Democracy between a just public legal order and the ideal of (equitable) transformation

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Abstract

Although it may seem easy to compare states in terms of the number of their citizens and the size and shape of their countries, the connection between the democratic state and the numerical and spatial considerations is more subtle and complex, for theoretical views of society and the state tend to diverge into opposing positions that explore the mutually exclusive extremes of *atomism* and *holism*. Against the background of some historical and systematic considerations, these theoretical stances are assessed by looking at some facets of the idea of equity and transformation within the South African context. In the discussion, attention is given to the idea of *majority rule*, alternative interpretations of 'transformation' and the difference between *constitutive* and *regulative legal principles*.

1. Orientation

When one reads the Annual Year Book of modern states one notices that normally there is first information that is about a breakdown of the population of the state under consideration. – This information among other facts specifies the *number* of inhabitants of the country. The second piece of information normally mentions the *size* and *shape* of the country. It therefore as if *number* and *space* form the basis of one's understanding of the reality of the state, for only after these 'facts' have been given, information is provided about other facets of the existence of the state, such as its economy, its history as a political institution, and its structural organisation.

What is presupposed in all of this is an implicit idea of the state as a multifaceted societal form of human life. This idea emerged through a long process of historical development. In this article the focus is on various crucial aspects of the emergence of the (idea of the) state by arguing that the traditional and influential opposition of *atomistic* (individualistic) and *holistic* (universalistic) theories of the state (and human society) actually explores the conditioning role of the core meaning of number and space – torn apart and set over against each other.[1]

Jellinek (1966) places an even heavier burden upon these two positions by referring to them as the expression of two large and opposing life and world views – 'the individualistic-atomistic and the collectivistic-universalistic' (p. 174).

In addition, there shall be an investigation on what are the proper confines in which the idea of the *majority* ought to function within a (so-called) *democratic state*. Within the South African context these considerations require an assessment of the problems attached to equity (see Employment Equity Act (Act No. 55 of 1998) and what has become known as 'transformation', in the sense that the societal institutions of the country ought to 'reflect' the (numerical) composition of its population. The problems involved in these views remind one of the traditional distinctions between republic, monarchy, aristocracy and democracy where the role of numerical relationships also appears to be decisive (cf. Arendt 1953, 133 ff.). The article may argue that the role of numerical relations and calculations easily end up in (albeit unintended) *totalitarian* consequences, because quantitative considerations *alone* do not contain any safeguards against totalitarian and absolutistic views and practices. A *totalitarian* state extends its power beyond its own confines in order to exercise control over all those societal collectivities distinct from the state such, as economic, religious and educational institutions (see Hayes 1969, 94–95). It denies its citizens their *personal* (civil) and *societal freedoms*. A state is *absolutistic* if it does not leave any room for the co-determination and co-responsibility of its citizens (i.e., when it denies them their *political freedoms*). This will lead the discussion to reflect critically on what has been designated as the 'total state.' Leibholz (1954, 1125–1126) points out that in the *total state* not only all human beings in all walks of life are subjected to the gripping power of the state, since also the educational institutions are absorbed in the firm hold of a totalitarian state or ruling party. The merciless control of this total state embraces human life from birth to death.

2. Brief historical contours

The history of reflection on human society from early on employed the idea of the state, although this idea, by and large, was always embedded in a particular view of human society and guided by specific expectations of the 'good life.' It is, therefore, not surprising that already the prominent thinkers of Greek antiquity, Plato and Aristotle, made significant and lasting contributions to the dominant views of both the ancient and the medieval world.

Already in the fifth century B.C. Callicles derived from nature the right of the strongest, thus anticipating the later ideas of Hobbes and Nietszche. He holds the view that the only *reality* within society is the *individuals*, entailing that the (general) abstract concepts that human beings construct, such as 'state' and 'society' have no 'objective reality' since they merely represent *concepts* or *words* (*nomina*) within the human mind. Plato and Aristotle, by contrast, not only believed that society and the state have 'objective reality', since they advanced an understanding of the state as the *encompassing whole* of society – embracing the individual citizens as integral and

sub-ordinate parts of this societal whole.[2] In his later dialogue *Laws,* Plato distinguishes between 'arithmetical equality' and 'geometrical equality,'[3] which was eventually incorporated in the thought of the classical Roman jurists when they formulated their understanding of justice as directed towards an equal treatment of those who are equal, but an unequal treatment of those who are not equal.

3. Multiplicity and wholeness in theories about state and society

The two most powerful views of human society since ancient Greece are respectively designated as *atomistic* and *holistic*. The atomistic perspective reduces society to a *collection of individuals*, to the *sum* of a *multiplicity* of human beings. Holism, by contrast, proceeds from the assumption that *society* or some or other societal institution should be viewed as the most *encompassing societal whole* (or: *totality*) that embraces every individual as an inseparable part of this larger (supra-individual) whole.[4]

The human most basic awareness of number is embedded in the existence of a discrete multiplicity, whereas the most basic intuition of space is tied up with the nature of continuous extension. Whatever is continuously extended is connected in all its parts and is, therefore, given as a whole (totality) – showing that the terms *wholeness* and *totality* are synonymous with *continuous extension*. A merely numerical multiplicity does not present the idea of *wholeness*. Wholeness is in an original and irreducible of sense something spatial. The mathematician, Hermann Weyl (1885–1955)[5] characterises the new apparent success of the aim to arithmetize mathematics as *atomistic* (Weyl 1921, 56, 72).[6] He also contrasts this atomistic view by explaining that according to its essence a spatial whole has parts.[7] In other words, the key perspective advocated by holistic views is given in their accentuation of the (spatial) *whole–parts relation* (albeit it is often in different contexts – remember the powerful *organicistic* mode of thinking that dominated the nineteenth century – where society was portrayed *as an organism*).

Eventually, within social philosophy, the opposition between atomism and holism was phrased in terms of the opposition between *individualism* and *universalism* (*collectivism*).[8] These terms became familiar in Germany and England during the twentieth century. Karl Popper (see Popper 1966–II, 324), F.A. Hayek and J.W.N. Watkins are prominent proponents of *methodological individualism* (cf. O'Neill 1973). When Charles Taylor discusses some ideas of Hobbes and Locke, he uses the terms *atomism* and *individualism* as synonyms (see Taylor 1989, 82, 196).

4. The initial view of the state as the encompassing whole of society

Within Greek culture the *polis* (city-state) emerged as a *totalitarian* institution. During its peak under the reign of Pericles, the Athenian 'democracy' witnessed a number of developments, such as the disappearance of politically based estate

differences, the right to complain became a universal right, economic life experienced freedom of movement while through their representatives the people made the laws (Wilamowitz 1919, 9 ff.). Yet the historian Thucydides still remarked: ‘In name it certainly was a democracy, but in reality a dominion exercised by the first man’ (Croon 1974, 249). In fact, both Plato and Aristotle adhered to a totalitarian conception of the state. They sacrificed all non-political dimensions of society to the concerns of the body politic – whether viewed as fitted in a strict ‘estate-order’ (Plato), or whether society as a whole is dissolved in the Greek *polis* as highest totality. The state is considered to be the *perfect community*. In it human beings can find whatever they need for their whole existence. As a ‘political animal’, the human being has an inherent natural drive towards the formation of the state (cf. Aristotle, *Politica* 1253). He believes that the social drive of the human person finds its *form–perfection* in the *polis*.[9]

Augustine and Thomas Aquinas continued this totalitarian conception by merely superimposing upon the state – as the highest temporal societal institution – the church as the supra-temporal perfection of human society. If an *ideology* is defined as the attempt to elevate one specific societal collectivity to become the all-inclusive one within human society, then both the ancient view of the *state* and the medieval conception of the *church* are exemplifying such an *ideological* stance.

5. The idea of the ‘majority’

It should be kept in mind that the Greek term *Politeia*, used by Plato as the title of his well-known work, literally means *republic*. The development of Greek society witnessed diverse forms in which the *polis* was organised – but in all the variants the popular assembly of free citizens played a key role. It was through the development of the Greek *polis* that the dominance of the clans, tribes and brotherhoods was eventually terminated. In this process, the initial four Ionian tribes were replaced by ten new territorial tribes. This provided the basis for the famous Athenian democracy that reached its peak under the reign of Pericles.[10] However it was indeed instrumental in the transition from the older *undiffer-entiated clans* and *tribes* to the relatively *more differentiated* legal order of the *polis*. (A discussion of the different forms of the state in the thought of Plato and Aristotle falls outside the scope of this article).[11]

The ancient world and the medieval period were, by and large, dominated by political institutions that did not conform to the requirements of a modern constitutional state under the rule of law.[12] The classical Roman like *ius civile* (folk law) was transformed – as a result of the expansion of the Roman Empire and it having on its territory many non-Romans – into the classical Roman *ius gentium*. The legal provision made for those who did not belong to the Roman ‘tribe’ forms the starting point for the modern understanding of *civil private law* (common law), where the individual is observed as such, apart from being a member of some or other social collectivity.

Throughout the history of the West, the term *democracy* did not find an all too important application (cf. Meier 1970). Since Aristotle, the term continued to be used as an indication of a *state-form* – and even in the seventeenth century Pufendorf still speaks about the three regular forms of the state.[13] The term *republic* appears more frequently. During the period between 1780 and 1800 the term *democracy* acquired its decisively modern meaning (see Maier 1972, 52 ff.). Indeed, the French revolution changed the modern political scene for ever. The idea of popular sovereignty (*a la* Rousseau) now became intimately associated with the idea of *democracy*. During the twentieth century the most common connotation attached to the term democracy is that of *popular sovereignty*, that is *majority rule*.

The idea of majority rule actually emerged from the struggle between the church and the state during the later middle ages. In 1326 Jean of Jandun and Marsilius of Padua completed their book, *Defensor Pacis* (In defence of peace) and presented it to the emperor. The new perspective emphasised in this book is that all forms of authority derive from the *people*, from which it follows that *law* could only be an expression of the *will* of the *majority*. Only the majority can make a law, change it, withdraw it, or interpret it (cf. Kates 1928, 37).[14] Suddenly, the familiar medieval perspective became a subject of an overhaul. The *Defensor Pacis* now introduced a state that is liberated from the authority of the church and which, in fact, does not acknowledge *any limits to its power*.

It was particularly in England where the ideas of Marsilius of Padua had a significant effect, for Thomas Cromwell even commanded that the *Defensor Pacis* had to be translated into English and that it had to be circulated at the royal court. The whole history of the English Reformation is a chronicle of the attempt of the state to assert its right to determine for its subjects *also* the form and substance of religious practice and belief (see Kates 1928, 42).

The question that should be raised is whether or not the point of entrance of number and space (majority versus collectivity) can resolve issues of (in)justice within the state and concerning the relationship between 'state' and 'society'. This question necessitates the need to analyse the doubtful status of *law* in social contract theories.[15]

6. The position of law within the social contract theories

The nominalistic movement, including William of Ockham alongside Marsilius of Padua and Jean of Jandun, challenged the official Roman Catholic position on the basis of the atomistic idea of popular sovereignty. During the Renaissance era, the newly developing natural sciences (Galileo, Kepler and Newton) served as an instrument of dominating and exploring reality. The newly developed paradigm of natural sciences once generated the quest for a *rational explanation* of the genesis of the state. The (hypothetical) state of nature was portrayed in diverse terms, but according to the *method* prescribed by the new natural science, the ideal (social)

reality had to be broken down to its simplest elements such that it can be rationally reconstructed in terms of its 'atoms', the *individuals*.

The theory of the social contract served this purpose. In the case of Hobbes it resulted in the transferral of all authority to the monarch who was empowered through the contract to everything.[16] According to Hobbes (1968, 227) the *people*, as mere collective name for the collection of individuals, are only bound into a real unity through the contract, which is seen as the government in person. Hobbes does not assign sovereignty to the people themselves, for only the *unity* of the people, as represented in the *ruler*, is *sovereign*. As a result, no single person can ever complain about anything done by the ruler, since through the contract, that person actually willed what the majority 'ordayned' (Hobbes 1968, 231–232).

Although Locke (1690) believes that all human beings are *born* free and equal, his (classic-liberal) idea of the state does not know the requirement of universal suffrage. Locke is satisfied with the restriction of the right to vote to the privileged classes, as was the case in the British monarchy of his time. The implication is that *democracy* for Locke is merely a *means* in service of the protection of the inalienable human rights of the citizens, without containing a guarantee for public legal freedom and equality. In spite of his appeal to the principle of the 'public good' ('common good') as supreme law, Locke does not articulate a criterion that restricts unlimited state action (Locke 1690, 158, 197). Is the 'public good' *(salus populi)* identical to what is willed by the majority? Also, how does one calculate the majority? Is it done on the basis of the properties owned by the majority? Since Locke does not provide an answer to these questions in his political theory of 'as little as possible state intervention and as much as possible (civil) freedom' (*laissez faire, laissez passer*). This caused other political theorists to refer to his theory of *state nihilism*. The classical liberal idea of the state provided subsequent governments with ample grounds for abandoning their normative legal task to *protect* the legal interests of their citizens within all the different societal contexts in which these legal interests manifest themselves. Jeremias Bentham (1748–1832) and James Mill (1773–1836) took the individualistic view of society to its peak with their motto of the *greatest happiness for the greatest number.*[17]

Rousseau's (1975) equally individualistic startingpoint is immediately abandoned through the conclusion of the contract itself, for suddenly the formerly free and independent individuals are transformed into inseparable parts of the new collective entity emerging from the contract, the *sovereign*, also designated as the *volonté générale* (the *general will*). At the contract, each individual gives up his or her (natural) human rights and then receives them back in the *higher form* of *equality* that is morally sanctioned through convention and law (p. 249). According to Locke 1966, the rights of the individual to *life*, *liberty*, and *property* are *absolute* and *inalienable* and, therefore, they can never be given up or transferred by means of the *social contract* (pp. 119, 181–182). By contrast Rousseau (1975), in his *Contrat Social*, explicitly claims that, within the state, the social contract forms the *basis of all rights*. The implication is that the *general will* acquires the same absolutist and

totalitarian position over all its 'members' as the sovereign in the political philosophy of Hobbes (p. 244). The new *moral person* produced by the contract possesses his or her own *unity*, *identity*, *life*, and *will*.[18] 'Immediately, the association produces, in the place of the particular person of every participant, a moral and collective body, composed out of just as many members as the voices of the gathering, which derives from this act its unity, communal self, life and will' (Rousseau 1975, 244). In addition, 'the social contract endows the body politic with an absolute power over all its members' (p. 253).

It is well-known that Rousseau advocates the idea of direct (radical) democracy. The sovereign can only act when the people are brought together – this embodies his idea of *direct popular democracy*. Laws are exclusively the authentic acts of the *general will* (Rousseau 1975, 298). In one place, he even uses the phrase *general will* and the word *law* as exchangeable terms *('la volonté générale ou la loi')*. His general view gives rise to the idea that all legislation (that is, all *law*) should be seen as an *expression* of the *sovereign general will*. The body politic finds its principle of life in the authority of the *sovereign* (Rousseau 1975, 297).[19]

It should be remembered that Rousseau (1975) defined freedom as 'obedience to a law which we prescribe to ourselves' (p. 247). Whenever there is a *minority* within the state that does not want to obey the *general will*, those people are actually disobedient to their own will therefore, *unfree*. Rousseau did not hesitate one moment to draw the totalitarian conclusion: in order to ensure that they are autonomous they must be *forced* to be free.[20]

The result of this entire legacy is that *law* is always identified with *state-law*. As an expression of the general will, *law* is founded in the social contract serving as the basis of *all rights*. Consequently, there is no room left for any *original* source of law *outside* the state.

The political theories of Hobbes, Locke and Rousseau demonstrate the impasse of atomistic and holistic theories – the options offered by the meaning of *number* (atomism) and *space* (holism) seem to fall short of the ideal of a just state.[21]

7. Legal principles and the 'dictatorship' of numbers

Since the thrust of *atomistic* and *holistic* approaches does not escape from the limited gateway of an arithmetical or spatial basic denominator in terms of which human society and the nature of the state is assessed, people have to move beyond these orientations in order to account for the meaning of *law* and *justice*. The meaning of law and justice cannot be derived from numerical considerations (the addition of individuals to the level of a *majority*) or from spatial considerations (by applying the whole–parts scheme to an understanding of human societal relationships).

It is impossible to determine justice and truth merely on the basis of the *majority principle*. Although there is a legitimate place for decisions taken by the majority within a 'democratic state', this principle remains purely *formal* in respect of the

contents (material nature) of legal principles and principles of justice.[22] Owing to this limitation, the majority principle can never be applied in order to decide what (truth and) justice is, for it irrevocably collapses into a *vicious circle*. The first question is: Did the majority decide that *what* the majority decide is just (or true)? The following one is: Did the majority decide *that* the majority decide that *what* the majority decide is just (or true)? Evidently humans have set foot on the path of an *infinite regress*. Just as little as it is possible to decide what is *just* through a majority vote, is it possible to decide what is *true* on the basis of a majority vote?

The constitution of a state is the *legal source* stipulating the competence of voters. Once the citizens of a constitutional state have exercised their competence to elect a government, that government has to rule in terms of the normative demands governing the domain of *public justice*. The differentiation of central governmental functions – such as the *legislative*, the *judicial* and the *executive* – depends upon the nature of the state as a *public legal institution*. These functions embody and incorporate specified legal principles of a public legal order. In their normal function, the relevant jural organs (parliament, the judiciary, and the police and the defence force) give positive shape to the typical jural principles guiding their actions.

As soon as the term *democracy* is understood in terms of its (formal) meaning within modern constitutional states, there is no need to interpret the place and role of the *majority vote* in such a way that it is seen as the *source* of principles for public justice, for in a material sense the principles for public justice also make the actions of the majority norm. Therefore, both the citizens and the government elected have to observe the requirements of a public legal order and of public justice in their deliberations. One of the fundamental public freedoms guaranteed by the constitutional state under the rule of law is the freedom to organise fellow citizens to support a particular (party political) view on the task of government. It is closely linked with the active and passive right to vote (i.e., to vote for someone or to make oneself available to be elected).[23]

Yet, the organisation of political parties is always directed towards the *public legal* nature of the state. Likewise, any acting government cannot simply act in an *arbitrary way* because its actions are also subject to supra-individual and supra-arbitrary standards of law and justice. Although people may have differences of opinion regarding *what* principles there are, they can hardly deny *that* there are such principles. Therefore, acknowledging the *relativity* of human insight into the nature and scope of fundamental principles does not warrant an *anchorless value-relativism*. The mere confession that one may be wrong does not warrant reaching the conclusion that one is indeed mistaken. In order to show that one has made a mistake there should be a rational argumentation and inter-subjective deliberations (Habermas). However, rational deliberations always refer people to assumptions that transcend as the realm of logic. With an appeal to the logical principles of identity and non-contradiction one can merely establish that two conflicting points of view cannot be both true at the same time and in the same context, but which one of the two is true cannot be established merely by employing these two principles. It is only

when the principle of sufficient reason (ground) is applied, that an appeal to some or other *extra-logical* foundation is needed – and these extra-logical views in practice reveal diverging views of reality. This explains why Jellinek (1966) referred to the opposition of *individualism* and *universalism* as the two *great life and world views*.

Some implications of what has been argued above will be articulated by looking at the difference between constitutive and regulative legal principles, at the specification of such principles in their bearing upon the state as a typical societal collectivity. This will be followed by assessing the nuances present in the South African political dispensation regarding equity and transformation.

8. Legal principles, equity and transformation

The structure of any public legal (state) order is such that it rests upon multiple normative building blocks that are constitutive for its functioning and existence. Any and every constitutional state under the rule of law has the task to bind together (to integrate) the multiplicity of legal interests within its territory into one public legal order. Through the appropriate jural organs such a state has to harmonise and balance these legal interests. Wherever an infringement of rights occurs, the state has to restore the imbalance created in a retributive manner.[24]

This task of the jural integration of legal interests entails a differentiation between the domain of public law (correlated with public freedoms – such as like that of the freedom to express political views, to organise political convictions in political parties, and to participate in the capstone of political freedom: the right to vote), the domain of personal individual freedom (common law or civil law) and the domain of societal freedoms (non-civil private law). The nature and existence of these jural spheres are *constitutive* for the existence of a just state.[25] In this context, specification *constitutive* implies that the legal order of a state cannot function properly except on the basis of the presence of all three of these jural domains. A *Bill of Human Rights* certainly constitute one of these building blocks.

In addition one can proceed by analysing the constitutive legal principles for subdivisions of the above-mentioned jural domains. For example, one can highlight the fundamental *procedural principle* of civil law, namely that the other side must also be heard (the *audi et alterem partem* rule). One may also consider the basic (constitutive) nature of criminal law, evinced in the principle that a person can only be found guilty if it is concluded upon evidence enabling a sentence reached *beyond any reasonable doubt*, and if it is based upon a *due process*. Within the domain of administrative law the requirement of *proper care* obtains, and so on.

Regulative jural principles, by contrast, first and foremost presuppose the (constitutive) existence of a specific legal order. Although regulative principles may, in unique circumstances, set aside an applicable law, they can never *replace* the existing jural order. Traditional systems of penal law, for example, adhere to the constitutive jural principle of *jural causality*, where attention is merely given to *effects* of an (illegal) act (in German known as *Erfolgshaftung*). A person is held

liable for the effects (consequences) of a deed without taking into account the intentions of the actor – the well-known *lex talionis* applied the proportionality of an eye for an eye and a tooth for a tooth. On the one hand, this measure established a certain *jural balance*, because one is not entitled to take a head for an eye. In undifferentiated societies, this configuration is intertwined with a collective accountability, which is also found in the *Old Testament* (see Deut. 5:9).

It is only when the jural awareness of a society and the jural order of the state is *regulatively* deepened under the guidance of the aspect of moral love that it becomes possible to account for the moral disposition of the perpetrator, for the subjective intentions of the person who committed the deed. Only now do the (disclosed) principles of *jural morality* come into play, such as the *fault principle* in its two forms: *dolus* (intent) and *culpa* (culpability).[26]

Aristotle already had an exceptional understanding of another deepened (morally disclosed) jural principle, namely *equity*. He distinguishes between justice and equity, but ascribes to equity a higher value (cf. *Nicomachean Ethics*, Book V, Chapter 10). Although equity is *just*, it is not the justice of the *law*. Everything cannot be regulated by law – and when the applicable law, in fact, would effectuate an injustice, the original law–statement ought to be rectified *ex equitate*, that is, on *behalf of equity* (see van Zyl 1989; 1991 and Hommes 1972, 481–546).[27] All the deepened principles of jural morality, such as the fault principle, the principle of equity, that of good faith (*bona fides*) are actually *principles of justice*.[28] Against this background *equity* and *transformation* (shall be briefly analysed).

Chapter 2, 8(1) of the 1996 Constitution of the Republic of South Africa, stipulates that '[T]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' Of particular importance are sections 9(2) and 9(3) of Chapter 2. Section 9(2) states that: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'; and 9(3) holds that the 'state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

The affirmative action entailed in section 9(2) seems to contain an implicit tension with the meaning of section 9(3). Disadvantages caused by 'unfair discrimination' ought to be rectified through legislation and other measures, thus leaving room open for what is called 'fair discrimination.'

Section 9(1) states that: '[E]veryone is equal before the law and has the right to equal protection and benefit of the law.' Taken together these three sections contain the central problem of the current constitutional dispensation of South Africa.

One the one hand equality and non-discrimination represent the application of a *constitutive legal principle* prevalent within the constitutions of all modern constitutional states. In a state where this constitutive jural principle does not find

application, all sorts of injustices are possible. Therefore, the legal order of a just state crucially depends upon the validity of this principle in a concretised form, that is in the shape of positive law.

Speaking about ‘unfair discrimination’ at once sanctions ‘fair discrimination.’ Since *fairness* is merely a synonym for *equity* and since equity, as has been earlier argued, is one of the regulative jural principles guiding the actions of competent jural organs in a refined, deepened and specified way in the assessment of unique (and formally and materially) unforeseeable situations, events or circumstances. These sections balance the constitutive demands of equality and non-discrimination with the morally deepened jural guideline of a regulative equity perspective.

If the difference between constitutive and regulative principles is not properly observed, one may end up by interpreting affirmative action in a *constitutive* sense on the same level as the (constitutive) appeal of modern *Bills of Rights*. As soon as these two, that is, principles are viewed as being constitutive, it would mean the peoples understanding has become a victim of an inherently contradictory view, for in a *constitutive sense* it is contradictory to authorise discrimination and to condemn it at the same time.

The implicit confusion of a constitutive and a regulative perspective is embodied in section 9(5): ‘Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’ The statement that ‘[D]iscrimination on one or more of the grounds listed in subsection (3) is unfair’ echoes the constitutive thrust of the general scope of a legal order, which means that the term *unfair* should have been replaced by a constitutive legal term such as *unlawful*. Without this having been done, the second statement, entailing that it can be established that ‘discrimination’ is ‘fair’, contradicts the first one by literally asserting that discrimination can both be fair and unfair.

Acknowledging that this section, in fact, does employ the term *unfair* (instead of unlawful), provides an option to sidestep the said dilemma. The problem may be resolved by applying the distinction between the constitutive and the regulative, for in doing this one can argue that the first part of section 9(5) sought to be interpreted in a constitutive sense, while the second part should be seen in regulative terms. This means there would be more contradictions because of the difference between a constitutive and a regulative context.

It is worth considering the position taken by the Constitutional Court of South Africa in this regard. In a recent case (Case CCT 63/03, decided on 29 July 2004), the absence of the distinction between constitutive and regulative perspectives in many instances haunts the deliberations of the judges concerned. This is clearly seen from the fact that these judges tend to interpret section 9(2) in separation from section 9(3) – as if both have a constitutive jural meaning. In one instance Mokgoro supports the conclusion of Moseneke interestingly where Moseneke argued in terms of section 9(2), Mokgoro argued that the facts of this case were to be decided in terms of section 9(3) (see CCT 2004, 67). In the case of the *Pretoria City Council v Walker* [1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC)], Sachs focuses on the case ‘where the

measure advances the disadvantaged, but in so doing, disadvantages the advantaged' and then points out that 'members of the advantaged group are not excluded from equality protection' (CCT 2004, 150). In addition, he mentions that the same judgment holds the following: 'Courts should, however, always be astute to distinguish between genuine attempts to promote and protect equality,on the one hand,and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other' (CCT 2004, 150).

As a rule 'constitutional democracies' take a *Bill of Rights* to serve as a constitutive building block for their legal order. In the case of South Africa, where the injustices of the past provide unique circumstances in which, on grounds of equity, affirmative action serves a disclosed jural purpose, one needs have to realise that the constitutive legal order is regulatively deepened. Since it embodies a regulative principle, employment equity has to be appreciated in terms of a time-limit, for if it is interpreted as a *permanent* task it not only turns into a constitutive stipulation. At the same time, it turns the South African Constitution into something flawed with an inner contradiction, sanctioning non-discrimination and discrimination at once and forever.

It is unfortunate that the regulative role of equity is currently eroded by interpreting it in terms of *transforming* the entire South African society into something that ought to reflect the *composition* of its population. If transformation is not interpreted in terms of equity, this alternative interpretation will cause it to decay into a new *Leviathan*, the *dictatorship of numbers*. Such a totalitarian view is not democratic in any sense of the word and it is irreconcilable with the idea of the *just state*, as well as with the idea of a *differentiated society* which is a pre-supposition of the idea of the constitutional state. This is because in practice it eliminates the principal structural differences between the state as a public legal institution and the various non-political societal spheres.

Strangely enough, the eradication of these structural differences is inherent in a mode of speech found throughout all of those societies in which the constitutional states are under the rule of law. Political theorists as a matter of second nature speak about a 'democratic society' where they should have referred to a democratic state.[29] Although non-political societal collectivities have their own distinct forms of co-responsibility and co-determination, there are obvious differences between them and a constitutional state. A church denomination is defined by its unique confession of faith, analogous to the programme of principles of a political party (the political confession of faith of the party). Whereas the state has room for multiple political parties, there is no room for multiple faith confessions in church denominations (for it would invariable result in a church division). If the nuclear family were to be 'democratic' in the political sense of the term, it would have meant that the children must predate the parents in order to be able to 'elect' them. It has already been

remarked that the issue of (scientific) truth cannot be decided through a (democratic) majority vote – demonstrating that the very nature of science and scholarship is not 'democratic'.[30]

9. Conclusion

Although it is undeniable that the concrete and many-sided existence of every state includes a function within the numerical and spatial aspects of reality, the distorted effects of those theoretical designs attempting to explain the nature of the state (and of society) in numerical (additive) terms (the source of atomistic or individualistic approaches) or in spatial terms (by using the original spatial whole–parts relation in some or other specified sense – the source of holistic or universalistic views of the state and human society) ought to be avoided.

The normativity of a public legal order and the normative requirements of constitutive and regulative jural principles transcend the restricted place of a majority–decision within a constitutional state under the rule of law. Moreover, law cannot be derived from the majority, and it is equally mistaken to view law as an expression of a majority-vote (compare Rousseau's *volonté générale*). This could then, by definition, mean that every original (and irreducible) non-political sphere of law would have been reduced to *state-law*, which inherently is a totalitarian view of human society. In a different but related way referring to democratic societies also eradicates the structural differences between diverse societal collectivities. It is particularly important within the current South African constitutional dispensation to steer clear from the dictatorship of numbers entailed in a misguided idea of transformation (directed by the idea that society on the whole ought to reflect the composition of the population of South Africa). If the South African state wants to continue on the road of a 'constitutional democracy', it may benefit from considering the implications of the distinction between constitutive and regulative jural principles for avoiding the lurking contradiction in the country's Constitution between the (constitutive) sanctioning of non-discrimination and discrimination at the same time.

Notes

1. In the conclusion of his work *After virtue* (1981), MacIntyre claims that three centuries of moral philosophy and one of sociology did not succeed in providing us with a satisfactory 'coherent rationally defensible statement' of a 'liberal individualist point of view' (see also MacIntyre 1988, ix). The alternative Aristotelian legacy put forward by MacIntyre opts for the (universalistic) view that when a person is separated from social ties that person is also lacking in justice (*themis*) – with reference to Homer and Sophocles as well as Aristotle himself (see Aristotle 1894, 1253a6 and Homer, *Iliad* IX, 63) (MacIntyre 1988, 96).

2. For a discussion of the dilemma of *nominalism* and *realism* in Greek social philosophy Callicles and Protagoras as opposed to Plato and Aristotle, (see Strauss 2005, 48-49).

3. This distinction anticipates that of Aristotle between *commutative* and *distributive justice* (during the later medieval period known as *iustitia commutativa* and *iustitia distributiva*). Rawls's *Theory of Justice* continues this distinction because it is still exemplified in his two basic principles of justice (see Rawls 1996, 228).

4. Aristotle captured this stance with his idea that the whole precedes its parts – 'the state, according to its nature, is prior to the family and the individual, since the whole must precede the part' (Aristotle, *Politica* 1253a 19–20).

5. He belongs to the intuitionist school in modern mathematics, including mathematicians such as Brouwer, Heyting, Lorenzen, Troelstra and logicians such as Beth and Dummett.

6. Weyl claims: 'A true continuum after all coheres within itself and cannot be divided into separate pieces; it contradicts its essence.' (Weyl 1921, 73).

7. See Weyl (1966, 74), Laugwitz (1997, 275–278; 307 ff.) and Strauss (2002, 8–28) for a more detailed account of the meaning of (spatial) continuity.

8. Whereas Comte was a *holistic organicist*, Spencer was an *atomistic organicist* (see Strauss 2006, 2, 49, 75–77, 178–182). The German sociologist and economist, Othmar Spann, amply used the terms *individualism* and *universalism* (see Spann 1930, 1931, 1934, 1938). Lonergan is, therefore, mistaken in equating *holism* and *organicism* (Lonergan 2000, 505).

9. Aristotle explains his view in Chapter I of Book I of his work on *Politics*.

10. However, it was not capable to maintain itself after the end of the Persian wars – soon after the reign of Pericles it came to a fall.

11. It should be mentioned that Aristotle distinguished *oligarchy* and (bad) *democracy* on the basis of *non-political criteria* (namely, *nobility* and *wealth*, on the one hand, and *freedom* and *poverty* on the other).

12. The Constitution of South Africa speaks about a 'Constitutional Democracy' (see for example Chapter 9 of the *Constitution of the Republic of South Africa* 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly).

13. About the 'civitatis regularis tres formae' (Maier 1972, 52).

14. The influence of this writing on authors from the Enlightenment in the eighteenth century shall be considered.

15. An analysis of the views of Rawls in this regard will require a different investigation.

16. Habermas explains that Hobbes wanted to reconstruct the classical theory of the state after the example of modern science. In doing this, he aimed at finding a foundation for social philosophy within the physics of that period (Habermas 1971, 88).

17. The classical school in economic theory, founded by Adam Smith (1723–1790), explored the dubious 'fruits' of Locke's idea of the state in the economic sphere of society and combined it with the 'law' of supply and demand – exerting its influence up to Milton Freedman who still viewed the vices of self-interest and greed as the *dynamo* of a capitalist economy.

18. See Rousseau (1975, 281). In other words, it produces an entity that obeys the law that it posits for itself.

19. The *Declaration of the Rights of Man and the Citizen* (1789) inherited this view of Rousseau when it says (article 6): *law is an expression of the general will*.

20. '. . . ce qui ne signifie autre chose sinon qu'on le forcera tre libre' (Rousseau 1975, 246).

21. Taylor is fully justified in appreciating the theories of Hobbes and Locke as an offspring of late medieval nominalism (cf. Taylor 1989, 82, 197).

22. Lambrecht incorporates this reference to the *formal* character of the majority in his general description of the meaning of the term *democracy* (Lambrecht 1999, 215).

23. Compare the stipulations of the South African *Constitution*, Chapter 3, 9(1)–(3).

24. The meaning of 'affirmative action' is to be seen in connection with this idea of retributive restoration (restitutionary measures), redressing injustices of the past.

25. The phrase 'just state' is used as the equivalent of the German expression 'Rechtsstaat'.

26. In German and Dutch they find the term 'Schuld', which is normally translated as either fault or guilt. Cameron points out that in English-speaking Common Law jurisdictions 'fault' is usually reserved for civil wrongs (torts) and 'guilt' for criminal wrongs, but that one can employ the term 'schuld' in order to refer to both types of wrong (i.e., to both civil and criminal delicts) (see his *Editorial note* in Dooyeweerd 1997, 42–43.) Therefore, the term 'fault' may be used in a broader sense not specific to any particular category of legal wrong.

27. What have been designated as *regulative jural principles* are discussed by Stammler in terms of his analysis of 'just law' – 'richtiges Recht' – which can only be accounted for in terms of law guided by the idea of justice (see Stammler 1923, 291).

28. In other words, *justice* in this sense embraces all the principles of juridical morality – the legal-ethical principles that emerge through the deepening and disclosure of the constitutive meaning of law.

29. John Rawls, for example, amply uses the phrase *democratic society*. See Rawls 1996:10 13 15, 24–25, 30, 33, 36, 38, 40–43, 61, 65, 70, 79, 90, 95 134 136 154 175 177 198, 205–206, 214, 221, 223, 243, 292, 303, 307, 320, 335, 344, 346, 369, 376, 387, 390, 414, 418, 424, 432; and Rawls 2003: 249, 280, 320, 326, 335. In the *Preamble* of the *Constitution* of South Africa one reads: 'Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'

30. Of course, the organisational form in which universities are organized does give shelter to *academic* forms of co-determination and co-responsibility.

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