: “[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

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<sup>42</sup> See e.g. *National Gambling Board v Premier, KwaZulu-Natal* (2001), [2002] 2 S Afr LR 715 at para 23, [2002] 2 B Const LR 156 (S Afr Const Ct): “It is true that in a constitutional State all public power is derived from the Constitution.” A very recent example is *Law Society of SA v Minister for Transport*, [2010] ZACC 25 at para 36, [2011] 1 S Afr LR 400 (S Afr Const Ct): “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.” See also *ibid* at para 38.

<sup>43</sup> *Constitution, 1996, supra* note 3, s 165(2): “The courts are independent and subject only to the Constitution and the law.”

<sup>44</sup> *Bernstein v Bester NNO*, [1996] 2 S Afr LR 751 at para 51, [1996] 4 B Const LR 449 (S Afr Const Ct).

<sup>45</sup> *Ibid* at para 105.

the upholding of the rule of law and the separation of powers in a constitutional State.”<sup>46</sup>

The centrality of the separation of powers was again emphasized by the Court in 2011. This time, however, the principle arose in a matter concerning the president’s extension of the chief justice’s term of office: “The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy.”<sup>47</sup>

The consistent association of the doctrine of the separation of powers with the rule of law is conspicuous.

#### *D. Legal Justification for Government Action*

Humans, by nature, tend to take short cuts when it comes to the exercise of authority; it may even be said that this human trait justifies the limitations typically imposed by constitutions. Thus, in a constitutional state, government conduct must be legally justifiable. This idea was emphasized from the outset by the Constitutional Court.<sup>48</sup> In 2006, the Court made the point as follows:

As this case demonstrates, 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 con-

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<sup>46</sup> *De Lange*, *supra* note 21 at para 89. For a more recent discussion of the separation of powers, see *Glenister v President of the RSA*, [2008] ZACC 19, [2009] 1 S Afr LR 287 (S Afr Const Ct).

<sup>47</sup> *Justice Alliance of SA v President of the RSA*, [2011] ZACC 23 at para 40, [2011] 5 S Afr LR 388 (S Afr Const Ct) [*Justice Alliance*].

<sup>48</sup> As early as in *Makwanyane*, the Court clearly stated:

We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order (*supra* note 38 at para 156).

See also *Prinsloo v Van der Linde and Another*, [1997] 3 S Afr LR 1012 at paras 25-26, [1997] 6 B Const LR 759 (S Afr Const Ct); *UDM v President of the Republic of South Africa (No 2)* (2002), [2003] 1 S Afr LR 495 at para 55, [2002] 10 B Const LR 1086 (S Afr Const Ct) (referring to *Pharmaceutical*, *supra* note 4 at paras 84-85).

stitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.<sup>49</sup>

### *E. Duty of the State to Protect Fundamental Rights*

In a similar vein, it has been 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 ... 'citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights.'" <sup>50</sup>

The duty and function of the state to acknowledge and protect fundamental rights is considered by the Court to be a basic tenet of the constitutional state. Justice Chaskalson, who at the time was the president of the Court, stated in the *Makwanyane* judgment: "The Constitution is premised on the assumption that ours will be a constitutional State founded on the recognition of human rights." <sup>51</sup>

### *F. Legal Certainty*

In more than one instance, the Court has pointed out that legal certainty is a central consideration in a constitutional state. In one of its very early judgments, the Constitutional Court gave legal certainty a central role in the constitutional state:

The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach. <sup>52</sup>

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<sup>49</sup> *Matatiele Municipality v President of the RSA*, [2006] 5 S Afr LR 47 at para 110, [2006] 5 B Const LR 622 (S Afr Const Ct).

<sup>50</sup> *De Lange*, *supra* note 21 at para 31 [footnotes omitted].

<sup>51</sup> *Makwanyane*, *supra* note 38 at para 130 [footnotes omitted]. *Cf. ibid* at paras 140, 220, 311. See also *Bel Porto School Governing Body v Premier, Western Cape*, [2002] 3 S Afr LR 265 at para 181, [2002] 9 B Const LR 891 (S Afr Const Ct).

<sup>52</sup> *Ferreira v Levin NO* (1995), [1996] 1 S Afr LR 984 at para 26, [1996] 1 B Const LR 1 (S Afr Const Ct), Ackermann J. Justice Ackermann also pointed out this factor in a different context, the application of fundamental rights in private law, in *Du Plessis v De Klerk*, [1996] 3 S Afr LR 850 at para 97, [1996] 5 B Const LR 658 (S Afr Const Ct).

Furthermore, in a 2009 judgment concerning the balancing of customary (tribal) law with the values of the constitution, legal certainty was in itself referred to as a “value”:

[C]ourts 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.<sup>53</sup>

Finally, in 2010, the Court stated with reference to the binding effect of its judgments: “[P]recedents 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.”<sup>54</sup>

Legal certainty also requires legal norms to be clear and accessible. The Court has referred to the necessity that “rules be stated in a clear and accessible manner” as “an important principle of the rule of law.”<sup>55</sup>

### *G. Democracy*

As can be seen in various dicta cited above, democracy is often mentioned in connection with the constitutional state and the rule of law. For example, the Court has stated that “[r]espect for the rule of law is crucial for a defensible and sustainable democracy,”<sup>56</sup> and more recently that, “[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.”<sup>57</sup> The term “democracy” is not capable

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<sup>53</sup> *Shilubana v Nwamitwa*, [2008] ZACC 9 at para 47, [2009] 2 S Afr LR 66 (S Afr Const Ct). See also *ibid* at paras 76, 84.

<sup>54</sup> *Gcaba v Minister for Safety and Security*, [2009] ZACC 26 at para 62, [2010] 1 S Afr LR 238 (S Afr Const Ct).

<sup>55</sup> *Dawood, Shalabi and Thomas v Minister of Home Affairs*, [2000] 3 S Afr LR 936 at para 47, [2000] 8 B Const LR 837 (S Afr Const Ct). The Court subsequently referred to this principle in *De Reuck v Director of Public Prosecutions*, WLD:

The first question is whether s 27(1), read with the definition of child pornography, is a “law of general application” as required by s 36(1). This Court has held that this requirement derives from an important principle of the rule of law, namely that “rules be stated in a clear and accessible manner” ((2003), [2004] 1 S Afr LR 406 at para 57, [2003] 12 B Const LR 1333 (S Afr Const Ct)).

<sup>56</sup> *Chief Lesapo v North West Agricultural Bank and Another* (1999), [2000] 1 S Afr LR 409 at para 17, [1999] 12 B Const LR 1420 (S Afr Const Ct).

<sup>57</sup> *Offit Enterprises v Coega Development*, [2010] ZACC 20 at para 36, [2011] 1 S Afr LR 293 (S Afr Const Ct).

of precise legal definition,<sup>58</sup> but it may influence an understanding of the “constitutional state” in the appropriate context. The phrase “our constitutional democracy” seems to come easily to the justices of the Constitutional Court.<sup>59</sup>

### *H. 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 the *De Lange* judgment that the rule of law might be “entirely subsumed under the concept of the constitutional State.”<sup>60</sup> This suggestion was taken one step further in the *Fedsure* judgment, in which the rule of law was extensively relied upon as a guiding model, and where it was stated that: “In Germany, art 20(3) of the Basic Law confirms the *rechtstaatprinzip* which is related to the concept of the rule of law.”<sup>61</sup>

At this juncture, it becomes clear that the focus is on the notion of the constitutional state rather than the narrower Diceyan concept of the rule of law.<sup>62</sup> In the judgment in *Van der Walt*, Justice Madala 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 stated explicitly in s 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.

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<sup>58</sup> Venter, *Comparison*, *supra* note 35 at 193.

<sup>59</sup> See e.g. *Justice Alliance*, *supra* note 44 at paras 40, 53, 65.

<sup>60</sup> *Supra* note 21 at para 31.

<sup>61</sup> *Fedsure Life Assurance v Greater Johannesburg TMC* (1998), [1999] 1 S Afr LR 374 at para 56, [1998] 12 B Const LR 1458 (S Afr Const Ct) [footnotes omitted].

<sup>62</sup> Such a close identification is also borne out by the following dictum in *S v. Dodo*:

In the field of sentencing, however, it can be stated as a matter of principle that the Legislature ought not to oblige the Judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional State ([2001] 3 S Afr LR 382 at para 26, [2001] 5 B Const LR 423 (S Afr Const Ct)).

### 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. ... [I]t [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.<sup>63</sup>

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.

### *I. 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. One should therefore not be surprised that it has been used, and potentially will be used, as a terminological and conceptual harbour within which the desirable constitutional attributes of the state are accommodated.

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 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 ten-

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<sup>63</sup> *Van der Walt v Metcash Trading Ltd*, [2002] 4 S Afr LR 317 at paras 65-70, [2002] 5 B Const LR 454, (S Afr Const Ct) [footnotes omitted].

dency for aggrieved persons to take the law into their own hands is a constant threat.<sup>64</sup>

Similarly, proportionality, the striking of a balance between various interests, was described as follows 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.<sup>65</sup>

### *J. 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 approach was laid in its inaugural *Makwanyane* judgment: “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.”<sup>66</sup> The most direct and concrete articulation of this aspect of the constitutional state is to be found in the *Carmichele* judgment, in which the Court stated that:

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 s 39(2)

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<sup>64</sup> *Lesapo*, *supra* note 53 at para 17. The principle against self help was reconfirmed in *Gundwana v Steko Development*, [2011] ZACC 14 para 45, [2011] 3 S Afr LR 608 (S Afr Const Ct).

<sup>65</sup> *Carmichele v Minister of Safety and Security*, [2001] 4 S Afr LR 938 at para 43, [2001] 10 B Const LR 995 (S Afr Const Ct) [*Carmichele*].

<sup>66</sup> *Supra* note 38 at para 156.



of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.<sup>67</sup>

That this view of the constitutional state is being perpetuated emerges from the following dictum of the Court in 2008:

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.<sup>68</sup>

## Conclusion: Comparison by Global Assimilation

We live in an era of constitutional law where comparison, sometimes on a global scale, has become second nature to constitutional lawyers. There is even a large academic lobby (mostly, but not exclusively, North American) that does not hesitate to use the expression “comparative constitutional law” as though this has been established as a field or discipline similar to criminal law, the law of contract, or public international law.<sup>69</sup> In most cases, this is probably merely a matter of imprecise labelling, stemming from the growing tendency of universities to include courses under that name. In some cases, however, no doubt is left regarding the view that it has the status of a discipline in the encyclopaedia of law disciplines.<sup>70</sup>

Why has constitutional comparison become a global enterprise? The answer to this question requires more elaboration than the theme of this

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<sup>67</sup> *Supra* note 62 at para 54 [footnotes omitted].

<sup>68</sup> *Thint*, *supra* note 37 at para 375 [square bracketed text in original, footnotes omitted].

<sup>69</sup> See e.g. Durga Das Basu, *Comparative Constitutional Law*, 2d ed (Agra, India: Wadhwa, 2008); Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011); Vicki C Jackson & Mark Tushnet, *Comparative Constitutional Law*, 2d ed (New York: Foundation Press, 2006); Joakim Nergelius, *Komparativ statsrätt* [Comparative Constitutional Law], 6th ed (Lund, Sweden: Juristförlaget, 2007); Bernd Wieser, *Vergleichendes Verfassungsrecht* [Comparative Constitutional Law] (Vienna: Springer, 2005).

<sup>70</sup> See e.g. David Fontana, “The Rise and Fall of Comparative Constitutional Law in the Postwar Era” (2011) 36:1 *Yale J Int’l L* 1 at 4 (defining comparative constitutional law as “the study of the domestic constitutional law of other countries”). This definition is certainly open to challenge: compare David Landau, “Political Institutions and Judicial Role in Comparative Constitutional Law” (2010) 51:2 *Harv Int’l LJ* 319 at 332-34. Landau argues that “theories of judicial role and judicial strategy in comparative constitutional law should rest more than they do on the comparative analysis of political institutions” (*ibid* at 334.)

paper allows for. The experience of constitution-writing in South Africa may, however, offer a partial response.

In the South Africa of the early 1990s, where the necessity of profound constitutional restructuring was as obvious as the need for a fundamental break with the foregoing system, a thorough examination of widely accepted constitutional constructs was the obvious route to take. For politicians and their advisors, it was possible to browse the global constitutional library in which the shining examples of late twentieth century constitutionalism were set out, cherry-pick from among those examples, and assimilate ideas into a negotiated text. Negotiation—a give and take process with a view to yielding optimal advantage for all parties—opened all possible avenues to the negotiators to adopt what was perceived generally to be “the best” from among the various exemplary legal systems and to jointly claim consensus that those were indeed the best choices for local circumstances.

This was a comparative exercise in the sense that drafters studied various commendable approaches to the regulation of the constitutional elements concerned and adopted those elements most attractive to the negotiating parties. This may be described as comparison by global assimilation, and conversely, the assimilation of globally venerated notions through comparison. Thus, it became possible for South African law to integrate concepts from historically divergent legal systems and to merge them into a working doctrine by twining overlapping characteristics into a single model: a theory of the constitutional state with which foreign proponents of both the *Rechtsstaat* and the rule of law might feel comfortable.

Finally, we may briefly consider the benefits offered by a hybrid constitutional system for the enhancement of our understanding of constitutional law in a globalized world. Over the centuries, different ambitions have been pursued by means of comparative law. A prominent example is that of Ernst Rabel, who hoped to facilitate the transition of international discord into accord through legal unification.<sup>71</sup> Conceptually more spectacular and recent is the work of Otfried Höffe, who wishes to see the rule of law, justice, and democracy be acknowledged as a global standard applicable to a future world order characterized by the notion of a subsidiary (in the sense of subsidiarity) and a federal world republic. Not a world

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<sup>71</sup> David J Gerber, “Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language” in Annelise Riles, ed, *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001) 190 at 196-97.

state, this world republic would take the form of a universal moral framework for sound governance.<sup>72</sup>

This universalistic drive towards cosmopolitan peace and harmony based upon democratic justice as a primary goal for human society is not new at all,<sup>73</sup> but it is receiving new impetus under the conditions of growing globalization. Methodologically, however, in the drive to find similarities such an approach obscures the realities of sometimes essential and irreconcilable divergences between constitutional systems.

By contrast, the well-established functionalist approach to comparison in law seeks out similar functions of norms in different systems in order to determine which of the solutions found in the compared situations are preferable. More often than not, the functional approach tends to be mechanistic, shying away from an analysis of the deeper values and principles upon which the norms being analyzed are built. Ralf Michaels, for example, identifies four elements on which he finds most functionalists agree:

- comparative law is factual, (i.e. “it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events”);
- the objects of comparison are understood by functionalists in their functional relation to society, meaning that law and society are separable but related;
- a *tertium comparationis* function as such is utilized rendering the objects of comparison comparable if they perform the same functions regardless of being doctrinally different; and
- some functionalists also consider functionality as useful for evaluation in the sense that the best of the compared material is that which fulfils the function concerned best.<sup>74</sup>

Global comparison of constitutional law, having become unavoidable and indispensable to the constitutional lawyer, should not, however, be approached from the perspective of making it into a tool for the realization of either the ambitions of the unification of the law or for brandishing

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<sup>72</sup> Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* [Democracy in an Age of Globalisation] (Munich: CH Beck, 1999).

<sup>73</sup> See e.g. Thom Brooks, ed, *The Global Justice Reader* (Malden, Mass: Blackwell, 2008) at 316 (noting that such ideals were defended by Kant in 1795 and also by Jürgen Habermas and Thomas Pogge).

<sup>74</sup> Ralf Michaels, “The Functional Method of Comparative Law” in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 339 at 342.

its results as a weapon for the condemnation of those systems that do not conform to the popular norm. Nor should constitutional lawyers be bogged down by a single methodology, be it functional, universalistic, or postmodern. Constitutional comparison is primarily a mechanism for acquiring knowledge and insight into the manner in which societies operate, and occasionally, as appears from the travails of the notion of the constitutional state in the hands of the Constitutional Court of South Africa, for the breeding of excitingly fresh constructions borne from historically incompatible parents.

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