

Dialectical tensions in the values of the 1996 Constitution

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Summary

In his paper *The Dialectics in the Values of the 1996 Constitution* Jan Swanepoel discusses various value statements in the 1996 Constitution of the Republic of South Africa and focuses the attention on indications of a lack of coherence as far as these value statements are concerned.

He does this against the background of some introductory perspectives on the 1996 Constitution. In this regard he points out that the 1996 Constitution, as successor to the 1993 Constitution with its set of thirty four constitutional principles, can be regarded as a document of political and ideological compromise. He points out that constitutions (and in particular the value statements in Bills of Rights) generally tend to be formulated rather broadly in order to promote flexibility and adaptability. He also focuses the attention on the fact that such a dialectic of values point to the variety of interests that has to be harmonized in a modern state, something which is unmistakably the case in South Africa with its heterogeneous society.

The 1996 Constitution contains a variety of "value terms". A closer study of these terms does, however, indicate that these terms (value, principle, foundation, and the like) are not used in a very systematic or technical fashion.

The problems regarding the value statements are, however, not only of a terminological nature. There are also some substantive problems, as becomes clear from a discussion of value terms in the Preamble and in Sections 1 and 7 of the 1996 Constitution. Swanepoel indicates that a tension exists between what can be called the "process" formulation in section 1(a) and the "state of affairs" formulation of the values in section 7(1). . While section 1(a) speaks of "the achievement of equality" and "the advancement of human rights and freedoms", section 7(1) simply makes mention of "equality" and "freedom". The dialectic between these two

formulations is discussed with reference to other relevant sections of the 1996 Constitution.

The discussion is placed against the background of a so-called blank space in the 1996 Constitution. While the 1993 Constitution characterized South Africa as a "constitutional state", the 1996 does not contain such a characterization. It is argued in this paper that the process phrasing in section 1 (a) ties in with a social democratic view of the state as an institution bringing about social change. The "state of affairs" phrasing of section 7(1) is, on the other hand, more in line with a liberal notion of a Rechtsstaat.

The issue concerning what type of state South Africa is under the 1996 Constitution, will depend on which of the two poles in the above-mentioned dialectic the primary emphasis will be placed.

Since the 1996 Constitution has been ratified by the Constitutional Court, it is regarded as extremely unlikely that the above-mentioned terminological problem will be rectified in future. Swanepoel provides a diagrammatic representation of the principle, values and objectives mentioned in the 1996 Constitution.

Further research is envisaged concerning the possibility of developing a juridical model of reconciling the social-democratic and Rechtsstaat tendencies in the 1996 Constitution within the framework of a broader vision on the state's task in bringing about justice.