

DELIBERATING THE RULE OF LAW AND CONSTITUTIONAL SUPREMACY FROM THE PERSPECTIVE OF THE FACTUAL DIMENSION OF LAW

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SUMMARY

Positive law is two-dimensional: it has a justice (or ideal) dimension (and requisite) and a factual (or real) dimension (and requisite). Both are essential. Hence positive law lapses when either of the two is absent. In terms of the factual requisite, law remains in place as actual norms of law (unlike mere norm-formulations), provided that a minimum degree of effectiveness is maintained; that is to say, only as long as the subjects of the law consistently and voluntarily act in accordance with such norm/s, and provided further that deviant conduct is remedied by effective coercive measures.

"Norm/s" that lose the factual dimension lapse into mere norm-formulations and no longer qualify as positive law. Thus viewed, a realistic grasp of the content of law is co-dependent on actual conduct, regardless of what the norm-formulations purport positive law to entail, because the norm-formulations may have lost track of the actual state of the law.

Grasping the actual content of law, including constitutional law, therefore requires not only analysing the norm-formulations of the formally recognised sources of the law, but more specifically social and political observation which may reveal the following:

- (1) actual behaviour that closely corresponds with a legal norm-formulation, in which case the formulations reliably happen to reflect (and by implication to describe) the actual state of law; or
- (2) conduct that regularly deviates from the norm-formulations (*usus*) by the deviators who deem themselves legally bound to act as they are acting

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(*opinio iuris*), in which case new (substituting) law has in fact come into being, without such substituting law being reflected in a new (amended) norm-formulation; or

- (3) large-scale but inconsistent and irregular deviant conduct where the deviators do not consider themselves legally bound to act in the various deviant ways, combined with haphazard enforcement, thus allowing deviators to get away with their transgressions. Unlike the first scenario, the purported norm (law) as reflected in the norm-formulations is in part unsettled but unlike as in the second scenario, no new norm (law) has come into being. A legal *lacuna* opens up - that is, an area not regulated by existing legal norms.

Viewed from the perspective of the factual dimension, law, including constitutional law, is much more susceptible to the volatility of unpredictable changes and instability than what the doctrine of the rule of law and constitutional supremacy purport it to be. The doctrine holds law (and the constitution) to be formulation driven, and therefore formal-static in nature, in that the law remains essentially static until the norm-formulations (the text) are amended in terms of the prescribed amendment procedures prescribed by the constitution. Consequently, the prevalent doctrine of the rule of law and constitutional supremacy fail to account for the factual dimension which causes it (the doctrine) to obscure the inner workings of the factual dimension of law, and therefore acts as a hindrance to understanding the nature and content of (positive) law, including the constitution.

KEYWORDS: Critique of rule of law and constitutional supremacy; faith strengthening language of the doctrine; factual dimension / requisite (of law); justice (ideal) dimension / requisite (of law); substituting law; lapsed law; legal lacunae; substituted law; legal norms in contrast to legal norm-formulations.