SOUTH AFRICA'S CONSTITUTIONAL DEVELOPMENT: A MATTER OF MACHIAVELLI'S *PRINCE* AND HOBBES' *LEVIATHAN* RATHER THAN MONTESQUIEU'S *SPIRIT OF THE LAWS*?

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Abstract

The democratisation and constitutional development of South Africa from a dominant parliament to a new constitutional order with a supreme constitution, was a significant development in the country's constitutional development. However, the adoption of a supreme constitution is not necessarily an indication that a country has been fully democratised. In this article it is suggested that the level of a country's democracy could also be measured by identifying the source or object of authority that enjoys the broadest legitimacy in society. This source or object of legitimacy will give an indication of the level of a state's political and democratic maturity and consolidation. In an effort to measure South Africa's level of democratic maturity and consolidation a theoretical framework was developed in the article that was based on the assumptions of Ken Wilber and Max Weber. The article points out that it is very important for further political development and democratic maturity in a state that the source or object of authority should be located on the second tier that consists of legal-rational rules. However, it seems that the majority of support in South Africa is based on the first tier, which predominately exists of a pre-rational level that focuses on traditional and charismatic authorities.

1. INTRODUCTION

South Africa's democratisation and constitutional development was a peaceful transition from an authoritarian Machiavellian state to a constitutional state based on the principles of Montesquieu. The framers of the new Constitution and the political decision makers adhered to the rule of law by, *inter alia,* incorporating Montesquieu's *trias politica* into the new constitutional framework. This was a welcome and marked departure from the centralised and personal rule of a leviathan state and was also a testament to the fact that a constitutional state would form the framework for future political development in the new South Africa.

However, in spite of early optimism, the period before and spanning the terms of former President Thabo Mbeki and the inauguration of President Jacob Zuma were riddled with tension and conflict. The split between the majority party dominating the fused legislature/executive and the judiciary definitely damaged the status of the constitutional state. The Constitutional Court's steadfast position on specific constitutional matters, together with Zuma's controversial brushes with the

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law, provoked angry responses and attacks from the ruling party and its supporters, who declared "open season" on the judiciary. Unfortunately the long-term effect of this negative interaction has the inherent potential to erode the status of the judiciary, the separation of powers and, ultimately, the constitutional state.

The inescapable truth is that the judiciary in a constitutional state is foremost dependent on the legitimacy of its status, because it is otherwise defenceless in the face of a potentially aggressive and interventionist government. The judiciary has therefore no defence mechanisms other than the respect, obedience and symbolic status of its position. If this status is eroded, this will impact on the application and adherence to the principles of the separation of powers, which is critically important in establishing a material, constitutional state. In South Africa's fused parliamentary system, with a subservient legislature dominated by the executive, the eroding of the judiciary will have serious implications for the separation of powers and the balance within the political system.

2. FOCUS OF THE ARTICLE

In the light of the introductory remarks, the overall objective of this article is to establish the dominant source of political legitimacy in South Africa. The source of legitimacy in a political system may be located in historical conventions or situated in support for a specific leader, a specific party or the Constitution. The rationale for the investigation is basically to illustrate that a state's level of democratic maturity can be measured by identifying that source or object of authority that enjoys broad legitimacy. This will give an indication of the level of political maturity and democratic consolidation in a state.

In support of the investigation, the second and reinforcing objective will be to construct a theoretical framework to structure the investigation into South Africa's source of legitimacy. A theoretical framework will be devised by integrating the assumptions of the American philosopher, Ken Wilber (the "father" of the integration theory) with the work of Max Weber, the German political economist and sociologist.

However, before constructing an analytical synthesis based on Wilber and Weber's assumptions, a historical and constitutional outline will be provided as background information.

3. CONSTITUTIONAL DEVELOPMENT IN SOUTH AFRICA: BETWEEN A ROCK AND A HARD PLACE?

Both the 1993 (interim) and 1996 (final) constitutions incorporated, for the first time in South Africa's constitutional history, a Bill of Rights as an integral part of an

entrenched constitution. The final Constitution made provision for extensive judicial review, including *judicial control over compliance with the Bill of Rights,* which signalled the transformation from the pre-1994 parliamentary sovereignty, with a subservient constitution, to a constitutional state with a supreme constitution.

The new constitutional state formed the parameters of South Africa's new democracy, and section 7(1) of the Constitution significantly stipulated: "The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The creation of a constitutional state generally attributed a special status to the judiciary, specifically the Constitutional Court, to act as a "watchdog" of the Constitution (section 8.1).

The Constitutional Court approached this task from the outset with both vigour and integrity by creating its own niche, counterbalancing the fused parliamentary system within the political system. The Court also fulfilled a transitional role that Teitel (1997:2009) coined "transitional jurisprudence", to describe the paradigmatic role that law could play in the normative reconstruction of a new political regime in a new democratic state.

In transitional justice, the law plays, in tandem with the government, an important paradigmatic role in the construction of a new political regime as a mechanism for social change. The pragmatic way for government is to "interfere in society" by way of statutes and administrative regulations, but these executive actions must be scrutinised by the judiciary to check whether they comply with the Constitution and the Bill of Rights.

However, the adjudication of executive actions has the inherent potential to create a certain amount of tension between the executive and the judiciary. In some instances, the courts' actions, specifically the Constitutional Court's actions, could frustrate the democratic will of the people.

One of the first important examples of judiciary assertion was when the Constitutional Court fulfilled its constitutional obligation by striking down the death penalty, in spite of its general popular support. This decision was followed by the *Western Cape Case*, when the Court declared section 16A of the Local Government Transition Act of 1993 an unconstitutional delegation of the legislative power to the executive, thereby frustrating the separation of power principle. In the latter case the Constitutional Court, for the first time, struck down intensely politicised legislation by a democratically elected parliament and a highly popular President (Nelson Mandela) (Klüg 2001:151).

The apparent political and populist danger of the Constitutional Court's actions is the contrasting implications of the two decisions. In the *Death Penalty Case* the Court, in contradistinction to the old judiciary under the apartheid system,

fulfilled its role masterfully. The Court addressed and corrected aspects of the legacy of apartheid by fulfilling its transformation role to create a more just society. However, in contrast, the Court's adjudication in the *Western Cape Case* could have been construed as upholding the antidemocratic designs of the former apartheid ruling party in the Western Cape (Klüg 2001:151).

Former President Mandela's graceful acceptance of the decision of the Constitutional Court in the *Western Cape Case* to uphold the principles of the Constitution and, specifically, the principles of separation of powers, was extraordinary and exemplary. His graceful behaviour cemented the Constitutional Court's symbolic position and improved its status in the new democratic order as the protector of the Constitution in a constitutional state.

However, this "frustration" of the political will of the elected fused legislature and executive in a parliamentary system has the potential to be a source of future frustration and could impact on the legitimacy of the judiciary, especially the legitimacy of the Constitutional Court. This translates to the fact that the judiciary (courts) has to exercise constraint when adjudicating executive decisions and when interpreting and applying the Bill of Rights. In one of the first cases of this kind the Constitutional Court, in *Soobramoney v Minister of Health, KwaZulu-Natal*, therefore refused to order the state to provide expensive dialysis treatment to keep a critically ill patient alive (De Waal 2001:22). This careful reading eluded the initial fears of tension between the executive and judiciary and explains the earlier, smoother ride.

The importance of the separation of powers in preventing the arbitrary use of power has its roots in the thinking of the seventeenth-century philosopher, John Locke, and was expounded upon and endorsed by the French constitutionalist Montesquieu in his *Spirit of the laws*. In the United States, James Madison declared "[that] the accumulation of all powers, legislative, executive and judicial in the same hands...may justly be pronounced the very definition of tyranny" (Jackson & Jackson 2003:208).

However, the separation of powers in relation to functions and personnel will achieve very little if the various branches are not simultaneously empowered with the appropriate checks and balances. The purpose of the internal allocation of checks and balances is to ensure that the three branches of government control each other and serve as counterweights to the power possessed by the other branches. The most conspicuous example of these "checks and balances" is the power of the judiciary to review executive conduct and laws to ensure that they comply with the Constitution and the Bill of Rights (De Waal 2001:22).

Unfortunately the inherent nature of South Africa's constitutional state (judicial review) predetermines a confrontation, basically because the judiciary may

and will frustrate what the executives perceive as the majority will. This will be the topic of the next discussion.

4. POLITICS AND LAW – TWO UNEASY BEDFELLOWS

Politics has, as its fundamental core, the ability to decide "who gets what when and how" (Laswell 1937:115) or, in Easton's (1965:1) words, "the authoritative allocation of scare resources in society". The insights of both theorists could be combined to define politics as "embracing all activity that impinges on the making of binding decisions of who gets what, when and how" (Jackson & Jackson 2003:9). If this basic political "right" is persistently restricted by the judiciary's checks and balances, this will certainly put pressure on the judiciary (law), which could have repercussions for the application of the separation of powers and, ultimately, the constitutional state itself.

The democratic link between the government and the people is through a popular elected assembly. In this Westminster-style parliamentary system, based on British traditions, parliament portrayed itself as the trustee of the majority of the people, with the primary responsibility to exercise its own judgment and wisdom on behalf of its constituents (Heywood 2002:317). In general, this inherent underlying function of an assembly represents the majority's interests and, in many instances, allows interest groups a point of access into the political system.

The legislature and the executive is therefore a *subjective* representation of specific interests, needs and demands of the majority of the constituents. The role of government is subsequently to make binding decisions on material and symbolic issues of the allocation of "scarce resources" by deciding who gets what, when and how on the basis of such a mandate.

In contrast, constitutional law concerns itself with the relationship between the individual and the state seen from an *objective* level, because it also reflects values and something more altruistic than distributive, formal procedures and rules dealing subjectively with politics. Within a stable democracy, a constitution reflects the *value(s)* that people nationally and internationally attach to orderly human relationships (e.g. individual freedom under the law, equality, free elections, free press and access to courts) as a buffer against arbitrary actions on the part of the state (Bradley & Wade 1988:3).

This normative approach, with its broader emphasis on values and human rights, demands that constitutional law should be the bearer of libertarian Western legal values. In this regard, an enforceable Bill of Rights – in the best tradition of the Western libertarian consciousness – ensures the establishment of a material constitutional state (Basson & Viljoen 1988:5).

5. CONSTITUTIONAL DEVELOPMENT IN SOUTH AFRICA

In the pre-1994 era, South Africa's constitutional position was a subjective political system (legislature/executive) that was not counterbalanced by an objective system of judicial (law) checks and balances. The pre-1994 political system was dominated by a too-powerful parliament and there were no limitations on its leviathan behaviour to arbitrarily restrict and abolish human rights. With the adoption of the interim and final constitutions, a Bill of Rights for the first time formed an integral part of an entrenched constitution, together with an extensive *judicial control over compliance with the Bill of Rights.*

The constitutional principles, with which the final Constitution had to comply, translated into the fact that "everyone... [enjoys] all universally accepted fundamental rights and freedoms and civil liberties" (Rautenbach & Malherbe 1996:285). Section 8(1) provides that the legislature, the executive and judiciary are all bound by the Bill of Rights and that the judiciary has to act as watchdog to ensure that the government is bound by the intrinsic values enshrined in the Bill of Rights.

Hans Kelson's well-known dictum that the legal order is the "opposite side" of the "coin" of the state and that the rule of law places limitations on what states can do, applies to South Africa: "[The] rule of law must somehow express the limits of what sorts of state activity counts as legal in nature" (Kelson 1989:313).

5.1 The South African judiciary: the challenge

The South African judiciary, especially the specialised Constitutional Court, was therefore duty bound to uphold the Constitution and to strike down any executive actions that may violate the values contained in the Bill of Rights. The Constitutional Court reiterated this in the *Death Penalty Case*, when former Judge President Chaskalson and ten members of the Constitutional Court stressed that they "must not shrink from their task of review, otherwise South Africa would return to parliamentary sovereignty and, by implication, to the unrestrained violation of rights common under previous parliaments" (Klüg 2001:145).

The allocation of substantial powers in terms of review and a role in the political, social and economic transformation has therefore constitutionally equipped the judiciary with its own source of authority. In the South African state, this naturally developed into "two sources of power": between the political, representative (subjective) authority versus the symbolic (objective) status of the judiciary. This set the stage for institutional stress and alienation which undermined the position of the judiciary in the face of the stronger executive authority.

As will be indicated later, the basic function of judicial review continued to frustrate public perception. Chaskalson, in the *Death Penalty Case,* explained the position of the Constitutional Court – namely, that he could not allow himself to be

diverted from his duty to act as an independent arbiter of the Constitution. If public opinion were to be decisive, he argued, there would be no need for constitutional adjudication.

In his deliberation in the case, Judge Didcott referred to the statement of judges Powell and Jackson of the United States Supreme Court, who had argued that the "assessment of popular opinion is essentially a legislative, not a judicial function, and that the very purpose of a Bill of Rights is *to withdraw certain subjects from the vicissitudes and to place them beyond the reach of majorities*" (my emphasis). Judge Didcott then argued that this decision is not a populist, legislative or executive decision, but the prerogative and duty of the judiciary "and not of representative institutions" (Klüg 2001:145).

The Constitutional Court's steadfast position on this basic premise clearly set the course for potential confrontation with the popular elected branches of government. The fused legislative/executive systems, which present the subjective aspirations, needs and desires of the people, was set up against an unelected body (judiciary) that represented objective, universal human rights and values. This scenario set the stage for a collision somewhere in the future, and was compounded by the prior experience of the frustration of the majority will in South Africa by undemocratic pre-1994 governments. After the attainment of democracy, it seemed to the majority of people that their needs and aspirations would be frustrated again, sometimes in favour of their former oppressors.

However, the independence of the judiciary remains the cornerstone of the rule of law in any country. The *trias politica* doctrine divided the authority of the state and carved out a special position for the judiciary. As Okpaluba (2003:109) writes: "It is universally accepted that the independency of the judiciary is a *sine qua non* of a democratic state. Nor has it ever been in doubt that it is one of the fundamental values of a democratic constitution. Indeed, the independency of the judiciary is the revered concept of *the rule of law,* the bedrock of the separation of powers and a safety-valve for the role that courts play in the democratic system of government."

The importance of a constitutional state and the rule of law is that both are a prerequisite for a stable society where certain values and principles (rather than the arbitrary use of power) are embodied in legislation that dictates the law. Trust in the judiciary is essential, because members of a society need to know that, eventually, justice will be victorious, simply because the "rule of law" will prevail, regardless of the status of the person in that society (Heyns 2008a).

However, from South Africa's past experiences it was evident that the independence of the judiciary would be under threat from the strong centralising tendency of a fused executive legislative system. The 2005 Constitution Fourteenth Amendment Bill, which was published on 14 August 2005, clearly revealed the

executive's centralising intentions. The Bill was published in 2005 with a 30-day period reserved for comments, which fell directly during the recess period for judges. In essence, it was a deliberate attempt to dilute the power of the Constitutional Court and to shift regulatory competencies from the judiciary to the executive. Judges were united in their condemnation of the proposed changes and broad criticism was articulated by the judiciary for the intrusion of the executive power into the independency of the judiciary (Bertelsmann 2006:45).

Although the proposed amendments were temporarily put on hold, the ANC's 2007 Polokwane Conference again confirmed the widespread populist support for this amendment and the erosion of the judicial power in favour of more substantive executive control of the transformation process. The implications of such a step for the rule of law and the separation of powers are obvious.

Fuelling the fire and central to the controversy, and which impacted on the independence of the judiciary, was the controversy surrounding the corruption trial of ANC President Jacob Zuma. At the same time the Judge President of the Western Cape, John Hlope, allegedly tried to influence individual members of the Constitutional Court in the (then) upcoming case. The Court brought the matter before the Judicial Services Commission (JSC) for deliberation. However, Hlope attacked the JSC's right to hear the issues and also the judges of the Constitutional Court, describing them as "incompetent" (*Business Day* 2008).

Sadly, not only were the proposed amendments and the status of the Constitutional Court under attack, but so too was the integrity of individual judges. This endangered the independence of the judiciary and the judges' status – seemingly for a short-term advantage (De Vos 2008:1).

These attacks on the judiciary were also vividly illustrated by the actions of other protagonists, such as the ANC Youth League (ANCYL), the Young Communist League, and supporters of President Jacob Zuma. All these groupings savaged the judiciary, calling the integrity and moral standards of the judges into question and claiming, *inter alia,* that "they (the judges) aren't even sober anymore". Julius Malema, President of the ANCYL, reiterated the group's belief that Zuma was the target of political malice, barely veiled under the cloak of a justifiable legal process (Heyns 2008b).

Although the independence of the judiciary could be partly safeguarded by the institutional arrangements within the Constitution itself (section 165 – 167), its true independence is materially dependent on the demeanour of society. It is important that role players in civil society, from government to ordinary members, respect and protect the freedom and integrity of judges to allow them to exercise their judgement without fear and prejudice (De Vos 2008:1).

It is important for the majority of citizens in the country to understand that they have to support the legal-rational rules, as embodied in the Constitution.

Indeed, the maturity of a country's democratic development can be measured by the level of general support for the Constitution and the level of respect accorded to the country's institutions.

The level of support for the Constitution will be the focus of the second part of this article. The theoretical synthesis of the work of Ken Wilber and Max Weber will be presented to identify the source of legitimacy in South Africa and to gauge the level of democratic consolidation and political maturity.

6. MAX WEBER AND KEN WILBER: DEVELOPMENTAL APPROACHES

Before attempting to integrate Weber's classification and Wilber's development lines into a theoretical construct, a brief basic outline of their work is given.

6.1 Max Weber: triclassification of sources of legitimacy

The German sociologist, Max Weber, made a classic contribution during the late 1940s to the understanding of categorising a state in relation to its sources of legitimacy. Weber's classification provides a good understanding of the level of democratic consolidation and political maturity in a state. He constructed three systems of domination or authority:

- Traditional authority
- Charismatic authority
- Legal-rational authority

Weber was intrigued by the contrast between relatively simple traditional societies and multifaceted, highly bureaucratic societies that functioned on the basis of legal-rational rules within a constitutional framework (Heywood 2002:211).

As far as the first level is concerned, traditional authority is regarded as legitimate by its members, because it has always existed and is sanctioned by certain histories and acceptance by earlier generations. It operates on the basis of unquestioned customs and there is no need for such authorities to justify their existence. *Traditional authority* manifests itself in tribes in rural areas (where patriarchy and gerontocracy still dominate). The state apparatus, in such societies, is noticeable by the lack of differentiation and the lack of adherence to the separation of powers: all authority and power is centred in the hands of an individual or an oligarchy. However, traditional authorities survived in the modern era in symbolic form in the United Kingdom, Belgium and the Netherlands, but all are subservient to some form of constitutional control.

The *charismatic authority* is based on the power and charisma that an individual personality can "transmit" to his or her followers. Modern examples of such leaders are Colonel Gaddafi and Fidel Castro. The former President of France, Charles de Gaulle, was also very charismatic, but his source of legitimacy was based on the formal powers of office. Charismatic authority can be very dangerous, because the leader is popularly envisaged as infallible, unquestionable and "above the law" – sometimes, in fact, such leaders are portrayed as divinities. Charismatic leaders sometimes deliberately cultivate their charismatic qualities through propaganda, practised oratory and certain presentation skills (Heywood 2002:212).

The third type of political legitimacy is *legal-rational authority*, which links authority to legal-rational rules as manifested in a constitution. The authority is attached to an office, rather than a person, history or tradition. Legal-rational authority is in force in most modern states, where the powers of the government are determined by formal constitutional rules (such governments are, in essence, limited governments). South Africa's 1996 Constitution outlined these restrictions on power and the judiciary is empowered to guard against any transgressions.

6.2 Ken Wilber and the lines of development

The American Ken Wilber approaches political development from an individual, psychological perspective. Wilber works with an X-construction model, with four lines that each represents an escalating, higher level of political and physiological status. For example: one line progresses towards more complicated, integrated forms of states, progressing from pure survival (on an individual basis) to the next higher political-societal level, as illustrated below:

Survival – ethnic tribes – federal empires – early nations (states) – corporate states – value-based communities – holistic groups and integral movements

The next line of interest that crosses the top line in the X-figure is on the level of the human subconscious and the identification of three main categories or phases of subconsciousness. Each phase progresses into the next phase and is built on the previous one. Wilber (Cf. Ferreira 2009:15) states: "States are free, but structures are earned...One has to *build* or earn a structure, it can't be experienced for free... higher states of freedom from the structure one already inhabits, so at any level one can experience these deeper/higher states. It is an ascending line achieving higher levels, which are built on levels already reached." Wilber also identifies an ethical development line that is divided into three development phases (from the pre-rational upwards).

The pre-rational phase can be subdivided into archaic, magic and mythological levels, which are integral to the development of human beings as they progress towards the rational and pluralistic phases. The pre-rational phase fundamentally depends on beliefs, magic and mythology.

The rational phase shifts the emphasis towards rational behaviour and rational thought, where perceptions of individuals are rationally shaped. The rational shift can be linked, historically, to the era of enlightenment and the philosophers of the fifteenth and sixteenth centuries, such as John Locke and Montesquieu, who based their views on a rational understanding of the observable world.

The *post-rational phase* is the next development phase, when the thought process is cosmos-centric as the next holistic step, from the rational thought and state level to the cosmos level.

SYNTHETICAL INTEGRATION OF WEBER AND WILBER FIRST TIER – FOCUS ON HUMANS, EITHER INDIVIDUALLY OR IN GROUPS

WEBER	**WILBER**	**FORMS OF POLITICAL ORGANISATION OR STATES**
Traditional authorities: Legitimacy is sanctioned by history and tradition **Charismatic authorities:** Legitimacy is based on the leader's personality traits; limited or no questioning of authority.	**Pre-rational:** Predominantly archaic (self-centric), magic (tribe-centric) and mythological (ethno-centric). The archaic phase focuses on survival and beliefs in magic (at the tribal level). At the ethno-centric or socio-centric level, the mythological element is paramount.	**Underdeveloped states in traditional setups:** Groups, tribes and underdeveloped states. Many underdeveloped states are a combination of traditional and charismatic authority.

Both Weber and Wilber categorised this primary phase (tier 1) as traditional and pre-rational. The overriding inclination is not on rational thought, but is inward-looking – both in terms of the group and survival in a biological-social sense; this view is built on the past and on certain histories. Pluralism and differentiation, typical of modern government structures, are restricted and political structures are undemocratic.

SECOND TIER – MORE OBJECTIVE FOCUS ON PUBLIC OFFICE OR OBJECTIVE RULES

WEBER	**WILBER**	**STATES**
LEGAL-RATIONAL The legal-rational classification links authority to legal-rational rules in a constitution. The legal-rational authority operates within most modern states where the power of the government is determined by formal constitutional rules and is, in essence, a limited government.	**RATIONAL PHASE** In this phase, the individual mind progresses from relying on inner beliefs in magic and mythology, to the orderliness of reason. The rational phase is therefore accompanied by pluralist thought that makes provision for a pluralist state where legitimacy is situated in legal-rational rules.	All modern states which adhere to legal-rational rules in a constitutional state fall in this category (e.g Western European states).

Interestingly enough, Wilber categorised Europe (by which he presumably meant most countries in the European Union) as being in the rational phase (i.e. the phase that borders on the post-rational phase). In Wilber's thought, the United States falls in the same category, although he argued that, under former President George Bush, the USA occupied a place between the pre-rational and rational phases.

THIRD TIER – POST-MODERNIST? EMPHASIS ON COSMOS

WEBER	**WILBER**	**STATES**
Weber did not specifically describe any category beyond the rational phase, because in his lifetime (he died in 1942) the challenge was to establish a constitutional state based on legal, rational rules.	**Post-rational phase** The post-rational phase has moved beyond the rational approach (which is centred round the nation-state). This focus shifted to a holistic perception. It therefore incorporates the rational phase and has moved beyond it to higher rational levels, and focuses on the "cosmos level".	Europe borders this phase and could soon be in this phase after the establishment of a value community and holistic group, which will be completed with an integral holistic approach towards a broad universal community

7. QUO VADIS SOUTH AFRICA? LEVIATHAN OR CONSTITUTIONAL STATE?

After 15 years of democracy South Africa is precariously balanced between the first and the second tier of political development. The reason for this is that the South African state/societal system basically operates on the basis of an inherent paradox, with conflicting gravitational powers. Outwardly, the state appears to have a constitutional status and, under the guidance of the Constitutional Court and the judiciary, has made good progress towards realising a material constitutional state and access to the second tier.

However, some South African leaders in both the pre- and post-apartheid South Africa were and are trapped, together with the majority of their support base, within a first tier pre-rational (psychological) mindset. Their overriding political allegiance is still predominantly traditional and based on certain histories; they have a high regard for charisma and a belief system that relates to the dominant values of individuals, tribes and racial groups. This homo-centric and group-centric allegiance enjoys preference over the higher objectives of legal-rational rules as manifested in the Constitution.

This strong populist notion of leaders as infallible, unquestionable and "above the law", and sometimes even portrayed as divinities, is a direct threat to the very fibre of a legal-rationality and the constitutional state. It also sets South Africa on a dangerous collision course between the forces of the subconscious (at different levels). The problem is that this populist notion is still trapped in the first tier (the pre-rational phase), but the people who are thus trapped are simultaneously attempting, or are being *forced*, to function within the next formal tier, the rational level – in other words, politically, their subconscious instincts are constantly being frustrated.

For example when, in the normal functioning of a democracy, the rights of freedom of speech and the right to criticise elected, populist leaders are articulated, the reaction from the populist support base (traditional/charismatic) is aggressive, because the reaction is based on subconscious, pre-rational (tier 1) inclinations. Modern human rights, such as freedom of speech, are basically situated at the next level.

President Zuma's populist support is a good example of the above. The ANC's support base and popularity are largely dependent on traditional and rural-based support. Many of these supporters are inclined towards the predominantly archaic (self-centric), magic (tribe-centric) and mythological (ethno-centric or socio-centric) mindset. Political support is embedded in loyalty and legitimacy is based on the first tier – the traditional and charismatic mindset. This explains why Thabo Mbeki's support base eroded over time; a distance developed between him and

his supporters, because he had moved on to the second, rational, tier and left them "behind" on the first tier. In contrast, Zuma subconsciously personifies the criteria for a leader who can function on the first, pre-rational tier. He is a smiling Zulu warrior dressed in traditional Zulu regalia, has a lack of formal education, practises polygamy (three wives), and has a traditional house in rural Nkandla (Rossouw 2009:5). And, of course, there is his favourite song, "Bring me my machine gun", which unites his supporters in almost fanatical devotion.

The ANC was therefore complimentary towards the judges who acquitted Zuma on, firstly, the rape accusation and, secondly, the charge of corruption, because they (the judiciary) "unintentionally" aligned themselves with the pre-rational notion of "the leaders can do no wrong". The fact that the judges operated on the rational level escaped the supporters' attention, because they just envisaged the outcome and not the rational process. However, when deputy chief judge Dikgang Moseneke privately admitted that he is in favour of establishing an equal society "and that this translates *not to what the ANC wants*, but what is good for the public as a whole" (Steenkamp 2009:vii), he was heavily criticised. The dichotomy between what the ANC wants (politics) versus the good of all the people built on the values which the Constitution (law) embraces, is noticeable here.

A further problem in South Africa's political development is that the separation between the dominant political party and the state is transparent; this means that party dynamics therefore inadvertently spill over into the state's activities. The violent reaction to the leader of the Democratic Party's (Helen Zille's) unsavoury remarks about President Zuma included threats to make the Western Cape ungovernable (liberation jargon based on the first tier). This prompted Mr Jody Kollapen of the Human Rights Commission to remark that South Africa is "still an immature democracy" (Rossouw 2009:5).

The Constitutional Court's more substantive powers as constitutional watchdog and the power of judicial review, within the broader parameters of transitional justice, have dragged the judiciary increasingly into the political realm. According to Kriegler (Anonymous 2008:vii), the role of the judiciary has, as a result, been politicised: various politicians and their supporters are now more critical of the courts than was previously the case.

However, as Landman (2009:6) correctly indicates, Zuma will have to set an example and make a point of respecting the supremacy of the judiciary and the courts. He has "to drag his followers from a pre-rational understanding" up to the rational level, to function within the legal-rational rules. The populist agitators will have to understand that *the courts articulate the final word over judicial matters and not the majority of the people* (my emphasis). This is how a legal-rational structure, such as a constitutional state, functions at a rational level.

8. CONCLUSION

The correct juxtapositioning of the judiciary and the government (fused legislature/executive body) in a balanced, self-corrective political system is of paramount importance for their continued existence in a constitutional state. As Teitel (1997:1335) indicated: "(L)aw does not determine politics nor does (or should) politics determine law." Within the constitutional state, law and politics are in a dialectical relationship that is mutually constructive and they should react to each other within the confines of previously agreed legal-rational rules (the second tier).

The South African constitutional state had no previous democratic precedent to develop from and therefore borrowed heavily from the German and Canadian examples when it structured its own constitution. However, the fact is that the new Constitution should be "custom-made" to enable it to confront the specific challenges facing a developing country that carries a heavy baggage of socio-economic backlogs and prejudices – none of which are going to disappear in one generation.

The present Constitution depends on the interaction within the political system, including civil society, to shape it within its status as the supreme law of the country. As Kriegler emphasised (Anonymous 2008:vii), the citizens of South Africa should cherish, execute or even replace it if necessary. The point is that interaction should take place in a developing and rational environment.

However, it is important that the theoretical principles of the separation of powers to provide checks and balances are understood and correctly integrated in any further development. The judiciary is totally dependent on the articulated support of its citizens; it does not possess its own armed forces and trusts the government to comply with its decisions.

It is important, in the final analysis, for further political development and democratic maturity that the majority of South Africa's citizens transfer their loyalties from the first pre-rational tier to the second rational tier, that is, the tier that consists of legal-rational principles. This is the only way to develop into a *de facto* material constitutional state firmly based on rationality. The judiciary is wholly dependent on the support of a nation that bases its legitimacy on legal-rational rules, rather than the inconsistent behaviour of a person or a small oligarchy at the pre-rational level.

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