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The idea of a 'Just State' (*Rechtsstaat*) (with reference to a unique feature of the Constitution of the Republic of South Africa)[1]

Danie Strauss
School of Philosophy, North-West University, Potchefstroom Campus, South Africa
dfms@cknet.co.za

In South Africa the acquisition of full political and civil rights for all rectified the former political situation of apartheid South Africa. Against the background of key developments in the political legacy of the West, including the opposing theoretical orientations of individualistic and universalistic approaches, the historical roots of those conditions which eventually were recognised as essential for the idea of a just state are highlighted. Adding a mere multiplicity of individuals (atomistic social contract theories) or postulating one or another encompassing whole (such as Rousseau's *volonté générale*) precludes an insight into the own inner laws of distinct societal spheres. The concept of sovereignty appears not to be sufficient to delimit state-law properly. An alternative view is introduced by Althusius (1603) with his objection to the application of the whole-parts relation to society and the state. He acknowledges 'leges propriae' (proper laws for each societal collectivity and thus opened up an avenue for introducing the principle of sphere-sovereignty, which leaves room for the internal spheres of law of non-political societal entities as well as for personal freedom. If the spheres of public law, civil private law and non-civil private law are intact, political freedom, personal freedom and societal freedoms are secured—the structural conditions for the just state. The Constitution of South Africa incorporates these requirements for a *Rechtsstaat* and in addition contains a unique equity content. The future of the South African democracy is therefore crucially dependent upon the internalisation of a truly *Rechtsstaat* political culture.

The theme addressed in this article comprises two elements: 'just' and 'state'. The former obviously refers to our understanding of the *jural*, which at once relates to our understanding of *justice*, and the second represents one of the most important institutions within a differentiated society.[2] Yet it is not that easy to explicate what is entailed in these two elements, particularly not when we also take historical perspectives and systematic considerations into account.

Preliminary remark: individualism/atomism and universalism/holism

One meaning nuance of the term *universalism* refers to an overestimation of *universality*—the opposite of individualism over-emphasising what is unique and individual. However, in this article these two terms will be used to designate an over-emphasis of the *one-and-the-many* (individualism/atomism) and the *whole-parts relation* (universalism/holism) respectively. By and large the history of reflection on the state did not succeed in effectively delimiting governmental authority, because it fluctuated between individualistic and universalistic views (this point is extensively argued in Strauss 2012). Within modern sociological literature we meet this legacy in the opposition of

1 An earlier version of this paper was presented at the Annual Congress of the Philosophical Society of Southern Africa in Port Elizabeth, South Africa, 12–14 January 2015.

2 When referring to 'primitive societies' the focus is actually on 'undifferentiated normative arrangements' of such societies. Harris explains that such communities 'have no specialist vocabulary for distinguishing legal from non-legal rules in the way we do' (Harris 2004: p. 241). We shall return to this distinction below.

action and *order*. It is also designated as *individualism* (*atomism*) and *universalism* (*holism* or *collectivism*—see O'Neill 1973). The former represents an attempt to explain society and societal institutions purely in terms of the interaction between *individuals* (the *atoms* of human society—compare modern social contract theories), while the latter attempts to surrender all societal actions and entities to one all-encompassing societal totality or whole (explaining the alternative term 'holism', derived from the Greek word *holon*). Adherents of psychological atomism are D. Hume, J. Mill, H. Spencer, and H. Taine.

The first striking historical connection is given by comparing the transition to a new democratic state in South Africa in 1994 with the development of Roman law. Initially the Roman *ius civile* was undifferentiated and exclusive. Those who were not members of the Roman tribe were without any rights, they were *exlex*, *hostis*, *barbaroi*. The Roman *familia* was undifferentiated and assigned to the *pater familias* a totalitarian competence over all its members. Yet this domain was still distinct from the power of the Roman tribe (*civitas*). Eventually the exclusive sphere of the patrician clans was transcended. With the expansion of the Roman Empire, the *ius civile* (*folk law*) faced the challenge to make legal provision for non-Romans whose numbers were on the rise within the boundaries of the Roman Empire. Similarly, in the Republic of South Africa before 1994, the non-whites in its territory also lacked fundamental civil and political (public legal) rights.

Within the further development of Roman law this need crystalised in the emergence of what became known as the *ius gentium*. It is often misunderstood as a *law of nations*. However, the way in which Lord Mackenzie characterises the *ius gentium* suggests an alternative appreciation. He writes that the '*jus gentium* was a definite system of equitable law, free from technicalities, applying to the legal relations of all free persons' (Mackenzie 1898: p. 77, 3n). The phrase 'all free persons' alludes to the sphere of personal freedom. The *ius gentium* thus actually forms the point of departure of what should be designated as the sphere of *civil private law*. We shall argue that this element is of crucial importance for understanding the nature of a just state (*Rechtsstaat*).

It is of equal importance to remember that the Greek *polis* (city-state) embraced all of society as its *parts*. In a biographical sketch of the life of Pericles J.H. Croon observes that after 443 B.C. Pericles occupied such a powerful position in Athens that the Greek historian Thucydides remarked that although in name a democracy, in reality the 'first man' (Pericles) ruled. It was 'a dominion exercised by the first man' (Croon 1974: p. 249). Both Plato and Aristotle advocated similar universalistic views of the *Politeia* and the *Politica* respectively. They saw in the *polis* an all-encompassing perfect community within which human beings find everything they need. In Chapter I of Book I of his work on politics, Aristotle phrases his universalistic view as follows:

> Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good (Aristotle 1252a1ff. and Aristotle 2001: p. 1126).

Both medieval society and medieval theoretical reflection on society continued this universalistic feature, except insofar as the *regnum* (state) was eventually depreciated as the lower portal for the church as the supra-natural institute of grace taking humans from a merely temporal good (moral perfection) to their supra-temporal perfection, namely *eternal bliss* (see Von Hippel 1955: pp. 312–313).

By the end of the middle ages, a tract by Marsilius of Padua and Jean of Jandun, with the title *In Defence of Peace* (*Defensor Pacis*), marked the transition from the Greek-Medieval era to the modern era. These two authors anticipate later theories of popular sovereignty by viewing all forms of authority as an expression of the will of the majority, for only the latter can make a law, change it, withdraw it or interpret it. Since every competency to form law was centred in the state, Von Hippel draws the inevitable conclusion that when the worldly power absorbs spiritual competencies, it becomes a total state, that is to say, 'the political sphere becomes the sole power over all areas of life'. In this way Marsilius of Padua provides a starting point for the doctrine of unrestrained *popular sovereignty* (see Von Hippel 1955: p. 363).

Initially the modern theories of the state, such as those found in the thought of Machiavelli and Hobbes, were both totalitarian and absolutist,[3] allowing for no civil and societal freedoms and also no public legal freedoms. They opted for a *power state*. The counterpart of these views is given in theories of the *just state* (*Rechsstaat* in German and Dutch). They were initially designed in the form of social contract theories, but unfortunately these theories did not succeed in transcending the limitations of individualistic and universalistic approaches. As a consequence they did not succeed in effectively limiting state law and therefore could not provide a proper view on the idea of a *just state*.

An individualistic or atomistic approach overemphasises the *individual* whereas a holistic or universalistic approach overemphasises the state by viewing it as the encompassing *whole* or *totality* of human society. Capturing the opposition between an 'individual-centred' (atomistic) or a 'societal-whole oriented' (holistic) view by employing the terms *individualism* and *universalism* goes back to the German sociologist and economist, Othmar Spann (see Spann 1930, 1931, 1934, 1938). One cannot restrict organicism to a holistic or universalistic approach, as is done by Lonergan (2000: p. 505), for organicism allows both for an individualistic and a universalistic perspective.

This is an important issue for the idea of a just state, because if state power is not effectively *limited* it will not be possible to demarcate non-political freedoms—and without societal freedom no just state can exist. A vague reference to the idea of the public good (*salus publica*) is not helpful at all. Just consider the guideline provided by Locke as he writes: '*Salus suprema lex* is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err' (Locke 1690: p. 197 – Chapter XIII, §158). Locke does not specify or effectively demarcate the public good when he argues that the government has to protect the life, liberty and property of its citizens while governing by the consent of society and by the 'authority received from them' (see Locke 1690: pp. 182, 184). Holding the view that this power is limited to 'the public good of the society' does not avoid the problem, for the supreme power can call upon the unlimited public good to justify anything! Moreover, the question is whether the 'public good' (or the *salus populi*) is identical to what is willed by the majority. And how does one calculate the majority? Is it done on the basis of their properties? Since Locke does not give an answer to these questions, his theory of the state, which actually is nothing but a continued state of nature endowed with a coercive power, inherently carries also within it the germ of unlimited state power.

Whereas Hobbes developed a theory of a *power state*, both in a formal and a material sense, Rousseau aimed at articulating a formal and material idea of the just state. Yet he merely succeeded in developing a *formal* theory of the just state. His aim was to guarantee public legal freedoms but he surrendered them to the unlimited power of the 'general will'. If law is an expression of the general will which can only come to expression within the state, then there is no room left for any non-state societal freedoms, in line with Rousseau's view that the social contract assigns an *absolute power* to the body politic over all its members: 'As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over all its members also' (Rousseau 1762: p. 24).

While Rousseau therefore commences with an (individualistically conceived pre-contractual) multiplicity of individuals, concluding the social contract immediately (universalistically) transforms all participating individuals into indivisible *parts* of a new *whole*, namely the *general will*: 'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole' (Rousseau 1762: p. 13). In other words, the social contract transforms the individualistic (atomistic) condition of the state of nature into the universalistic (holistic) whole embodied in the *volonté générale*—which serves as the foundation of his view that law is 'purely the declaration of the general will' (Rousseau 1762: p. 79). This explains why Rousseau holds the (totalitarian and absolutist) view that any minority disobedient to the general will is not obedient to its own will

3 The term *absolutistic* characterises a state in which there is no political co-determination or co-responsibility (i.e. no political freedoms), while the term *totalitarian* concerns the absence of civil and societal freedoms (i.e. the freedoms of civil and non-civil private law). A true power state (German: *Machtstaat*) is therefore both *absolutistic* and *totalitarian*. The legal scholar Johan Van der Vyver defines the terms absolutism and totalitarianism in the same way (see Van der Vyver 1982: p. 461).

(which supposedly is the condition for freedom) and which therefore 'means nothing less than that he will be *forced to be free*' ['ce qui ne signifie autre chose sinon qu'on le forcera à être libre!'] (see Rousseau 1975: p. 246).

From a societal perspective we notice the developments within Western Europe since the Renaissance which amount to an increasing differentiation of distinct societal spheres. First of all, with the transition from the medieval period to the modern era, state and church parted ways, eventually followed by the differentiation of the guild system and the differentiation of domestic industry into the nuclear family and the modern business enterprise. The modern wage-earner only surfaces after the transition of the domestic industry into the factory system. During the sixteenth and seventeenth centuries the Greek term *politeia* and the Latin term *regnum* was slowly replaced by our current term 'state' (see Jellinek 1966: pp. 132–135).

A medieval kingdom was the private property of the King and it included certain *royal rights* and *privileges* for the nobility. Through a slow process of societal differentiation, the state as *public legal* institution emerged. The public legal task of the state defines the meaning of what is designated as a *res publica*. This process of differentiation brought into existence diverse societal collectivities, such as social organisations (including various clubs), the business enterprise, the school, the nuclear family, universities, distinct cultural communities, the church and also the state itself. Every non-political societal collectivity took responsibility for its own type of organisation and all of them brought to expression their typical internal spheres of law, where the term *law* ought to be understood in the *jural* sense of the term. From the perspective of the idea of the *just state*, this development resulted in a diversity of societal legal interests which had to be integrated within the public legal order of the state. But Jellinek points out that legal theories view that state as potentially without limits.[4]

The juridical bond uniting government and citizen within the state disregards ethnic and racial differences, differences in social rank or economic wealth, religious differences, language differences, family differences and differences in intelligence. Yet, this integration of legal interests aimed at by the government cannot totally neglect these non-political legal interests, nor does it entail that the state is elevated to become the highest and most encompassing whole of society. On the contrary, a universalistic understanding should be rejected by realising that it belongs to the very nature of the state that while creating a juridical unity on its territory, it leaves *intact* the diversity of non-political ties that present the *to-be-cared-for* multiplicity of legal interests on the territory of the state. The important point is therefore that the state disregards other societal ties in such a way that it can protect the legal interests entailed by them. Moreover, none of the non-political societal entities derives its right to exist from the state. The latter has to recognise them and it has to protect their legal interests, but they do not owe their existence to the state.

Since all collective and communal relationships are strictly correlated with coordinational (inter-) relationships,[5] the implication is that although a human person can assume multiple societal roles, the multifaceted life of such a person can never be exhausted by any one of them—such as being a citizen within the state. This insight avoids the one-sidedness present both in individualistic theories of human society and the state. Starting in an individualistic fashion from a collection of individuals, ultimately takes recourse to the majority principle. But logic textbooks warn against the 'majority fallacy'. Bowell and Kemp mention among the 'rhetorical ploys and fallacies' the 'fallacy of majority belief' (Bowell and Kemp 2005: p. 131ff.). The majority is neither a criterion of *truth* nor one of *justice*. Postulating the state in an individualistic sense is equally distorting because such a view cannot account for the inner nature of distinct societal spheres.

4 'Der potentiell schrankenlose Staat der juristischen Theorie' ['The potentially limitless state of legal theory'] (Jellinek 1966: p. 328). Remarking that the juridical sovereignty of the state is nonetheless limited, he shows that he ambiguously still advocates a totalitarian conception of state sovereignty (see Jellinek 1966: pp. 327–328).

5 When social interaction displays both a permanent authority structure and a durable unitary character it is designated as a 'Verband' in Dutch and German. The translational equivalent for *verband* is *collectivity*. When only one of these two features applies, we may speak of a community and when we account for inter-relationships on equal footing (*next-to* or *in opposition to* others), we may designate them as co-ordinated relationships. Individualism can now be defined as a reification of coordinated relationships, whereas universalism reifies communal or collective relationships.

It is remarkable that Johannes Althusius published a work in 1603 (*Politica Methoice Digesta*) in which he, for the first time, succeeded in transcending the application of the whole-parts relation to human society and the state. Althusius advocated the existence of *proper laws* (*leges propriae*) ruling 'particular associations' as required by their own nature (Althusius as translated in Carney 1965: p. 16).

Under the influence of Groen van Prinsterer, two other Dutch thinkers, Abraham Kuyper and Herman Dooyeweerd, captured this insight by employing the expression *sphere sovereignty*. Later on, prominent sociologists and (political) philosophers came up with similar phrases—although not always in a consistent way. Münch refers to Max Weber who discerns an increasing acknowledgement of societal spheres guided by their *own inner laws* (Münch 1990: p. 442). Both Rawls and Habermas explored the same avenue. Habermas alludes to the *own private spheres of the life* of citizens (Habermas 2001: p. 81), while Rawls accepts *different principles for distinct kinds of societal subjects* (Rawls 1996: p. 262).

Acknowledging the *own inner laws* of the different societal entities raises the question of how the different spheres of competence should be distinguished from each other? Since Jean Bodin, the idea of the competence of the government of a state was captured by the term *sovereignty*. However, for the idea of a *just state* (*Rechtsstaat*) it is of vital importance to provide a meaningful *limitation* of state power, of governmental authority (*sovereignty*). Bodin did not succeed in achieving this aim. To be sure, he was concerned with the highest authority in society, causing Mayer-Tasch to characterise the orientation of Bodin as a choice for the 'classical formula of juridical-political absolutism' (Meyer-Tasch 1981: p. 35). This also explains why Bodin holds that sovereignty is both absolute and indivisible, and why he considers any claim to the formation of law (by non-political societal entities) as a threat to the idea of the state of a *res publica*—as if such entities would aim at obtaining *original* sword power (see Bodin 1981: p. 30).

Initially, in the thought of Locke, Kant and von Humboldt, this limitation was sought in the non-interference within the spheres of non-political society, while the sole *aim* of the state was to protect the life, liberty and property of its citizens, i.e., their innate human rights. In the second phase of the theory of the *Rechtsstaat*, the desired delimitation was found in the mere *formal* limitation of the *purposes* of the state. In the third phase of the idea of the *Rechtsstaat*, with Kelsen as its leading figure, identifying the state concept with the concept of law resulted in eliminating the true content of both these concepts. This explains why Kelsen, in his 'norm-logical' understanding of (state) law, can accept an absolutist and totalitarian state as a *Rechtsstaat*. [6]

Kelsen states this view in his *Foreword* to a work on the legal-philosophical foundations of the Soviet state by the author Boris Mirkine-Guetzévitch (*Die rechtstheoretische Grundlagen des Sowjetstaates*, Vienna, 1929). Without any hesitation, Lenin characterises Bolshevism as 'unlimited power, not restricted by any laws or any general rules and resting directly on force' (quoted by Dooyeweerd 2010: p. 37).

These developments show how the idea of the *Rechtsstaat* was uprooted and turned into its opposite, surfacing in the idea of the *power state* (*Machtstaat*) and why we should return to the idea of sphere sovereignty in order to search for a meaningful demarcation of the sovereignty of the state. It should be remembered that legal scholars who do not want to advocate a totalitarian and absolutist view of the state nevertheless may still adhere to an unlimited view on the legislative competency of the state. Even Gierke grants formal omnipotence to the state legislature (Gierke 1883: p. 1189).

It is not surprising that we still encounter different conceptions of sovereignty. Just consider expressions such as *popular sovereignty*, *state sovereignty* and the *sovereignty of law*.

Is it sufficient to appeal to the 'public interest' in order to prevent 'sovereignty' (governmental authority) from embracing all of society? A long-standing legacy is found in the persistent attempt to use the idea of the public interest, public good ('salus publica') to achieve this goal. However, it turned out that this idea may serve all possible extremes, from the ancient universalistic-organic theory of the state, to Wolff's theory of the police state and up to the Leviathan state in the thought

6 An extensive analysis of the three phases of development of humanistic theories of the *Rechtsstaat* is found in the work of Mekkes (1940: pp. 200–422; 423–572; 575–728).

of Hobbes and Rousseau. It can also easily serve the classical liberal idea of the constitutional state (Locke and Kant), as well as modern totalitarian political theories:

> For the sake of the public interest Plato and Fichte defended the withdrawal of the children from their parents and wanted their education to be entrusted to the body politic. With an appeal to the public interest Plato wanted to abolish marriage and private property as far as the ruling classes of his ideal State were concerned. Aristotle wanted education to be made uniform in 'the public interest'; on the same ground Rousseau wished to destroy all the particular associations intervening between the State and the individual citizen. Wolff desired the body politic to meddle with everything human and, at least for the Protestant Churches, he wanted the government to fix the confession. The idea of the 'salus publica' was the hidden dynamite under the Humanistic natural law theories of Hugo Grotius and S. Pufendorff. In Chr. Wolff's doctrine of natural law this idea resulted in a frankly admitted antinomy with his theory of innate natural rights. The slogan of the public interest was the instrument for the destruction of the most firmly established liberties because it lacked any juridical delimitation. The terrible threat of Leviathan is audible in this word as long as it is used in a juridically unlimited sense. The universalistic political theories could conceive of the relation between the State and the non-political societal structures only in the schema of the whole and its parts. This is why they could not delimit the idea of 'the public interest' (Dooyeweerd 1997–III: pp. 442–443).

The decisive phrase here is what is *juridically limited* or *unlimited* and how an appeal to the jural aspect of our experience can help us to delimit the competence of the state. This brings us back to the first element in the expression *just* state. What is the meaning of the *jural aspect* of reality? Is there a consensus regarding the concept of law within the science of law and among political theorists? It reminds us of the words of Kant, namely that the jurists are still searching for their concept of law.[7]

Speaking of the *jural aspect* of reality presupposes first of all that there are other (non-jural) aspects as well (such as number, space, the biotic, the logical, lingual and ethical modes) and secondly that the dimension of aspects must be distinguished from concrete (natural and societal) entities and processes,[8] even though these two dimensions are intimately connected. To be sure, every entity or process in principle *functions* in all aspects of reality in a *typical* way. The type law (structural principle) for being a state is *universal* in the sense that it holds for all states. But because not everything is a state, this type law is specified—it only applies to states, not also to firms, clubs, faith communities, atoms and the like. One may also capture the uniqueness and irreducibility of the various aspects by applying the phrase *sphere sovereignty*. Yet the meaning of every unique aspect only comes to expression in its coherence with all the other aspects of reality. The structure of every modal (functional) aspect contains various structural features, among which the core meaning (or meaning nucleus) qualifies all the others.[9]

On the basis of diverse aspects, one can account for the typical nature of societal entities (communities and collectivities) by characterising their respective type laws in terms of a typical *foundational* function and a typical *qualifying* function. Most of them display a typical foundational function within the cultural-historical aspect guided by a post-historical aspect serving as the qualifying aspect. The business enterprise, for example, has its foundational function in the cultural-historical aspect—the *power of capital*—and its qualifying function in the *economic* aspect. When

7 'Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht' (Kant 1787: pp. 759 footnote).

8 The state (like any other natural or societal entity) in principle also functions in all the modal aspects of reality (including the quantitative, spatial, kinematic, physical, biotic, sensitive, logical-analytical, cultural-historical, lingual, social, economic, aesthetic, jural, moral and certitudinal aspects.

9 Other structural elements are the backward-pointing and forward-pointing (retrocipatory and anticipatory) analogies, the distinction between norm side and factual side and factual subject-object relations and subject-subject relations. For example, avoiding what is excessive within legal life captures the principle of *juridical economy*, which at the same time highlights an analogy on the norm side of the jural aspect pointing backward to the economic aspect (a retrocipatory analogy). The core meaning of the jural may be captured by the idea of 'tribution', giving each person his or her due (a more detailed explanation of the various modal aspects of reality is given by Strauss 2009: Chapter 3, and various sections of Chapters 5 and 6).

the qualifying function is employed to distinguish societal entities, one may characterise a people in the ethnic sense of the word as a *cultural* community, the nuclear family as an *ethical* collective bond, the church as a *fiduciary* collectivity and the state as a (public) *legal* institution.[10]

Throughout the history of state-formation and of theoretical reflection on the political domain, *power* is acknowledged as an essential element of every genuine state. This could be related to an earlier footnote where we explained the distinction between coordinational, communal and collective social relationships. In terms of this the state clearly belongs to the category of *societal collectivities* (*Verbande*). Specifying the foundational and qualifying modal functions of the state therefore has to account for the nature of *might* and *right* because, ever since Plato, justice is appreciated as closely linked to power. *Might* indeed highlights the requirement of obtaining the monopoly on the power of the 'sword' on a culturally delimited (state) territory, whereas *right* in turn points at the *qualifying function* of the state. This function guides and limits the nature of the state as a true 'thing of the public', a *res publica*.

However, there is a difference between the original function of the state in the cultural-historical aspect, expressed in the sword-power of the state, and the retrocipatory coherence between the jural and the cultural-historical aspects, displayed in the jural competence of the government of a state. This *jural competence* concerns *power over persons* (a cultural-historical analogy on the norm side of the jural aspect), which ought to be distinguished from power over objects forming the basis of subjective rights). Since the power over persons entailed in this *jural competence* is embedded within the *office* of government, and since it appears at the norm side of reality, it manifests itself in the power or competence to *form law*. This power of the state, as a public legal institution, requires a public legal organ, the legislature, to accomplish its law-making task. In addition it needs criminal and civil legal courts supported by the police force to ensure that sentences for offences are officially executed.

The nature of the state as a true *res publica* entails that its concern for integrating legal interests cuts across all the other ties connecting its citizens to the non-political spheres of life. As a public legal institution, the state has the legal obligation to harmonise and balance the multiplicity of legal interests within its jurisdiction on the basis of the monopoly over the 'power of the sword' within its territory—while the police force is responsible for the internal maintenance of law and order with the military force (infantry, navy and air force) to guard against external threats.

Since this public legal task of integrating a multiplicity of legal interests on its territory presupposes non-political spheres of societal life, with their own respective jural competencies to form law, we have to distinguish between state law as a *ius commune* (communal law) and non-state law as a *ius specificum*. Because every non-political societal collectivity pursues its own private concerns, guided by one or another non-jural aspect, its function within the jural aspect is constituted merely as a *ius specificum*. Within the domain of public law, one can distinguish between constitutional law, international public law, administrative law, penal law, as well as criminal procedure. In addition, the sphere of public law is co-constituted by public legal freedoms, such as the freedom to express political views, to criticise the government, to organise political parties and to participate in the capstone of political freedom, the right to vote.

In the absence of a theory of modal and typical structures, Habermas approximates the idea of a foundational and qualifying function in his own way where he refers to the inner connection of law with the acquisition of political power and their application in the shaping of a democratic constitution (Habermas 1998: p. 70). He comes equally close to this idea where he discusses the coherence between 'law and political power' ('Recht und politischer Macht'). According to him the idea of the *Rechtsstaat* requires that the *code of law* and the *code of power* should serve each other mutually, in order to accomplish what they respectively want to achieve (Habermas 1998: p. 208).

10 One reviewer suggested that I consider a reference to the ideas of Duguit, Hauriou, Walzer and Santi Romano. However, since these thinkers do not operate with a theory of sphere-sovereign modal aspects, they did not succeed in making a contribution to the idea of the just state as it is developed in this article. The syndicalist-pluralist view of Duguit is still fully individualistic and naturalistic. Hauriou rejects this naturalistic approach, his own neo-Platonic conception of 'idées-forces' [Literally: 'idea-forces'] approximates what we have in mind with societal collectivities, but discussing his view of institutions would take us beyond the confines of this article. Unfortunately Romano identifies the political sphere with 'law'—which also does not help us to come to a proper understanding of the idea of a *just state*.

When one abstracts from all societal communities and collectivities within which an individual may participate as a part of a larger whole, a personal sphere of freedom comes to light. Earlier we alluded to the expanding Roman Empire and the rise of the *ius gentium* which forms the point of departure of our modern *civil private law*. The latter allows the expression of personal freedom of thought, freedom of association, freedom of economic endeavours, of speech, of faith, and so on. As a coordinational sphere of law, civil private law lacks any relation of super- or sub-ordination. It deals with individuals (and societal entities) on an equal footing, next to or in opposition to each other. For this reason, it is the shelter of maintaining and protecting personal freedom within the legal intercourse of a differentiated society. Both the state and civil private law are qualified by the jural aspect of reality. But civil private law cannot exist apart from the state and the non-political spheres of life. The latter fall within the domain of *non-civil private law*. Conversely, communal and collective spheres of law cannot exist apart from civil private law. The qualifying functions of the non-political spheres of life are different from the *jural* qualifying function of the state and of civil private law. Moreover, the constitutions of modern states form the originating source of diverse legal spheres of competence within a differentiated society. It serves as a formal source of law because the constitution of a modern democratic state contains stipulations regarding *materially different* spheres of law. Consider the domain of civil private law (common law and human rights), constitutional law (including the procedure according to which, through general elections, a government is put into office), and so on. The state is the only institution integrating a multiplicity of legal interests into *one public legal order* within its territory.

We are now in a position to explain what the idea of a *just state* (*Rechtsstaat*) entails.

A just state presupposes multiple spheres of law within a differentiated society, including the domain of public law, civil private law and non-civil private law. The domain of public law embraces constitutional law, the law of nations, administrative law, penal law, and the law of criminal procedure. It guarantees and protects the political freedoms of citizens, such as the freedom to express political views, to organise political parties, to criticise the government, the right to protest, and the right to participate in the capstone of political freedom, i.e. to vote (and to be elected). The domain of personal freedom (common law or civil private law) concerns the participation of individuals and societal entities on equal footing in the legal intercourse of a differentiated society. The domain of societal freedoms (non-civil private law) relates to the existence of non-political spheres of law that are co-constitutive for the existence of a just state (*Rechtsstaat*), for without them a substantial part of the legal interests to be protected by a government would be absent. On the basis of the monopoly over the sword power, a *Rechtsstaat* has to harmonise and balance the multiplicity of legal interests on its territory and restore any loss of rights in a retributive way.

When a differentiated society is characterised by the presence of political freedoms, personal freedoms (freedoms belonging to the domain of civil private law) and societal freedoms (the internal spheres of freedom of societal forms of life distinct from the state), the conditions for a just state are met. In other words, a just state (*Rechtsstaat*) is constituted by the spheres of public law, civil private law and non-civil private law with their accompanying freedoms.

The current constitutional dispensation of South Africa shows that the Constitution of the Republic does conform to these defining features of a *Rechtsstaat*. It is therefore not surprising that the country received praise from all over the world for having one of the finest constitutions in the world.

One of its remarkable features is the way in which it embodies affirmative action in order to rectify the injustices of the former, discriminatory, apartheid era. To appreciate this unique characteristic, it is necessary to distinguish between *constitutive* and *regulative* jural principles. The constitutive elements of a specific legal order are necessary building blocks for a just state in the sense that such a state cannot properly function without them. It exceeds the scope of our current discussion to explain in more detail how constitutive legal principles are intertwined with the subdivisions of the abovementioned legal spheres. Merely consider the fundamental *procedural principle* of civil law (the *audi et alteram partem* rule) or contemplate the basic (constitutive) nature of criminal law, evinced in the principle that a person can only be found guilty if the sentence is based upon

evidence enabling a conclusion beyond any reasonable doubt. In addition, it must be based upon a due process. Within the domain of administrative law, the requirement of due care applies.

Some modern democratic states accept a *Bill of Rights* as a constitutive building block for their public legal order. In the light of the injustices of the past, the South African Constitution in this regard included a regulatively deepened legal principle, namely *equity*. In Book V, Chapter 10 of his *Nicomachean Ethics*, Aristotle revealed the insight that a general law cannot necessarily foresee all possible future unique events. When the application of a law leads to an injustice, the applicable law should be set aside for the sake of equity. Equity certainly is just, but it cannot be confused with the justice of the (constitutive) law. But the applicable law itself cannot be set aside, for this will lead to chaos.

In the case of South Africa, affirmative action acquired its regulative status guided by the deepened legal-ethical principle of equity. Yet because it embodies a *regulative* principle, it can never serve a constitutive function. Therefore employment equity will sacrifice its legitimacy as a regulative principle of justice if it is not connected to a time limit or a sun-set clause, for if it is interpreted as something permanent, it not only turns into a constitutive stipulation, but at the same time changes our constitution into something flawed, with an inner contradiction, sanctioning both non-discrimination and discrimination forever.

Chapter 2, Section 8(1) of the Constitution stipulates that 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. Section 9(1) specifies the constitutive meaning of equality: '[E]veryone is equal before the law and has the right to equal protection and benefit of the law'. However, it should be read with a view to Section 9(3) which prescribes 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 regulative element surfacing here is already explicit in Section 9(2) where equity provides the regulative basis for affirmative action:

> 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.

The distinction between constitutive and regulative is the unique feature of the South African Constitution.

When these principles permeate a democratic political culture, the idea of the state as a public legal institution entails that the protection of rights is the responsibility of the state, prohibiting citizens from taking matters into their own hands. *Public legal interests*, such as the integrity of life and property, in principle preclude the frequent violent strikes currently occurring in South Africa, often resulting in people being killed and the loss of property.

The future of the young South African democracy therefore crucially depends upon the question of whether or not the citizens of the Republic of South Africa will internalise a democratic political culture guided by the requirements of a just state (*Rechtsstaat*).

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