Aspects of the South African Constitution of 1996: An African Democratic and Social Federal *Rechtsstaat*?*

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1. Introduction

Heralding the end of six years of intensive negotiations and dramatic socio-political change, President Nelson Mandela formally assented to the new Constitution of the Republic of South Africa on 10 December 1996. The manner in which this Constitution was produced, the structures it will create and the premises upon which it was developed, reflect a conglomerate of various notions associated with the modern constitutional state and of social values of mixed content. Examples of these are:

– a heavy emphasis on equality, which is however counter-balanced by the unequal promotion of the disadvantaged;[1]

– provision for mechanisms designed to deter interference by the state with the interests of the individual[2] and the simultaneous introduction of advanced socio-economic rights;[3]

– vague elements of direct democracy, such as the duty of the National Assembly to "facilitate public involvement in the legislative and other processes of the Assembly and its committees"[4] and in policy-making[5] and the involvement of civil society in official appointment procedures;[6] and

– an insistence on national unity while extensive provision is also made for the protection of cultural diversity.[7]

For the interpretation of the Constitution all of these values will have to be taken into consideration[8] despite the reality that they do not display consistency or an internal harmony. The interpretational balancing of the whole spectrum of guiding principles of the new Constitution is however

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[1] E.g. sections 9, 195(1)(i) and 217(2).

[2] This is the typical dilemma of the social state: cf. – e.g. E. De Wet, Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?, 1995 South African Journal on Human Rights 30. However, there is reason to believe that one is dealing here with more than merely the *soziale Rechtsstaat*: some Africanist elements of communalism (as opposed to democratic socialism) can be discerned in the text of the Constitution – see notes 4 – 6 below.

[3] Sections 26 and 27 e.g. provide for rights to access to housing, health care services, food, water and social security, all requiring performance on the part of the state.

[4] Section 59(a).

[5] Section 195(1)(e).

[6] Section 193(6).

[7] Section 185(1)(b), e.g. determines that one of the primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is "to promote and develop peace, friendship, humanity, tolerance and national unity amongst cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association."

[8] Cf. e.g. *Zuma* v *S*, 1995(3) SACLR (CC) par [17] per Kentridge, A. J.

not the present focus. In the course of the development of the new Constitution much notice was taken of the mechanisms and principles of the German Constitution. It is therefore important for the understanding of the new Constitution to consider the nature and background of the federal principles and mechanisms that found their way into the text, as well as the elements of the *Rechtsstaat*, perhaps as inevitable elements of modern constitutionalism, that may be discerned in the evolution of the new constitutional dispensation.

2. Quasi-Federalism[9]

2.1. Historical Background

2.1.1. The 19th century

During the 19th century all the territory composing the contemporary Republic of South Africa, was systematically absorbed into the domain of the British Crown. The Cape of Good Hope was first occupied by British forces in 1795 and permanently annexed in 1806 as a Crown Colony. This colony was gradually extended eastward and northward by conquest, barter and cession. The interior of Southern Africa was systematically occupied from 1836 onward by migrating non-British pioneer farmers, historically known as the Voortrekkers, in order to break away from colonial rule. First the Republic of Natalia was established following clashes with the AmaZulu. When the British annexed Natal as a colony in 1843, the Voortrekkers moved further inland and established in the early 1850's the Boer Republics of the Orange Free State and South African Republic (Transvaal). For the rest of the century, what was later to become South Africa, constitutionally consisted of two British colonies and two sovereign republics. Despite their numerical superiority, the power of the Bantu speaking nations inevitably crumbled before that of the British colonists and the Voortrekkers: the white people, some British and others by

[9] To the slight irritation of Canadian constitutional lawyers, the well-known British constitutional author K.C. Wheare once called the Canadian system "quasi-federal". Wheare's opinion, founded upon certain national powers of disallowance of provincial legislation, was however changed in the 1940's, when he acknowledged that Canada was a "true federation": B. Reesor, The Canadian Constitution in Historical Perspective (Scarborough 1992), 79 and 203, and P.W. Hogg, Constitutional Law of Canada (3rd ed. Scarborough 1992), 99–100.

then with roots of two centuries in Africa, were equipped with European technology and organisation.

The discovery of gold and diamonds in the north whetted the British imperial appetite for the conquest of the Boer Republics. The twentieth century dawned upon the Anglo-Boer War, ending in the annexation of the two republics as new British colonies.

2.1.2. Union

The four South African colonies to a large extent shared a single infrastructure, especially regarding transportation. In addition, having rapidly reached the same constitutional status as self-governing colonies in the first decade of the century, the advantages of unification became self-evident, leading to the formation of the Union of South Africa in 1910. This Union in the next few decades came to share the external status of British dominion with Canada, Australia and New Zealand. Internally, however it had its own unique composition and problems.

In the preparations for unification, the federal option was seriously considered. However, at union in terms of a constitution adopted by the British Parliament, the four colonies became provinces, each with a measure of autonomy, but as parts of a unitary state governed in Westminster fashion by a national cabinet controlling a sovereign parliament. The system of provincial government was tailored on the unicameral legislature and detached executive of the Boer Republics, but its lack of constitutional protection contained the germ of its eventual demise. The boundaries of the provinces related only to their 19th century colonial and republican history, and had no special relation to culture, nationality, economy or geography.

The Union was also formed in a colonialist frame of mind: the majority of the population, the black nations of Southern Africa, had no part in the process and was considered an administrative problem rather than a constitutional component of the newly established dominion.

2.1.3. Republic and apartheid

By the middle of the century, Afrikaner republicanism, nurtured by decades of British domination, and also inspired by the gradual constitutional emancipation of the Union, prevailed politically. This introduced a period of significant constitutional change: a little more than a decade later (in 1961) the Union became the Republic of South Africa and in the

two following decades the policy of "separate development", universally notorious as "grand apartheid", unfolded.

The constitutional aim of separate development was to establish ten sovereign black ethnic nation states, leaving the rest of the territory to the white, "coloured" and Asian (mainly Indian) population. Despite the international outrage, the policy produced four constitutionally independent ethnic states, Transkei, Bophuthatswana, Ciskei and Venda (the "TBVC states") and six self-governing territories which could theoretically also aspire to independence.

By the 1980s the nature of the South African state was quite complicated. At national level the constitution provided for a sovereign parliament with a parliamentary executive in full control of the legislative process. Also constitutionally sovereign and therefore beyond the direct control of the South African legislature, executive and judiciary, but lacking international recognition or financial independence, were the TBVC states. Having self-governing status, six of the "black homelands" each had their own constitutional arrangements, providing for partially elected legislatures, cabinets, lower courts and administrations. In 1983 a new constitution was adopted in terms of which an extremely powerful executive presidency was created, the (still sovereign) Parliament became a tricameral body (one house each being reserved for respectively the Indian, "coloured" and white population groups, the latter having the power of veto). The powers of the four provinces had since 1920 gradually declined until, in 1986, the elected legislative provincial councils were abolished, and the provincial executives became administrative extensions of the national executive.

2.1.4. Negotiation and Delimitation (1993)

Soon after F.W. de Klerk took over the leadership of the governing National Party, a process of negotiating a thoroughly new constitutional dispensation was launched in 1990. Maximal inclusiveness was sought and achieved in the following four years, but it was generally accepted that the major role-players were the government as composed in terms of the 1983 constitution and the African National Congress, which had been banned until 1990 and had until then not participated in formal party politics in the Republic or in any of the homelands. The government wielded the established constitutional power, and in the negotiations formally represented only those structures under its exclusive constitutional control. The government was nevertheless only one negotiating entity among a va-

riety of political parties and organisations active in the Republic and the ten homelands. The governments of the TBVC states also took part in the negotiations. Although some of the homelands clung to their constitutional independence or autonomy in the negotiations, it was generally assumed that they, the constitutional products of separate development, would be fully absorbed into a single restructured state.

During 1993 the Negotiating Council of the Multi-Party Negotiating Process appointed a demarcation commission to investigate and propose a regional demarcation to be regulated by a new constitution. The commission was provided with a set of criteria, which it then classified into four broad groups, namely economic aspects, geographic coherence, institutional and administrative capacity and socio-cultural issues. The result was the delimitation of nine areas, only two of which correlated with the original provinces of the Union, the other seven having newly conceived boundaries.

In the Constitution of the Republic of South Africa of 1993, adopted by Parliament in accordance with the 1983 constitution, but emanating directly from the extra-parliamentary negotiating process, the nine areas were designated "provinces" and they were integrated into a new constitutional dispensation providing for a form of state displaying elements of federalism and constitutionalism completely absent from previous dispensations.

Although South Africa was not transformed into a formal federation, many of the features of the new Constitution were strongly reminiscent of federal principles. How was the new Constitution then to be classified? The defiance by the new dispensation of description either as a unitary state or a federation, is comparable to the difficulty of classifying the form of state of India.[10]

Where a state is governed by a constitution which provides for a clear distribution of competencies, both horizontally among the various organs of government, and vertically among the various levels of government, each with its geographically demarcated jurisdiction, it is submitted that such state may be described as a composite state. South Africa had become such composite state. This can be demonstrated with reference to the following provisions of the 1993 Constitution:

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[10] See e.g. Chitnis, in: Singh/Makkar/Hamid (eds.), Constitutional Law – a Miscellany (1990), 62 – 63.

– section 1[11] of the Constitution, read with Schedule 1 established "one, sovereign state", which was however defined in terms of a geographical description of the nine provinces;
– the provisions dealing with the Senate[12] left no doubt that it was intended to be representative of provincial interests;
– although the judiciary continued to be unified nationally, section 105(1)(j) involved a provincial Premier and the provincial Judge President in the judicial affairs of the province;
– provinces were empowered to establish provincial public protectors (ombudsmen)[13] and to create provincial service commissions involved in provincial public administration;[14]
– the key provisions of sections 126,[15] 144(2) and Schedule 6 allocated

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[11] "1. (1) The Republic of South Africa shall be one sovereign state.
(2) The national territory of the Republic shall comprise the areas defined in Part 1 of Schedule 1."

[12] Sections 48(1), 61, 62(2), 73(2), 73(11), 156(1A) and 157(1A). Cf. also *Certification of the Constitution of the Republic of South Africa*, Case CCT 23/96 (Constitutional Court judgment of 6 Sept 1996) par [320].

[13] Section 114.

[14] Section 213(1).

[15] "126. (1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.
(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.
(a) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).
(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except insofar as
(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

significant original legislative and executive powers to provincial governments. Section 126 conferred, in a style reminiscent of federalism,[16] prevalent (though not exclusive in absolute terms)[17] competence upon the provincial legislatures in matters falling within the functional areas listed in Schedule 6, leaving Parliament with overriding competence only for certain defined purposes;
– the Constitution afforded provinces a right to an "equitable share of revenue collected nationally",[18] and gave every province a seat in the Financial and Fiscal Commission;[19]
– every province was empowered to adopt its own constitution providing for legislative and executive structures different from those created by the Constitution;[20] and
– provincial governments were entrusted with functions regarding provincial policing.[21]

2.2. New Constitutional Foundations for further Development

Analysis and understanding of current South African constitutional law is complicated by the circumstances of the flurry of constitution-writing over the past few years, of which the 1993 Constitution was but the first product.

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(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other."

For an interpretation of these provisions, see J. De Ville, Guidelines for Judicial Review on "Division of Powers" Grounds, 1995 Stellenbosch Law Review 139.

[16] Compared to constitutional provisions in formal federations, this seems to amount to a strong emphasis on provincial autonomy. In contrast to the Canadian doctrine of federal paramountcy (cf. Hogg [note 9], 417 – 434); article 6, section 2 of the United States' Constitution, known as the supremacy section (" ... the laws of the United States ... shall be the supreme law of the land ... and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding"); and article 31 of the German Fundamental Law *(Bundesrecht bricht Landesrecht)*, section 126(3) gave prevalence to competent provincial legislation, qualified only by the specified objective tests provided there.

[17] Section 126(2A) and (3).

[18] Section 155(1).

[19] Section 200(1)(b).

[20] Section 160.

[21] Section 217.

The 1993 Constitution, which came into operation on 27 April 1994 and which caused the fundamental changes already mentioned to occur, expressly provided that a new constitutional text should replace it within a few years. The replacing Constitution was not expected to be dramatically different, because its content was pre-programmed by special provisions of the 1993 Constitution, which clearly laid down the parameters of further constitution-writing.

Chapter 5 of the 1993 Constitution provided for the procedures and structures for future constitution-writing, and Schedule 4 prescribed in the thirty-four detailed "Constitutional Principles" the requirements that had to be satisfied by the next constitutional text.

The pre-programming mechanism of enshrining constitutional principles for further constitution-writing was an interesting innovation, if compared to constitution-writing processes elsewhere in the world. The principles were developed authochtonously as a matter of priority during the process of the negotiation of the 1993 text, and substantial agreement on their content preceded the drafting of the actual text. The principles, designed to guide future constitution-writing therefore already served as a guideline for the formulation of the provisions of the Constitution of 1993.

The Principles may be described as strict injunctions to the Constitutional Assembly (consisting of the members of both Houses of Parliament elected in 1994) regarding the drafting of a new constitutional text. The sole task of the Constitutional Assembly was to draft and adopt a new constitutional text consistent with the prescribed principles and following the procedures prescribed by the 1993 Constitution. Certification by the Constitutional Court of compliance with the Constitutional Principles was required absolutely: without such certification, a new constitutional text could not be adopted or implemented.[22]

In the course of the writing of the "final" Constitution of 1996, the matter of the vertical distribution of governmental authority was once more a matter of high contention among the political parties. The provisions of the 1993 Constitution dealing with provincial government, were in the process of implementation and had therefore inevitably to be used as the foundation for the further development of the new provincial dis-

[22] Cf. *Certification of the Constitution of the Republic of South Africa*, Case CCT 23/96 (Constitutional Court judgment of 6 Sept 1996) parr [5]-[19].

pensation.[23] Some interesting new conceptual and structural features of vertical power distribution were nevertheless introduced in the new constitutional text completed in 1996.

In terms of section 43 of the Constitution of the Republic of South Africa, 1996, the legislative authority of the national sphere of government is vested in Parliament, that of the provincial sphere of government is vested in the provincial legislature of a province, and that of the local sphere of government is vested in Municipal Councils.

2.2.1. Co-operative Government

Under the heading "Co-operative Government," Chapter 3 of the 1996 Constitution is composed of only sections 40 and 41.[24] These provisions contain important principles regarding the interpretation and application

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[23] Furthermore Constitutional Principle XVIII 2 provided as follows: "The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution."

[24] "Government of the Republic

40. (1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

Principles of co-operative government and intergovernmental relations

41. (1) All spheres of government and all organs of state within each sphere must –

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) implement effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic, and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with each other in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting each other;

(iii) informing each other and consulting on matters of common interest;

(iv) co-ordinating their actions and legislation with each other;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against each other.

(2) An Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations.

of all the other parts of the Constitution which deal with the inter-relationships between the different levels of government. Various interesting questions are raised by these provisions, such as the extent to which they will inhibit strife between different levels and organs of government, and the nature of the assistance that the courts might glean from them when called upon to adjudicate inter-governmental disputes.[25]

The expression of "co-operative federalism" is also used elsewhere, e.g. in Canada,[26] but there can be no doubt that the inclusion of the notion of co-operative government was influenced by the German concept of *Bundestreue*.[27] Some inspiration might also have been gleaned from the (mostly financial) German notions of Kooperativer Föderalismus,[28] and Paktierender Föderalismus.[29] Comparative consideration of German constitutional law should therefore be undertaken by the courts. A crucial difference, however, between the South African and German concepts, is that co-operative government has been written into the Constitution as a set of principles constituting binding obligations,[30] whereas Bundestreue would appear not to take the form of a substan-

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(3) An Act of Parliament must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(4) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(5) If a court is not satisfied that the requirements of subsection (4) have been met, it may refer a dispute back to the organs of state involved."

[25] It is clear that the Constitutional Court has already acknowledged the importance of these provisions as constitutional mechanisms for the balancing of the distribution of powers: see e.g. *Certification of the Constitution of the Republic of South Africa,* Case CCT 23/96 (Constitutional Court judgment of 6 Sept 1996) parr [245], [264], [371] and [468].

[26] Hogg (note 9), 130–133, Reesor (note 9), 113. In Canada cooperative federalism seems primarily to be concerned with intergovernmental financial and fiscal arrangements. At p. 132 Hogg also says: "The dominant role of the executive branch of government in working out intergovernmental relations has led Smiley to characterize the Canadian Constitution today as 'executive federalism'."

[27] In BVerfGE 12, 205 (the "First" *Rundfunkurteil*) the following was e.g. stated (p. 254): "Im Deutschen Bundesstaat wird das gesamte verfassungsrechtliche Verhältnis zwischen dem Gesamtstaat und seinen Gliedern sowie das verfassungsrechtliche Verhältnis zwischen den Gliedern durch den ungeschriebenen Verfassungsgrundsatz von der wechselseitigen Pflicht des Bundes und der Länder zu bundesfreundlichem Verhalten beherrscht." (See also p. 255 where the term *Bundestreue* is actually employed).

[28] Explained by *inter alia* I. von Münch, Grundbegriffe des Staatsrechts II (4th rev. ed. Stuttgart 1987), 152–156.

[29] Cf. e.g. J. Ipsen, Staatsrecht I (7th rev. ed. Neuwied 1995), 209–211.

[30] Section 40(2).

tive legal rule, but to be more in the nature of a guiding principle of uncertain substance.[31]

Section 40(1) describes government in South Africa not to be stratified necessarily into hierarchical levels, but as consisting of "distinctive, interdependent and interrelated" spheres of government. This choice of words seems to have the purpose of counteracting the idea of national government being "higher" than the other spheres and simultaneously discouraging an emphasis on the autonomy of provincial and local governments.

A conspicuous purpose of co-operative government is to avoid, as far as possible, inter-governmental litigation. Thus parliamentary legislation must be adopted to provide for mechanisms for the (extra-judicial) resolution of inter-governmental differences, which mechanisms must be exhausted to a reasonable extent before a court may be approached.[32] A difficulty that can be expected to arise in this context, concerns the nature of an inter-governmental dispute: clearly co-operative government cannot be understood to suppress political differences among institutions of government functioning in different spheres under the control of different political parties, whereas the resolution of differences of a more specific legal nature regarding e.g. national and provincial competencies or fiscal and geographical interests, would more likely fall within the sphere of the principles of co-operative government.

The principles of co-operative government provided for in section 41(1) may be categorised as follows:

Principles emphasising national unity concerned with
- the preservation of peace, national unity and the indivisibility of the Republic;[33]
- co-operation in mutual trust and good faith, including friendly relations, mutual support, consultation on matters of common interest, co-or-

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[31] Cf e.g. K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (19th rev. ed. Heidelberg 1993), 108–110, and von Münch (note 28), 150–152.

[32] Section 41(2)-(5). Regarding section 41(4) the Constitutional Court said in *Certification of the Constitution of the Republic of South Africa,* Case CCT 23/96 (Constitutional Court judgment of 6 Sept 1996) par [291]: "This provision binds all departments of state and administrations in the national, provincial or local spheres of government. Its implications are that disputes should where possible be resolved at a political level rather than through adversarial litigation. It is consistent with the system of cooperative government which has been established and does not oust the jurisdiction of the courts or deprive any organ of government of the powers vested in it under the NT."

[33] Section 41(1)(a).

dination of actions and legislation, adherence to agreed procedures and avoidance of "legal procedures against each other."[34]

Principles defending areas of competence, requiring
- respect for the constitutional status, institutions, powers and functions of the other spheres of government;[35]
- not to assume powers and functions not conferred by the Constitution;[36]
- not to encroach on the geographical, functional or institutional integrity of government in another sphere.[37]

Principles promoting good government and service to the public, whereby
- the well-being of the people of the Republic is to be secured;[38]
- the implementation of effective, transparent, accountable and coherent government is to be achieved, and[39]
- loyalty to the Constitution, the Republic and its people is to be promoted.[40]

The novelty, vagueness and complexity of these devices of co-operative government can be expected to have unforeseen consequences, especially for the interpretation of other substantive provisions of the Constitution relating to the competencies of the various spheres of government. A predictable difficulty will be the interpretation of the almost naive injunctions to be friendly, mutually supportive and to avoid conflict. These injunctions seem to be premised on an ideal of non-competitive politics and homogeneity of purpose, which does however not exist in the multi-cultural and geographically varied South Africa.

2.2.2. Competitive powers

Despite the introduction of the idealistic notion of co-operative government, the 1996 Constitution inevitably also provides for inter-governmental competition for power and the resolution of disputes in this regard. In a composite state, such constitutional measures are essential. The

[34] Section 41(1)(h).
[35] Section 41(1)(e).
[36] Section 41(1)(f).
[37] Section 41(1)(g).
[38] Section 41(1)(b).
[39] Section 41(1)(c).
[40] Section 41(1)(d).

1996 Constitution however deals with this matter in an inordinately complex fashion.

2.2.2.1. Functional areas of exclusive and concurrent competence

Central to the determination of the governmental competency of the provinces relative to that of the national government, are Schedules 4 and 5 of the 1996 Constitution. Schedule 4 lists the "functional areas of concurrent national and provincial legislative competence" and Schedule 5 the "functional areas of exclusive provincial legislative competence." Section 104(1)(b) empowers a provincial legislature to pass legislation on all matters listed in both of these schedules.[41]

Parliament may[42] pass legislation on any subject, specifically also those listed in Schedule 4, but excluding in principle those falling within the exclusive legislative competence of the provinces listed in Schedule 5. However, the exclusion of the legislative competence of Parliament from the functional areas mentioned in Schedule 5, is relative. Parliament has the

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[41] "Legislative authority of provinces

104. (1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power

(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

(b) to pass legislation in and for its province with regard to –

(i) any matter within a functional area listed in Schedule 4;

(ii) any matter within a functional area listed in Schedule 5; and

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution supported by two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law."

[42] In terms of section 44:

"National legislative authority

44. (1) The national legislative authority as vested in Parliament –

(a) confers on the National Assembly the power –

(i) to amend the Constitution;

authority to adopt legislation that will take precedence over "exclusive" provincial laws under certain circumstances.[43] Whether the provincial competency to perform exclusive legislative acts can truly be described as being "exclusive", can therefore be doubted.

2.2.2.2. The provinces in Parliament

In terms of the 1996 Constitution Parliament consists of the National Assembly, and the National Council of Provinces.[44] The National Assembly "is elected to represent the people and to ensure government by the people under the Constitution." The National Council of Provinces however "represents the provinces to ensure that provincial interests are taken into account in the national sphere of government" by "participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces." The National Council of Provinces is a novel feature of the 1996 text. It replaces the Senate as second House of Parliament and is designed to provide effective representation of provincial interests at national level. No doubt the conception of the National Council of Provinces was inspired by the example of the German *Bundesrat*.

The National Council is composed of delegations from the nine provinces, each consisting of the provincial Premier and nine other delegates.[45] Each provincial delegation has one vote, and five out of the nine votes therefore determine a question before the National Council.[46]

Where national legislation in the field of the functional areas of concurrent competence (listed in Schedule 4) is envisaged, the National

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(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within the functional areas listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power –

(i) to participate in amending the Constitution, in accordance with section 74;

(ii) to pass legislation in accordance with section 76, with regard to any matter within a functional area listed in Schedule 4, and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly."

[43] See par 2.2.2.3 below.

[44] Section 42.

[45] Section 60.

[46] Section 65.

Council of Provinces has to participate in the process. A Bill of this nature adopted by the National Assembly is referred to the National Council of Provinces, where it can either also be passed, be rejected or passed in an amended form.[47] If the National Assembly accepts amendments to the Bill introduced by the National Council, the Bill is adopted.[48] Should the two Houses however disagree on the proposed legislation, the matter is referred to a Mediation Committee, which can approve of the version of the Bill supported by either of the two Houses, or it may develop a new version of its own.[49]

The Mediation Committee is composed of 18 persons: nine members of the National Assembly chosen to reflect the party political composition of that House proportionally and one delegate from each of the nine provincial delegations in the National Council. Five votes from each of the two components of the Committee are required for the decision of a question before the Committee.[50]

The Mediation Committee has 30 days within which to come to a decision on a Bill referred to it. Where the Committee agrees to the version of the Bill supported by one of the Houses, the other House must again consider it, and if it then passes the Bill, it is adopted. Where the Committee develops its own version of the Bill, both Houses have to consider it and pass it before it can become law.[51] If the Committee fails to come to any agreement within 30 days or the National Council of Provinces rejects the Bill in the form agreed to by the Committee, the Bill lapses, but the National Assembly may again consider and adopt it if the Bill is supported by a two thirds majority of its members.[52]

All ordinary Bills and money Bills must also be referred to the National Council, where such Bills may be rejected or amendments may be proposed.[53] The National Assembly is under such circumstances required to reconsider the Bill, but may, without any special majorities, again adopt the original Bill (or with amendments) finally. For amendments to sections 1 and 74 of the Constitution, the Bill of Rights and other provisions relating to the National Council or provincial matters, six out of the nine

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47 Section 76(1)(a).
48 Section 76(1)(c).
49 Section 76(1)(d).
50 Section 78.
51 Section 76(1)(f)-(h).
52 Section 76(1)(e) and (i).
53 Sections 75 and 77.

provincial votes in the Council are required and provision is also made for the consultation of the provincial legislatures.[54]

2.2.2.3. Parliamentary intervention in "exclusive" provincial authority

Legislative intervention of Parliament in the "exclusive" domain of the provinces is possible and requires the involvement of the National Council of Provinces. When a Bill whereby Parliament would "intervene" in a matter falling within a functional area of "exclusive" provincial competence is passed by the National Assembly, exactly the same procedure must be followed as that which is prescribed for the adoption of legislation in the field of concurrent jurisdiction.[55] The test for the validity of such legislation however goes beyond the question whether its subject matter falls within a functional area listed in Schedule 5 and whether it was adopted in accordance with the prescribed procedure. The crucial question would be whether the intervention by Parliament is objectively necessary to attain the goals of the maintenance of national security, economic unity, essential national standards, the establishment of minimum standards required for the rendering of services or the prevention of unreasonable action taken by a province which is prejudicial to the interest of another province or the country as a whole.[56]

The determination of such objective necessity would typically be a matter for judicial determination. Where the objective necessity however becomes manifest, the interpreter is informed in another constitutional provision[57] that such national legislation prevails over the provincial legislation.

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[54] Section 74.

[55] Section 76(4) – see par 2.2.2.2 above.

[56] Section 44(2):

"(2) Parliament may intervene by passing legislation, in accordance with section 76, with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province, or to the country as a whole."

[57] Section 147(2): "National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters referred to in the functional areas contained in Schedule 5."

2.2.2.4. Conflicting laws

An inquiry into the validity of competing parliamentary and provincial laws will however not end with an application of the widely dispersed provisions of the Constitution referred to above. In yet another part of the Constitution, at the end of the Chapter dealing with the provinces, a division of the Chapter is specially devoted to questions concerning "conflicting laws".[58] These provisions deepen the complexity of determining the chances of survival of provincial legislation which is in conflict with national legislation.

Various norms to be applied to determine the prevalence of parliamentary or provincial laws which deal in different and conflicting ways with the same matter, where such matter falls within an area of concurrent competence, are provided for.[59] A provincial law will only prevail if the conflicting parliamentary law does not satisfy the prescribed requirements.

A general requirement for national legislation to prevail, is that it must apply "uniformly with regard to the country as a whole."[60] An exception to this requirement may occur where Parliament adopts legislation "aimed at preventing unreasonable action by a province" which prejudices other economic, health or security interests or which "impedes the implementation of national economic policy."[61] Such exceptional legislation might apply to the specific offending province alone.

In addition to the general requirement that national legislation should have uniform application in all parts of the country, at least one of a list of alternative[62] conditions must be met. These conditions fall into three categories:

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[58] Sections 146–150 in Chapter 6.

[59] Section 146(1).

[60] Section 146(2).

[61] Section 146(3). It would appear that the test in cases of this nature would be whether Parliament subjectively aimed its legislation at preventing the consequences of provincial action objectively prejudicial to the relevant interests or objectively impeding the implementation of economic policy. The determination of national economic policy is naturally a matter of subjective decision by the national executive. Such policy determination is a matter for executive discretion, inevitably limited however by the provisions of the supreme Constitution. This will presumably be an area for the application of the principles of co-operative government.

[62] Section 146(2) refers to "any of the following conditions."

- practicability;[63]
- the need for national uniformity;[64] and
- necessity.[65]

These conditions warrant extensive analysis and comment which cannot be undertaken here.[66] It must however be pointed out that the condition of necessity is regulated further.[67]

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[63] Section 146(2)(a) states it as a condition that "[t]he national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually."

[64] Section 146(2)(b) states it as a condition that "[t]he national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing

(i) norms and standards;

(ii) frameworks; or

(iii) national policies."

[65] Section 146(2)(c) states it as a condition that "[t]he national legislation is necessary for

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment."

[66] Questions that arise include e.g. how "effectiveness" in section 146(2)(a) is to be determined; does "legislation establishing frameworks" referred to in section 146(2)(b)(ii) open the possibility of the development of a mechanism similar to the German *Rahmengesetze*; and should the interpretation of the references in section 146(2)(c) to "economic unity", "the common market" and "economic activities across provincial boundaries" be influenced by the American jurisprudence concerning the "commerce section" in Section 8 of the USA Constitution? (Concerning the latter question, see e.g. the useful exposition of G. Devenish, The Prospects for Constitutional Litigation in Relation to the Powers of the Central and Provincial Governments as Contained in the Interim Constitution, and Related Issues, 1996 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 34.)

[67] By section 146(4) which reads: "When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection 2(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces." To this provision the Constitutional Court (*Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 Case CCT 37/96, delivered on 4 December 1996, par [155]) has given the following meaning: "All that the court is enjoined to do is to have 'due regard to the approval or rejection of the legislation' by the NCOP. The obligation to pay 'due regard' means simply that the court has a duty to give to the approval or rejection of the legislation by the NCOP the consideration which it deserves in the circumstances. This is a consideration which the court might in any event have been entitled to take into account without an express provision to that effect."

2.2.2.5. Parliamentary procedure for conflicting legislation

As has been pointed out already, the adoption of parliamentary legislation in a field of concurrent competence requires the involvement of the National Council of Provinces.[68] Additional regulation of the legislative process is provided for separately in the context of conflicting laws. Thus, on the one hand, conflicting national legislation cannot prevail except if it was approved of by the National Council,[69] but the Council is on the other hand given only 30 days to reach a decision on supporting or rejecting conflicting draft legislation, failing which "the legislation must be considered for all purposes to have been approved by the Council."[70] Presumably the Court would in the event of a dispute regarding the necessity of such legislation also be entitled in terms of section 146(4) to have regard to the fact that the National Council had not been active in the matter.

An interesting twist to these provisions is the requirement that also provincial legislation in the field of concurrent competence must be approved by the National Council of Provinces to prevail over conflicting national legislation which does not satisfy the requirements for prevalence.[71] Should the National Council however not approve a conflicting national or provincial law, as the case may be, it must "forward reasons for not approving the law to the authority that referred the law to it."[72]

2.2.2.6. Executive intervention

Apart from the ability of Parliament to compete and intervene with the legislative processes of the provinces, the national executive is also empowered to supervise the provincial executives.[73] The provinces have executive authority mainly for the implementation of provincial legislation, the implementation of national legislation concerned with the functional areas listed in Schedules 4 and 5[74] and the administration of national leg-

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[68] Section 76(1).

[69] Section 146(6)(a).

[70] Section 146(6)(b).

[71] Section 146(5) reads as follows: "Provincial legislation prevails over the national legislation if subsection (2) does not apply."

[72] Section 146(7).

[73] Section 100.

[74] "Unless the Constitution or an Act of Parliament provides otherwise" (section 125(2)(b).

islation not concerned with those functional areas but assigned to the province by Act of Parliament.[75]

Section 100(1) begins with the following words: "When a province cannot or does not fulfill an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation. ... " The national executive may under such circumstances either issue a directive to the provincial executive to meet its obligations,[76] or it may itself assume the responsibility for that obligation. This latter (rather drastic) step may be taken to the extent that is necessary for the maintenance of the standards of the rendering of services, economic unity, national security and the prevention of unreasonable and prejudicial actions of the province.[77] The National Council of Provinces must be informed of such intervention and may disapprove and terminate it.[78]

2.3. An Unpredictable Outcome

Political motives for supporting or opposing the provincial system and elements thereof during the development and negotiation of the Constitution before 1993 and also in 1996 varied from socialistic centralism to ethnic separatism. Once provincial governments and administrations were however established, the interests of provincial politicians and public servants also came into play and planning and administration soon acquired specific provincial focuses. These factors, in addition to the various relevant constitutional prescriptions of the 1993 Constitution appeared to

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[75] Section 125 reads as follows:

"(2) The Premier exercises the executive power, together with the other members of the Executive Council, by –

(a) implementing provincial legislation in the province;

(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 unless the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province national legislation outside the functional areas listed in Schedule 4 and 5, the administration of which has been assigned to it in terms of an Act of Parliament;

(d) developing and implementing provincial policy;

(e) co-ordinating the functions of provincial departments and administration;

(f) preparing and initiating provincial legislation; and

(g) performing any other function assigned to it in terms of the Constitution or an Act of Parliament."

[76] Section 100(1)(a).

[77] Section 100(1)(b).

[78] Section 100(2).

lend some weight to the idea of provincial autonomy and the composite nature of the Republic. How the provincial system will develop further, will in the course of time naturally be influenced strongly by the political motives behind the legislative, executive and administrative actions of the national and provincial governments.

In the further development of South Africa's form of state, the courts of law will also play a crucial role. The judiciary, being the independent and impartial guardian of the supreme Constitution[79] will inevitably in future, as has already been the case in a few instances,[80] be called upon to adjudicate disputes concerned with the relative competence of the national and provincial authorities. Such jurisdiction for the Constitutional Court, being the "court of final instance over all matters relating to the interpretation, protection and enforcement"[81] of the Constitution, is provided for by the express inclusion of jurisdiction on "any dispute of a constitutional nature between organs of state at any level of government"[82]. The provincial and local divisions of the Supreme Court do not have the jurisdiction over disputes between the national and provincial authorities, but may adjudicate over "any dispute over the constitutionality of any executive or administrative act or conduct ... of any organ of state", as well as over a dispute "over the constitutionality of a Bill before a provincial legislature".[83]

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[79] See *inter alia* section 96(2) of the 1993 Constitution and section 165(2) of the 1996 Constitution.

[80] E.g. *Executive Council, Western Cape Legislature v President of the Republic of South Africa*, 1995 4 SA 877 (CC); *Premier, KwaZulu-Natal* v *President of the Republic of South Africa*, 1996 1 SA 769 (CC); *Ex Parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 3 SA 165 (CC) and *Ex Parte Speaker of the National Assembly: in re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995*, 1996 3 SA 289 (CC).

[81] See introductory paragraph of section 98(2) of the 1993 Constitution and section 167(3)(a) of the 1996 Constitution, which provides that the Constitutional Court "is the highest court in all constitutional matters."

[82] Section 98(2)(e) of the 1993 Constitution and section 167(4)(a) and (b) of the 1996 Constitution.

[83] Section 101(3)(b) and (e) of the 1993 Constitution. In terms of section 169 of the 1996 Constitution the Supreme Courts are to be replaced by High Courts with the jurisdiction to decide "any constitutional matter except a matter that only the Constitutional Court may decide." In terms of section 167(4)(a) and (b) "only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state," or "decide on the constitutionality of any parliamentary or provincial Bill" in accordance with the relevant provisions of the Constitution.

A thoroughly regulated constitutional foundation has been laid for the development of a South African composite state. Whether this development will be centrifugal or centripetal, is fully unforeseeable. Perhaps, however, the tendency of modern constitutional states to take the route of "regional states" as Schneider[84] calls it, will prevail if constitutionalism as such is allowed to prevail.

3. The Rechtsstaat *in South Africa*

3.1. The Introduction of the Notion in South Africa

Before 27 April 1994 the material constitutional law of South Africa was almost completely founded upon the British colonial constitutional notions that were introduced and developed since the beginning of the nineteenth century. Continental concepts were hard to find in South African public law. The idea of the *Rechtsstaat* was not widely discussed or understood, because it could not, except in the most abstract terms, be superimposed on a system in which the legislative sovereignty of Parliament was the *Grundnorm*.

On the other hand, academic legal literature in South Africa was not devoid of mention of the *Rechtsstaat*. Academic lawyers who had been exposed to German and Dutch learning, and visiting European scholars started introducing the concept late in the 1970's.[85] Under a constitutional dispensation which employed an easily amendable statute for a constitution, the idea could however hardly become an element of the common public law doctrine. The South African lawyers who are informed about the nature and characteristics of the *Rechtsstaat* concept, seem to find it

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[84] H.-P. Schneider, The Regions in Europe – From a Constitutional Perspective, in: G. Färber/M. Forsyth (eds.), The Regions – Factors of Integration or Disintegration in Europe? (Baden-Baden 1996), 45 – 56.

[85] E.g. H.J. Van Eikema Hommes, De materiële rechtsstaatsidee, 1978 Tydskrif vir die Suid-Afrikaanse Reg 45; D.H. Van Wyk, Suid-Afrika en die regstaatidee, 1980 Tydskrif vir die Suid-Afrikaanse Reg 152; K. Stern, A Society Based on the Rule of Law and Social Justice: Constitutional Model of the Federal Republic of Germany, 1981 Tydskrif vir die Suid-Afrikaanse Reg 241 (this contribution actually dealt with the *Rechtsstaat* and not the Rule of Law); V.G. Hiemstra, Suid-Afrika terug in die wêreld langs die weg van die regstaatbeginsel, 1985 Tydskrif vir die Suid-Afrikaanse Reg 1, and L.C. Blaauw, The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights, 1990 South African Law Journal 76. The concept also began appearing in some doctoral theses, e.g. P.J. Henning van R, Oor die begrip diskresie in die administratiefreg (LL D thesis UNISA 1967), and D.H. Van Wyk, Persoonlike Status in die Suid-Afrikaanse Publiekreg – 'n staats- en administratiefregtelike studie (LL D thesis UNISA 1979).

attractive not only intellectually, but because the constitutional state of the late twentieth century has developed upon common foundations laid through the centuries of the formation of the state in Europe, England and North America, and it promises balance and justice.

As has been pointed out above, the main role-players in the multi-party constitutional negotiations that produced the 1993 Constitution were representatives of a liberation movement on the one hand, and on the other hand, of an order that was established and was functioning under a constitutional dispensation founded in English legal thinking. None of these was likely to have a natural intellectual affinity for continental legal theory, nor did any one of them initially mention the *Rechtsstaat* in the negotiating process.

Exactly how it came about that the idea was introduced into the negotiating process, can not be determined readily, and it is, for present purposes, not particularly important. What is however interesting, is that it did appear in the negotiated constitutional text of 1993, and that it was subsequently absorbed into South African constitutional terminology, despite the manifest unlikeliness of it happening.

The introduction of the idea and term of the *Rechtsstaat/Verfassungsstaat* however did not bring about the full or even extensive reception of German constitutional principles. When change takes place in a constitutional system, it usually builds upon what existed previously in an evolutionary fashion. That has also always been the pattern in South African constitutional law. Furthermore express provision is made in both the 1993 and 1996 Constitutions for legal continuity[86]. It may therefore be expected that certain constitutional elements which South Africa inherited from British tradition, will still survive for some time. Furthermore it should be kept in mind that other countries with a British colonial history that became constitutional states, such as Canada and India, present useful and generally accessible comparative sources for South African constitutional development.

The first paragraph of the preamble to the Constitution of the Republic of South Africa, 1993 refers to the establishment of a "sovereign and democratic constitutional state" ("regstaat" in the Afrikaans text) and the provisions of the Constitution provide for the realisation of the different elements of the constitutional state.

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[86] Section 229 of the 1993 Constitution and item 2 of Schedule 6 of the 1996 Constitution.

Since the German concept *Rechtsstaat* cannot be translated directly into English (notwithstanding the fact that the Rule of Law is sometimes wrongly considered to be its equivalent), the best expression that could be found therefor was "constitutional state". Although the German concept *Verfassungsstaat* (constitutional state) is not an absolute synonym for *Rechtsstaat*, the similarity is close enough to use the direct English translation for it to indicate the full notion of the material and formal *Rechtsstaat*.

The Constitution therefore expressly announced the introduction of the *Rechtsstaat*. The statement in the preamble, significant as it was, would not alone have been sufficient to establish the idea. More important was the concretisation, without express mention thereof, of the principles and elements characteristic of the *Rechtsstaat*, both in the formal and material sense, in the substantive provisions of the Constitution. These principles and elements were also prescribed to the Constitutional Assembly for its task of producing a "final" constitution. Thus the doors were opened for the enrichment of the South African legal system from the more mature sources of continental (especially German) constitutional thinking. Nevertheless, due to the immense influence of the English language on the practice of legal science and jurisprudence in South Africa, there is a real possibility that the tendency to satisfy the obvious need for the exploitation of foreign comparative material from Anglo-American rather than continental sources, will be perpetuated.

As in continental learning, the question what should be accommodated under the umbrella of the constitutional state in South Africa, cannot be answered exhaustively. It is however submitted that certain concepts, procedures, principles and structures should be associated with the idea of the South African *Rechtsstaat* and that a distinction should be made between the formal and the material or substantive aspects thereof. The notion presents a standard by which the balance, fairness and effectiveness of the constitutional system and government action under it may be measured. Given the opportunity to develop, the notion's content and impact will not merely be determined by the provisions of the Constitution and related legislation, but it will develop an independent, directive life of its own.

For present purposes, the following formal elements are considered to be characteristic of a *Rechtsstaat*:[87]

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[87] Cf. P. Kunig, Das Rechtsstaatsprinzip (Tübingen 1986), 117–123, for a compact review of current German views on the Rechtsstaat. R.H. Huber, Deutsche Verfassungs-

– the exercise of government authority (only) in terms of legislation adopted in accordance with the Constitution;
– guaranteed freedom, justice and legal certainty;
– equality before the law, distribution of authority and judicial control over the exercise of authority;
– commitment to the law, judicial protection and a prohibition of excessive power;
– constitutional protection of fundamental rights and the prohibition of retrospectivity;
– the supremacy of the law, unambiguity of the law and the measurability, predictability and
– the calculability of executive conduct.

The material or substantive aspect of the *Rechtsstaat* is understood here to reflect the higher values and ideals for the modern state and is generally associated with justice and democracy. It therefore expresses the legal ideal that the exercise of governmental power must conform to higher values and that government actions should ensure justice.

That the *Rechtsstaat* is distinctly different from the Rule of Law cannot be argued fully in the present context. Suffice it to say that the Rule of Law is a concept of English law which finds application mainly in the context of parliamentary sovereignty. On occasion the expression is used merely to indicate orderly legal regulation of the community in contrast to arbitrary exercise of government power. There are however also authors who associate various material values for government conduct with the concept.[88]

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geschichte, Vol. VI (Stuttgart 1981), provides the following impressive definitions: "Verfassungsstaat heißt ein Staat, dessen politisches Dasein und Sosein sich in einer rechtlichen Ordnung vollzieht, die den staatsbestimmenden Grundideen gemäß die Einheit und die Aktionsfähigkeit des Staatsganzen sichert, die Funktionen der Staatsgewalt gegeneinander abgrenzt und den Staatsbürgern das Recht der Teilhabe an der Bildung des Staatswillens einräumt. Rechtsstaat heißt ein Staat, dessen politisches Dasein und Handeln durch eine der Verwirklichung und dem Schutz konkreter Grundwerte dienende Rechtsordnung begrenzt ist, die den Freiheitsraum der Einzelnen gegenüber dem Staatsganzen wie in ihrem wechselseitigen Verhältnis gewährleistet, ihnen den gebotenen Entfaltungsraum nach Maßgabe ihrer Anlagen und Kräfte überläßt oder schafft und ihnen Sicherheit für ihre Existenz, ihre menschliche Würde und ihr Schaffen verbürgt."

[88] Cf. L. Fuller, The Morality of Law (London 1969).

3.2. Elements of the *Rechtsstaat* in the Material Provisions of the Constitutions of 1993 and 1996

3.2.1. The 1993 Constitution

The following are some of the key elements of the 1993 Constitution which were indicative of the establishment of a dispensation consistent with the idea of a *Rechtsstaat*:

- The major cause of the metamorphosis that the South African legal system underwent on 27 April 1994, was section 4 of the 1993 Constitution that rendered the Constitution to be "the supreme law of the Republic";
- the first provision in Chapter 3[89] which introduced a regime of fundamental rights into the South African legal system, subjected all legislative, executive and administrative actions to every fundamental right enjoyed by the individual citizen;
- the Constitution was rendered rigid in that a two thirds majority of all the members of both the National Assembly and the Senate was required to amend it;[90]
- the courts were made completely independent and were required to perform their function impartially;[91]
- the Public Protector[92] was enjoined to seek to expose any maladministration, corruption, administrative injustice or inefficiency on the part of public functionaries.[93]

3.2.2. The constitutional principles

The continuation and entrenchment of elements of the *Rechtsstaat* was prescribed as follows by the Constitutional Principles contained in Schedule 4:

- Principle I required the Constitutional Assembly to provide for a continuation of "a democratic system of government", and Principle XVII stated that there shall be democratic representation at each level of government; the new constitutional text is also required (in terms of Principle VIII) to promote multi-party democracy;

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[89] Section 7.
[90] Section 62(1).
[91] Section 96(2).
[92] Which was the overly gender-sensitive term chosen for an ombudsman office.
[93] Section 112(1).

– Principle II ensured that a fundamental rights regime would be continued by the next constitution;
– Principle IV ensured a continuation of the principle of the supremacy of the constitution;
– Principle V enshrined the cornerstones of constitutionality, equality and equity;
– Principle VI required the maintenance of the horizontal separation of powers between the executive, the legislature and the judiciary;
– by giving an "appropriately qualified, independent and impartial" judiciary the "power and jurisdiction to safeguard and enforce the Constitution", Principle VII promoted the effectiveness of the constitutional state. This in effect meant that the judiciary had to be endowed with original constitutional competence, thus elevating it to the status of an autonomous constitutional institution. It also implied that the judiciary may in no way be made subject to undue interference by legislatures, executives and administrations;[94]
– Principle X dictated that "formal legislative procedures shall be adhered to by legislative organs at all levels of government," thereby prohibiting the arbitrary and unchecked issuing of commands by an authoritarian government;
– Principle XV which prescribed "special procedures involving special majorities" for amendments to the Constitution thus again requiring a future constitution to be rigid; and
– Principle XVIII required the new text to define the powers and functions of government at national and provincial level.

3.2.3. The 1996 Constitution

The term *Rechtsstaat* or constitutional state does not again appear either in the preamble or the rest of the text of the 1996 Constitution. This can however not mean that the potential for the development of a South African *Rechtsstaat* has been terminated. Such potential must be judged against the effect of the actual provisions of the Constitution.

Thus, for example, Section 1 states that the Republic is founded on the following values:

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[94] This reminds one of § 1 of the German *Bundesverfassungsgerichtsgesetz* which states that the German Constitutional Court is a court of law that is self-reliant and independent ("ein selbständiger und unabhängiger Gerichtshof") as against all other organs of the Constitution.

- human dignity, the achievement of equality and advancement of human rights and freedoms;[95]
- non-racialism and non-sexism;
- supremacy of the constitution and the rule of law;[96] and
- democracy.[97]

The application of Constitutional Principle IV resulted in section 2 of the 1996 Constitution, which reads:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.

Various other provisions of the 1996 Constitution provide for the separation of powers and reinforce the requirement that government authority is to be exercised in accordance with and subject to the Constitution.[98]

Chapter 2 contains the Bill of Rights, which is a comprehensive catalogue of fundamental rights. Section 7, the first provision of this Chapter, states that the Bill of Rights is a cornerstone of democracy and that the "state must respect, protect, promote, and fulfil the rights" provided for.

For the determination of the question whether the failure of the Constitutional Assembly to refer to the *Rechtsstaat* expressly has terminated the chances of a South African *Rechtsstaat* to evolve, one might consider whether express mention of the term is required; whether the inclusion in the Constitution of principles not usually associated with the *Rechtsstaat* will prejudice its further development, and whether the constitutional jurisprudence of the first two years under the 1993 Constitution contains the critical mass required for the future expansion of the notion.

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[95] Compare also sections 7(1), 36(1) and 39(1).

[96] In the context in which "rule of law" is used here, one might assume that the doctrine of the Rule of Law, such as it is, which assumes the sovereignty of Parliament, is not intended. A scaled-down meaning, which is also an indispensable element of the *Rechtsstaat*, must probably be attached to it, namely supremacy of the law.

[97] Section 1(d) specifies the following elements of democracy: "Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[98] E.g. section 44(4): "When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution"; in terms of section 83 the President, as head of state and head of the national executive "must uphold, defend and respect the Constitution as the supreme law of the Republic"; and section 165(2) states: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

3.3. *Rechtsstaat* Jurisprudence

Already in the case of *Makwanyane*,[99] which may be considered to have been the inaugural decision of the Constitutional Court and whereby the death penalty was abolished, the *Rechtsstaat* principle was mentioned in several places with reference to its introduction in the preamble of the 1993 Constitution.

The concept was in the first place considered to be an expression of the acknowledgement of human rights and fundamental rights.[100]

Judge Ackermann, who has thus far referred to the *Rechtsstaat* most frequently, has associated the prevalence of the Constitution over all law and actions of organs of the state with the concept,[101] and also with the principle of equality,[102] the requirements of reasonableness and legal justification of government action,[103] and the duty of the state to protect the rights of the individual.[104]

Judge Sachs has related the *Rechtsstaat* to parliamentary democracy.[105] The Court has also indicated[106] that legal certainty was an essential characteristic of the *Rechtsstaat*,[107] as well as the democratic values of openness, freedom and equality.[108] The separation of the legislative, executive and judicial powers, and especially the requirement of independent courts as a characteristic element of the *Rechtsstaat* has also been underlined by the Court.[109]

Very significantly, in the first certification judgment of 1996, the Constitutional Court referred various times to the notion of the constitutional

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[99] *S* v *Makwanyane*, 1995 3 SA 391 (CC).

[100] Cf. the judgments of P. Chaskalson in parr [130] and [140], Langa j in par [220] and Mokgoro j in par [311]. P. Chaskalson repeated this sentiment in par [7] of the judgment in *Executive Council, Western Cape Legislature* v *President of the Republic of South Africa*, 1995 4 SA 877 (CC). Kriegler j also associated himself with the idea in par [181] of the *Western Cape* case.

[101] See also the joint judgment of Ackermann and O'Regan jj in par [151] of the *Western Cape* case.

[102] Par [155] of the *Makwanyane* judgment.

[103] Par [156] of the *Makwanyane* judgment. See also his judgment in the *Ferreira/Vryenhoek* case, 1996 1 SA 984 (CC) par [51].

[104] Parr [168] and [171] of the *Makwanyane* judgment.

[105] Par [202] of the *Western Cape* case.

[106] Per Ackermann j in par [26] of the *Ferreira/Vryenhoek* case.

[107] In a different context (the application of fundamental rights in private law) Ackermann j also pointed out this factor: *Du Plessis* v *De Klerk*, CCT 8/95 par [97].

[108] O'Regan in par [222].

[109] *Bernstein* v *Bester*, 1996 2 SA 751 (CC) parr [51] and [105] per Ackermann j.

state as guiding principle for the new Constitution. In this connection the Court said for example:[110]

> It is appropriate that the provisions of the document which are foundational to the new constitutional state should be less vulnerable to amendment than ordinary legislation.

It therefore appears that the Constitutional Court has already, in a brief period of two years, attached special weight to the idea of the *Rechtsstaat* and that it has already progressed some distance along the road to giving it an autochtonous content. Important, however, is the fact that the Court has often used the appearance of the concept in the preamble as a point of departure, but that it consistently interpreted its meaning with reference to the material provisions of the Constitution itself.

3.4. Will South Africa Become a Rechtsstaat?

It is submitted that the absence from the constitutional text of 1996 of the Afrikaans term "regstaat" and its English equivalent "constitutional state" should not be understood to imply the end of the short history of the development of the idea of the *Rechtsstaat* in South Africa. After all, even in the prime example of the German *Grundgesetz*, the *Rechtsstaat* is not mentioned prominently[111] and it might safely be stated that the German doctrine does not depend on that constitutional reference. What is however lacking for future South African development of the idea, is the convenient platform for the incorporation of the concept in the interpretation of the Constitution that was provided by the preamble of the 1993 Constitution.

The Constitutional Court has demonstrated an ability and willingness to develop the notion of the *Rechtsstaat* in the South African context. It is to be hoped that the judicial utilisation of its terminology and ideas under the 1993 Constitution will serve as a platform for carrying it into the future. To promote such development, the concept will have to be nurtured and actively developed by legal scholars and the judiciary.

The greatest potential challenge to the survival of the *Rechtsstaat* in South Africa lies in the undercurrent of values vaguely expressed in the 1996 Constitution which have the potential, if over-emphasized, of neu-

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[110] *Certification of the Constitution of the Republic of South Africa,* Case CCT 23/96 (Constitutional Court judgment of 6 Sept 1996) par [153].

[111] It is only in article 28(1) of the *Grundgesetz* that the notion is referred to, and then only in the context of requirements for the constitutional arrangements of the *Länder*.

tralising *Rechtsstaat* values: depending on future political and economic circumstances, there is the potential of communalism overshadowing individualism, *Sozialstaatlichkeit* gaining the upper hand over *Rechtsstaatlichkeit* and remedial promotion of the disadvantaged to undermine the ideals of equality. This is not to say that communalism, social involvement of the state or affirmative action are as such anti-*Rechtsstaat* values: an unbalanced over-emphasis thereof will however ensure the demise of the constitutional state.

4. Conclusion

Where the legislation, government, administration and especially the jurisprudence of the courts will take the development of the South African composite, constitutional state, is at least as difficult to foresee as it would have been for a German interpreter in 1949 to predict the eventual significance of the expression "democratic and social federal state" in Article 20(1) of the *Grundgesetz*.

The necessary constitutional materials, well understood and thus far sensibly applied by the Constitutional Court, are at hand. If the merits and values of the composite form of state and of the fruits of many centuries of constitutionalism would develop as values living in the social and juridical consciousness of the South African nation, chances are that the Republic will evolve into Africa's democratic and social composite constitutional state of the 21st century.