Democracy and equity: the idea of the *just state* (*Rechtsstaat*) before and after 1994[1]

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Abstract:

The recent publication of a special number of the SAJP dedicated to a discussion of Samantha Vice's thoughts on being a white South African prompted this reflection on justice, equity and the modern idea of the state – against the background of moral feelings of guilt and shame, cultural diversity and merging identities. Its aim is to provide a perspective on the unity of the public legal order of the state, the distinct meaning of citizenship and affirmative action in terms of the distinction between constitutive and regulative legal principles also helping white South Africans to understand how affirmative action relates to injustices of the past. The classical understanding of equity will play a key role in this discussion, aimed at showing how we can avoid the apparent impasse of equality before the law and of "fair discrimination."

1. Orientation

During the past decade or two a lively debate emerged regarding the lasting issues of *race*, *gender*, *culture* and *identity* as well as attitudes related to "whiteness" in the aftermath of *Apartheid*. Samantha Vice (2010) particularly focuses on the effects of privilege present amongst white South Africans. She contemplates a personal, inward-directed project which "should be cultivated with humility and (a certain kind of) silence". Participants in this discussion are sensitive to the extent in which these categories are subject to continuous change and therefore co-dependent upon socio-cultural construction (and deconstruction).

Ward Jones summarizes two issues presented in the above-mentioned article of Samantha Vice: "first, white South Africans have reason to adopt certain self-directed and self-censuring emotions towards themselves, most notably shame; second, white South Africans have reason to adopt a kind of 'political silence' toward events that occur in South Africa" (Jones, 2011:405-406). He also states: "Interestingly, late in his response McKaiser – the only non-white South African in this collection – appeals to

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white South Africans to remain in the public sphere: 'If white South Africans are not fully present in the public political space', he writes, 'then I can never learn to overcome, as a black person, my angst in the face of whiteliness' " (Jones, 2011:405-406). Samantha confesses, as a white South African, to be still benefiting from *Apartheid* owing to the fact that whites are "thoroughly saturated by histories of oppression" (Vice, 2010:323). She envisages to undertake a "personal, inward-directed project" which "should be cultivated with humility and in (a certain kind of) silence" (Vice, 2010:324). Although the notion of a *constructed self* has no *essential* link with race, according to her the South African context does require an engagement with race and oppression (Vice, 2010:324). She relates this to the uncomfortable guilt and shame[2] which is "an ineradicable part of white life" – from which she concludes that if South Africans "experience these emotions they are therefore both fulfilling and failing to fulfill their moral duties" which seems to be "the morally best state they can be in" (Vice, 2010:326-327). She holds that it is therefore morally appropriate to live with shame while constantly being aware of oneself "as privileged" (Vice, 2010:229).

Among the many nuances presenting themselves within the context of these problems we may consider the issue of *diverse identities* and the various kinds of interaction emerging between different cultural identities in post 1994 South Africa. Natasha Distiller and Melissa Steyn note that "whiteness" is "not a homogenous category" because, "[L]ike any other strand of identity, 'race' cannot be separated from class, gender, sexuality or ethnicity" (Distiller & Steyn, 2004:6). They quote Kashope who claims that "identity is not given and fixed but rather is constantly (re)produced in and as performance" (Distiller & Steyn, 2004:5).[3] Wicomb mentions a related connection by warning that in a world where "whiteness remains bound up with privilege and economic power it cannot simply be written off" (see Wicomb, 2001:180 and Helene Strauss, 2004:26).

On a more fundamental level of reflection, transcending the peculiarities of the South African situation, we discern the problem of the *one* and the *many*, or of *unity* and *diversity*. Helene Strauss addresses this problem from the perspective of creolisation which is "more broadly" seen "as a complex process of subjective meaning making in a culturally heterogenous and unequal society" (Strauss, 2004:35, note 5).

It should be kept in mind that the European immigrants who came from the Netherlands (the Dutch settlers), from Germany, France (the Huguenots), and later on also from England since the beginning of the 18th century, saw themselves as "people from Africa" (see Steyn, 2001:27). Particularly during the nineteenth century *the people from Africa* living in Southern Africa started to give shape to various *state formations* – in Natal, the Free State and Transvaal. Not only form these developments part of the background of the political history of South Africa during the twentieth century, because they also reflect the cornerstones of a much longer history – one in which the rise of the modern state could be observed.

2   She believes that "shame better captures the identity and phenomenology of the white South African self than the others" (Vice 2010:332).

3   This view reminds one of the theory of *structuration* advanced by Giddens. In an interview he indicated that his theory of *structuration* must be seen as an attempt to come to terms with its implications for the problem of individual and society (see Giddens 1998:75). Rather than starting either with the "individual" or with "society," Giddens opts for the dynamic flow of "recurrent social practices" – "I wanted to place an emphasis on the active flow of social life" (Giddens 1998:76). Constantly *reproducing identity* closely resembles the *flow of recurrent social practices*.

What is at stake is an understanding of societal differentiation and the accompanying proliferation of distinct social spheres of life. A brief look at the distinction between differentiated and undifferentiated societies will pave the way for discerning the remarkable similarities present in the development of classical Roman law and the recent developments of the Republic of South Africa and for obtaining an articulated understanding of the nature of citizenship.

2.   Differentiated and undifferentiated societies[4]

In traditional or undifferentiated societies one does not find those distinct societal entities present within differentiated societies.[5] All activities in such an undifferentiated society are bound together in one organizational form. In a differentiated society, by contrast, each independent life form possesses its own form of organization. This coheres with the peculiar characterizing function of each differentiated societal entity, guided by a distinct *destinational function*. For example, the legal or jural function is prominent in the case of the state, similar to the way in which the nuclear family is guided by mutual love, the business enterprise by economic considerations and universities by intellectual pursuits. However, within undifferentiated societies it is impossible to discern specific qualifying functions. The variety of social forms of life which eventually come to the fore in the course of a gradual process of cultural-historical differentiation and disclosure, are previously bound together in an undifferentiated manner within such a society. That is why such a society does not only exhibit an economic aspect, because the whole society acts as something which is recognized on a differentiated cultural level as an *economically qualified business* (whether it be of a hunting-, agricultural or cattle farming type). Likewise, an undifferentiated society exhibits not merely a juridical aspect, since the whole acts as an entity fulfilling the functions which are performed by an independent state within a differentiated society. Within such an undifferentiated totality the form of organization embraces a variety of structurally typical branches which time and again brings the undifferentiated society as a whole to activities which are performed by independent life forms within differentiated societies. Within undifferentiated societies one of the interwoven societal structures takes the lead. Consider the extended family and the sib or clan. This type of society, which binds parents, children and grandchildren together in a patriarchal unit, puts the patriarch and the oldest son in such a position that it cannot be exclusively derived from the blood relationship which exists between them – for that a specific kind of historical organization is required.

The extended family does not only evince a family structure, because in its undifferentiated total structure, other social life forms are also intertwined. The presence of the political structure is clear from the (political) force with which the patriarch maintains internal order and peace. Equally clear, the economic enterprise can be distinguished by the way in which the subsistence economy functions. The question is: which one of these interwoven structures takes the lead in this undifferentiated structural whole?

4   A more elaborate articulation of the basic distinctions employed in this article are found in Strauss, 2009, Chapter eight.

5   Harris speaks of "primitive peoples" or "primitive societies" and in particular refers to "undifferentiated normative arrangements of primitive societies." To this he adds that in general *primitive communities* "have no specialist vocabulary for distinguishing legal from non-legal rules in the way we do" (Harris 2004:241).

The role which the (fatherhood-related) family structure plays in the extended family is truly of a central leading nature – despite the fact that the interwoven family structure does not inherently possess a permanent authority structure.

The sib (clan or gentes), which apparently only occurs when agriculture and livestock farming partly or completely replaced hunting as the basis of economic life, is an coordinationally organized larger group of relations (where either only the father's or the mother's line of descent is taken into account). Normally, membership is dependent on blood relationship, that is to say ,it rests on natural birth. However, the sib is so large that it is no longer (as in the extended family) possible to assume direct descent from a communal father – although such descent functions as a fictitious presupposition or mythological conception. Besides activities like the ancestor cult, carrying out revenge (which in a more differentiated context is carried out by an independent state), and the presence of forms of division of labour, also the family structure is interwoven with the sib. In reality this family structure takes on the *undifferentiated leading role* within the sib – a leading role which rests on a particular historical form of power organization (just as in the case of the extended family).

Moreover, it is only the stronger organized tribe that displays such a prominent political organization that the interwoven family structure cannot any longer take the lead in it. Nonetheless there is not yet any mention of a durable monopolistic organization of the sword power in this leading political structure (as in the case of a true state), because even fights between members of the tribe do not provoke any tribal punishment – only a relative of someone who is killed in such a fight could consider revenge.

Further examples of undifferentiated societies are, *inter alia*, the guilds of the middle ages (with structures similar to those of the extended family and sib, but without any real or fictitious common descent), the pre-feudal and feudal communities (*villas* and *domains*) and the *lordships*.

Kammler employs two criteria to distinguish between undifferentiated and differentiated societies: (a) technologically such societies are largely undeveloped; and (b) they do not display a large degree of societal differentiation, which means that most of what we know within a differentiated society are still *absent* in such societies (or they are prevailing only in a *rudimentary* shape). Kammler contrasts *differentiated societies* (also referred to as "complex societies") with undifferentiated societies (Kammler 1966:17-18). He points out that even at the lowest level of technological and economic development undifferentiated societies contain elements of *social ordering*, including relations of super- and subordination (Kammler 1966:30).

Both ancient Greece and Rome developed on the basis of initial undifferentiated conditions. It was during the reign of the patrician clans in Greece that the age of chivalry was confronted with a dynamic process of cultural development and societal differentiation. The traditional sources of economic income of the nobility, agriculture and stock-breeding, soon was overshadowed by the money aristocracy (cf. Strauss 2009:615-616). While the undifferentiated patrician clans were the bearers of power within the Greek city-states (the *polis*), the subsequent development of the Greek polis brought an end to the dominance of the clans as well as the tribes and brotherhoods. The initial four Ionian tribes were replaced by ten new territorial tribes. Upon this basis the Athenian democracy reached its peak under the reign of Pericles (446-404 B.C.), although 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 .

By and large Greek political thinking simply considered the *state* to be the all-inclusive *whole* of society – and both Plato and Aristotle thought that the perfection of human societal life could only be achieved in the state, guided by *justice* which was appreciated as a *moral virtue*. Since the state was supposed to *embrace* society no meaningful distinction between *state* and *society* was possible.

Early Roman history reveals that the initial bearer of law was the Roman folk community. Family life of the patrician clan was distinct from the area of competence which belonged to the Roman tribe, designated as *civitas*. Through the rise of the Roman *res publica* the power of the large patrician clans were superseded and dissolved into the Roman *familia*. The latter was an undifferentiated social entity normally under the authority of the oldest male member, known as the *pater familias*, who disposed over the life and death of its members. Similar to the structure of ancient Germanic folk law the initial *ius civile* (Roman folk law) excluded non-Romans. The legal status of a person was bound to the Roman *populus*. Those who were pushed out of the Roman folk community were considered to be *without* any rights. They were seen as *exlex*, *hostis*, as savages (*barbaroi*) without any legal recognition (cf. Strauss 2009: 560).

At this point we have to note an element of the striking similarity of this situation with the old (*Apartheid*) South Africa, because the latter treated whites like folk members while excluding non-whites from certain basic human rights. At the same time we have to observe that political philosophy wrestled with the idea of *justice* since its inception.

On the basis of his tripartite view of the human soul Plato, in his Republic (*Politeia*), assigned an encompassing role to *justice*, which is supposed to embrace the *moral virtues* of *wisdom*, *courage* and *temperance*. Justice actually pertains to the principle of *legal economy* because it prohibits the transgression of the legal domain of the different parts of the soul, i.e., it commands avoiding any *legal excess* – and this also applies to the three estates within the state (see Plato 1973, *Politeia* 436 ff.). Although Aristotle was the first political philosopher who distinguished between *natural law* and *positive law*, he continued the broad *moral* understanding of justice (*dikaion politikon*) which embraces all virtues manifested within the state (such as courage, moderateness, friendliness, and so on). It is remarkable that for him justice in a strict sense concerns *equality*. Nonetheless one of his most influential and significant contributions to our understanding of (public) justice is found in his exceptional explanation of the meaning of *equity* (see Book V, Chapter 10 of his *Nicomachean Ethics* contained in Aristotle 2001). He argues that although equity is *just* it is different from what the law can contribute. In spite of the fact that a law is meant to cover all cases in a just way, it is not possible to regulate everything by law. Suppose in a certain case the applicable law in fact would cause an unjust effect, then the existing law-statement ought to be rectified *ex equitate*, that is, on behalf of *equity*.

These views of Plato and Aristotle, when combined with key elements in the development of *Roman Law*, shed new light on the meaning of transformation within present-day South Africa and the relative position of various groups, including "Whites."

3. The link between Roman Law and the South African transition of 1994

The legal development which took shape in the course of the expansion of the *Roman Empire* is significant for our understanding of pre- and post-1994 South Africa. To

comprehend this link it should be remembered that the Apartheid regime gave shelter to a majority of black people who did not possess some of the most basic human rights associated with a constitutional state under the rule of law.

Consider the above-mentioned development of ancient *Roma Law* commencing with the *ius civile* (folk law). The latter was still embedded in Roman tribalism and it was *exclusive* in the sense that the legal status of a person was entirely dependent upon membership in the Roman *populus*. Foreigners had no rights, except under the patronage of a Roman *pater familias* (normally the oldest male member), who gave shelter to such a person within the *familia*. During the existence of the *Roman Republic* (about 753-31 BC), the law which developed exclusive to *romans* was known as *ius civile*. This was from the outset *Roman folk law*, reminiscent of the undifferentiated, tribal background of Roman life. Foreigners, known as *perigrini*, did not have any political or civil rights and it was impossible for them to acquire these rights under the *ius civile*.

The effect of the exclusive nature of the *ius civile* was that during the expansion of the *Roman empire* many people started to live within the boundaries of this empire without having those rights attached to *Roman citizenship*. This situation was met with the development of a new type of law by the middle of the third century. It was designated as the *ius gentium* which is commonly often appreciated as a *law of nations* (see *Encyclopedia Britannica. ius gentium* 2011). The jural void requiring a legal response was to make provision for people who lived on the territory of the *Roman empire*. However, the mere fact that this law applied both to Romans and foreigners is not sufficient to introduce the category of the *law of nations*, because these foreigners did not live *outside* the *Roman empire*. The historical fact that, as it is formulated in the Encyclopedia Britannica, the "Roman lawyers and magistrates originally devised the *jus gentium* as a system of equity applying to cases between foreigners and Roman citizens," does not detract from the reality that it was established to obtain for all the people living *within* the *Roman empire*.

Lord Mackenzie provides the following characterization of the *ius gentium*: "The *jus gentium* was a definite system of equitable law, free from technicalities, applying to the legal relations of all free persons" (Mackenzie, 1898:77, note 3). On the next page he adds the historical dimension: "During the flourishing period of the republic, when the Roman territory had been greatly extended by conquests, treatises, and alliances, a crowd of new subjects and allies aspired to participate in the privileges of citizenship." He mentions on the same page that refusing to grant these rights led to the *social war* of 90 BC. By the end of this war Roman citizenship was conferred on all of Italy.

For quite a time there persisted a distinction between *cives*, *Latini*, and *perigrini* – where *Latini* described an artificial class intermediate between citizens and foreigners. After Marcus Aurelius made it possible to grant citizenship on request, it was Caracalla who opened it up for the entire empire. Mackenzie writes: "Finally, Caracalla bestowed the citizenship on all three subjects of the *Roman empire*" (Mackenzie, 1898:79).

What happened therefore with the expansion of the *Roman empire* is that multiple non-Romans prevailed within the jurisdiction of this *empire*, similar to the situation within the pre-1994 South Africa where non-white people were living within the territory of South Africa while being excluded from certain basic rights. The Roman *ius gentium* developed in order to make legal provision for the non-Romans on Roman territory, manifested in the civil freedom and equality of human beings as such. The

ius gentium is therefore *not* the starting point for a law of nations, but rather for *civil private law* (distinct both from *non-civil private law* and *public law*) – and thus for the modern idea of a *just state* ("legal state" or "democracy").

4. Remark on the recent origin of the term *state*

The word *state* is of a fairly recent origin. In ancient Greek and medieval thinking about human society "state" and "society" were not properly distinguished. Plato used the term *republic* and during the medieval era the term *regnum* was also used, known as *empires* and *kingdoms*. Charlemagne saw in the Frankish empire the successor of the Roman Empire and assigned to it the duty to "defend by armed strength the holy Church of Christ everywhere from the outward onslaught of the pagans and the ravages of the infidels, and to strengthen within it the knowledge of the Catholic Faith" (quoted from Ehler and Morrall 1954:12). Eventually it was powerful counts and dukes who emerged as the real bearers of governmental authority – of course supported by the church. Even before the latter took on political rule Noble notes that it "was a large and sophisticated enterprise with a huge staff, vast estates, and wide-ranging responsibilities" (Noble 1984:254).

By the late 18th and early 19th centuries the term *state* obtained its modern content which was situated within the increasing *differentiation* of Western societies. The modern idea of the state crucially depends upon the increasing differentiation of Western society since the Renaissance (differentiation of state and church) and the industrial revolution (differentiation of nuclear family and the business enterprise).

5. Citizenship and the distinction between state and society

The French thinker, Jean Bodin, was the first to introduce the term "*sovereignty*" in order to capture the governmental authority present within the state. Yet in opposition to the view of Machiavelli the political views advanced by Bodin accepted that the government was bound both to natural law and divine law. It implies that he also defended the validity of the classical principle of *natural law*, namely *pacta sunt servanda* (contracts should be respected and kept). However, he assigned to the state, within the boundaries of its territory an *absolute* and *original competence* to the formation of law. Although this view brings to expression a key element present in medieval guilds, it resulted in his fear that the process of differentiation would amount to a threat to the idea of the state as a *res publica*, as an institution for the sake of the *public good* (see Dooyeweerd 1997a:101 ff.).

The irony is that Bodin's aim with his theory of sovereignty was to use the monopolisation of the power of the sword in order to create an absolute monarchical power. According to this view governmental authority had an exclusive competence to the formation of law. However, what he did not realise was that in practice such an integration of governmental authority enhanced societal differentiation which gave rise to distinct and independent non-state spheres of social life. This process of differentiation, in turn, by itself led to non-state spheres of competence – each of them having an original juridical competence to form positive law within its own domain. The implication is clear: the *way* in which Bodin envisaged reaching his aim – namely through the differentiation of different spheres of law – in fact displayed an inherent tension

with the aim itself, namely the identification of every sphere of competence to the formation of law with the *state sovereign*.

When our view is liberated from the intrinsic contradictory view of an absolute state power another appreciation of the modern process of differentiation is made possible, one in which it is acknowledged that each one of the newly differentiated non-state social entities merely displays a limited sphere of law, restricted to a *specific* group of people. These non-political social forms of life therefore represent a *ius specificum*, a *specific law*, which is limited merely to a *section* of the population of the state. It is only *state citizenship* that cuts across all other societal ties, because it embodies a truly universal collective (public) communal law (*ius commune*). A proper understanding of citizenship should exceed both atomistic and holistic (individualistic and universalistic) views of society, because these two one-sided views (practically dominating the entire history of reflection on state and society), constantly eradicate the boundaries between state and non-state. The question regarding citizenship has to abstract from race, gender, sex, language, social status, economic position, ethnic affiliation, denominational ties, and marital status. Modern constitutional law acknowledges two basic requirements for citizenship – descent (when the parents are citizens) and "territorial birth" (when a person is born on the territory of a state).[6]

In spite of the tragic history of various modern states which did not succeed in disregarding race in their recognition of citizenship, it remains in principle the case that membership of the state ought not to be established on the basis of race or (other) related social realities.[7] Membership of the state solely represents participation in the body politic of a state organized in service of the protection of diverse legal interests on the basis of the monopoly of the power of the sword on its limited territory.

The implication is therefore that a person may at the same time be a *father*, *club member*, *share holder*, belonging to a certain *cultural community*, display *differences in gene sequences*, and so on. Yet, participating in these distinct identities does not mean that anyone of them fully absorbs all the other differentiated societal collectivities in which persons function. The mystery of being human indeed comes to expression in the fact that no single differentiated social identity can fully and exhaustively encompass the entire scope of *being human* – not even state citizenship.

However, the distinction between the state and the various non-state spheres of a differentiated society is more complicated than it may appear to be at first sight. One of the reasons for the difficulties encountered in this regard is found in an inappropri-

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6   These general criteria for citizenship (namely *descent* and *place of birth*) is asserted by Lord Mackenzie who wrote: "In France, lawful children, wherever born, are held to be members of that state to which their fathers belong at the time of their birth, but may choose, if they prefer it, the nationality of their place of birth" (Mackenzie 1898:82-83). Owing to the fact that people often move from one state to another one, modern states also have specific stipulations regarding *naturalization*.

7   Stephanie Fullerton advances a balanced view in respect of the biotic and non-biotic dimensions of the term "race." The one extreme attaches "no real meaning to an understanding of human biological difference" (she quotes Appiah – see Fullerton 2007:245). She points out that when the modern evolutionary synthesis "replaced the typological conception of racial biology with a population based understanding of genetic variation" the upshot was not an entire denial of "racial biological differences" but merely a redefinition of them "in population-based terms" (Fullerton 2007:247). The other extreme reverts to "a social constructivist understanding" – to which she responds: "This unreflexive propagation of a social constructivist understanding of race and racial identity relies on a peculiar form of ignorance, one in which specific features of the empirical record, not to mention pervasive scientific practices, have been systematically overlooked in favor of broad disclaimers relevant to only a narrow applicable model of human biological difference" (Fullerton 2007:242-243).

ate application of the *parts-whole scheme*. When this scheme is employed in such a way that cultural communities, families, business enterprises, social clubs, schools and universities, and cultic denominations, are seen as *parts* of the state as societal *whole*, then it is no longer possible to arrive at a meaningful distinction between *state* and *society*. Since this confusion is most of the time played out on a subconscious intellectual level, authors exhibiting it in their thought tend to be unaware of it ("ignorant" – to use a popular word). Consider for example the following statement in which one element of this problem evinces itself: "In general then, I have been plotting how modern state and regional arrangements have come to form, fashion, make, and mold - in short, how they manage - their heterogeneous populations" (Goldberg 2009:328). The implicit question is: is it correct to envisage that the state *comprises* and even *manages* "heterogeneous populations" without any further qualification?

Our argument is that human beings have distinct *functions* in a diversity of societal entities and that these specific identities must be distinguished properly. This view represents a *principled* stance, it considers how we *ought* to think about how human beings function within society. For this reason its normative claim entails a specified use of the whole-parts relation – restricted to the typical nature of each one of them. It took quite some time before political theory realized that not everything is *part* of the state. Schools, business enterprises, social clubs, art associations, nuclear families, convictional communities (including church denominations), and so on, have their own "inner laws" – as it is asserted by social and legal scholars such as Althusius, Kuyper, Münch and Habermas, and a political theorist such as Rawls. Althusius already realized that societal entities like families, churches and the like are not *parts* of the state. Genuine parts of the state are solely *provinces* and *municipalities* (Althusius, 1603:16). Kuyper is known for introducing, in the footsteps of Groen Van Prinsterer, the phrase *sphere-sovereignty* (Kuyper, 1880; and see Walzer 1983), while Münch and Habermas gave recognition to the "own inner laws" of societal entities (Münch 1990:442, 444; Habermas 1995-2: 437). Rawls recognize distinct "roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects" (Rawls 1996:262). He continues on this page by emphasizing that "the various elements of society" "within some sphere" indeed "act from their own principles designed to fit their peculiar nature."

Binding together government and citizens within the unity of the state therefore, as we noted, disregards *ethnic differences*, *racial differences*, *religious differences*, *language differences*, *differences in economic position* and *social rank*, *family differences* and *differences in dispositions* or *intelligence*. It belongs to the typical nature of the state that it creates a *juridical unity*, leaving this diversity of non-state societal ties *intact*. The upshot is that all people within the territory of the state, through this unitary juridical organization, receive a typical function within the state as public legal entity, as *res publica*. Yet this does not mean that disregarding all these non-state ties constitutes an unbridgeable divide, because the aim of disregarding these societal affiliations is precisely to take care of the *legal interests* entailed by them! Of course it should be kept in mind that the governmental task of *public legal integration* is not unlimited, for it does not authorize the state to engage in the usurpation of any specific private legal sphere. On the basis of the monopoly over the "sword power" on its territory, the government of a *just state* has the responsibility to protect the legal interests of its citizens (including those legal interests forthcoming from their connections with non-state spheres of social life delimited by their own inner laws), and whenever a violation of

these legal interests takes place it has to restore the balance in a truly jurally *retributive* sense.

In the absence of a structural understanding of the state one's reflection can easily fall prey to the kind of approach found in a work of Goldberg. He states: "The line of argument I adopt here suggests by comparison that the state is inherently contradictory and internally fractured, consisting not only of agencies and bureaucracies, legislatures and courts, but also of norms and principles, individuals and institutions" (Goldberg 2002:7).[8]

5.   Equity and affirmative action within the new South Africa

The new constitution of South Africa made provision for redressing the injustices of the past. It is done by assigning a key role to the idea of *equity* which should be read in coherence with the *Employment Equity Act* (No.55 of 1998). However, redressing the injustices of the past creates the impression that there is an inner tension present in the *Constitution*. First consider Chapter 2 where section 8(1) stipulates: "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." The same spirit is revealed in section 9(1): "[E]veryone is equal before the law and has the right to equal protection and benefit of the law."

These stipulations reflect the above-mentioned acknowledgment that *being a citizen* disregards all the non-state relationships of state citizens and it upholds the view that every citizen will onjoy civil rights. This practice conforms to the break-through established by the French revolution. Lord Mackenzie explains the new dispensation against the background of the old legal arrangements in force before 1789: "In France, prior to 1789, there were many Frenchmen who did not enjoy civil rights, or did so imperfectly and unequally. Serfs were numerous; native-born Jews were considered as foreigners; persons devoted to a religious life were supposed to be civilly dead; Protestants were incapable of holding any public office. The rights of other Frenchmen varied according to the order to which they belonged – to the clergy, the nobility, the army, the law, finance, or any other public department." In the realm of property individuals and the soil were ruled by similar inequalities pervading "every sphere of social life" (Mackenzie, 1898:82-83). The French *Civil Code* rectified the inequalities of the former dispensation. It declares (a): "The exercise of civil rights is independent of the quality of citizen, ..." (b) "Every Frenchman shall enjoy civil rights" (Mackenzie 1898:83).

The first part of section 9(2) continues the unqualified constitutional emphasis on *equality*: "Equality includes the full and equal enjoyment of all rights and freedoms." But the following sentence introduces the distinction between *fair* and *unfair discrimination*: "To promote the achievement of equality, legislative and other measures de-

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8   A brief consideration will highlight how confusing the view of Goldberg actually is. From a unitary perspective the state comprises, within its territory, its citizens by binding them together (as government and subjects) in a public legal community founded on the monopoly of the power of the sword and guided by the jural function of reality which gives direction also to its various organs of state (such as the parliament as legislative body, and civil and criminal courts). State organs are not simply *agencies* or *bureaucracies*, just as little as it is correct to say that the state consists of "norms and principles, individuals and institutions." The reference to norms and principles is unqualified, because it lacks a focus on *jural* norms and principles. Furthermore, since the life of no individual is ever exhausted by any social role which an individual may assume, the function of such an individual within the state merely relates to its role as a *citizen* of a state. States do not have *individuals* as members, only *citizens*. The same applies to "institutions" – there are different kinds of institutions, those which are jurally qualified (such as the state itself) and those with a non-jural qualification.

signed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." Although section 9(3) mentions what is normally found in bills of rights or in the statement of basic rights – with their emphasis on non-discriminatory equality – it is embedded in the just-mentioned distinction between *fair* and *unfair discrimination* of section 9(2). If we leave out a few words it perfectly matches the general international practice: the "state may not ... discriminate ... 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." However, in fact the words to be added are "unfairly" and "directly or indirectly." It then reads 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."

Since sections 9(2) and 9(3) leave room for "fair discrimination" the *equality* lying at the basis of normal declarations of basic human rights is clearly threatened. The only acceptable way to justify this apparent contradiction in the constitution is to employ the distinction between *constitutive* and *regulative* legal principles.

6. The important distinction between constitutive and regulative legal principles

The *building blocks* of law represent the indispensible elements of every legal order, such as a unity in the multiplicity of legal norms, a legal domain of validity (jurisdiction), legal relationships of cause and effect, relevant legal organs, the legal will-function (desires), legal lawfulness an unlawfulness, legal accountability, legal power (normally vested in the competence enclosed in an *office*), legal signification, expression and interpretation, legal intercourse, the requirements of juridical economy (avoiding an abuse of power or an excessive exercise of power), and legal harmony (harmonizing a multiplicity of legal interests). Whatever the concrete form and shape of these elements may be, they are all present in any legal order. For this reason they are appreciated as constitutive and therefore to be distinguished from regulative legal principles. Whereas constitutive structural elements within the meaning of jural relationships are presupposed in every possible legal order, the regulative structural elements only come into view when the meaning of legal relationships is deepened and disclosed (opened up) by the moral and fiduciary aspects. *Fault*, for example, refers to a *disclosed principle* of criminal law. It requires that the punishment should fit the crime (taking into account both forms of fault; *intent* and *negligence*).

This principle of punishment proportionate to fault is a *deepened* legal-ethical principle of justice that differs from the strict responsibility for those outcomes evident in undisclosed legal systems (e.g. the *lex talionis*, known as the "eye for an eye" or "tooth for a tooth" principle). In the *talio*-principle, the ethical aspect of moral love had not yet deepened the meaning of the jural aspect of reality, since the attitude of the actor was neglected, and only the consequences of the act taken into account.[9]

9   In an ethically deepened or disclosed legal system, life imprisonment is only one application (positive expression) of the underlying principle of punishment according to fault. Another application of the same principle, for example, could be a shorter term imprisonment, depending upon the degree of possible mitigating circumstances.

The apparent tension between *equality* and *fair discrimination* disappears once the above-mentioned distinction has been made. Affirmative action represents an instance of the regulative principle of *equity* already articulated by Aristotle. We have pointed out that if an appicable law turns out to be unjust in a particular case this principle justifies setting it aside *ex equitate*. *Fair discrimination* has a more encompassing *equity meaning* because it concerns an entire unjust political system of decades.

However, when affirmative action is interpreted as a *permanent condition* it loses its regulative meaning and turns into a constitutive stipulation, radically in conflict with the constitutive legal principles entailed in the equality presupposed by the modern idea of basic human rights. Therefore, distinguishing between constitutive and regulative jural principles may help South Africans to come to terms with their responsibilities in the new South Africa. This perspective leaves room both for jural guilt and moral sorrows, such as *shame*. But it does not terminate the political co-responsibility and co-determination embedded in state membership. Citizenship is not a *passive state*, it demands positive actions, including those kinds of actions required to advance the cause of affirmative action. Yet, without a sun-set clause the latter will inevitably degenerate into a constitutive principle, fundamentally contradicting the constitutive meaning of equality entailed in our current Constitution.

Affirmative action is the price paid by those who benefited unjustly from not disregarding "whiteness" and *colour* as conditions for citizenship in South Africa during the *Apartheid* era. The negative effect was that the legal interests flowing from the non-state ties of those against whom discrimination was enacted were not protected by the Apartheid regime.

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