Constitutionality of South Africa's competition policy

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Part A: The constitutional principles

The failed experiment – from unchangeable law to an unchangeable constitution

Constitutional law is different from other laws. This must be so since the constitution is above other laws. It is the fundamental law. Where a country has a constitution, that country operates under a different dispensation than a country without a constitution. A country with a constitution is subject to a constitutional dispensation in which Parliament no longer has the sovereign power to make laws.

The idea of a constitutional state is, in the grand scheme of things, a recent innovation. If the then young Alexis de Tocqueville (1805-1859) is to be believed America was the first country to introduce constitutional government. As is well-known England to this day does not have a written constitution.

Why does a country nowadays need a constitution? If we start off with the point made by Hayek then the need for a constitution becomes clear. He pointed out that until comparatively recently it was accepted:

> the state cannot itself create or make law, and of course as little abolish or violate law, because this would mean to abolish justice itself, it would be absurd, a sin, a rebellion against God who alone creates law. For centuries it was recognized doctrine that kings or any other human authority could only declare or find the existing law, or modify abuses that had crept in, and not create law. Only gradually, during the later Middle Ages, did the conception of deliberate creation of new law-legislation as we know it come to be accepted. In England, Parliament thus developed from what had been mainly a law finding body to a law creating one. It was finally in the dispute about the authority to legislate in which the contending parties reproached each other for acting arbitrarily, acting that is, not in accordance with recognized general laws that the cause individual freedom was inadvertently advanced.

Once it began to be accepted that law can be made and Parliament was the body which could make laws, or as was stated at the time Parliament was sovereign, the problem became clear. By sovereign was meant the power to make or unmake any law; laws without limit. Laws made by this sovereign body could not be challenged. If Parliament had this great unlimited power John Austin, the English jurist asked the obvious but awkward question; what would happen if Parliament were to pass a law that all blue eyed babies be put to death – would this indeed be valid law? Different answers were given to this question. AV Dicey (1835-1922) England's most famous constitutional lawyer argued the answer lay in revolt, in the ancient and fundamental right defence especially self-defence. If any Parliament became so depraved as to pass such a law, the people should rise up against this Parliament as they had done against kings in the

past. He did not think any other remedy would help. He therefore did not advocate a constitution and England did not go down the written constitutional route.

The Americans had another approach, a constitution. The constitution as a law would be different. It was not a ‘law’ passed by a Parliament. It derives its legitimacy from other sources. The Preamble of the Constitution of the United States declares (1789):

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The legitimacy came directly from “We the people” whatever that may mean. The constitution also rested on the assumption declared in the Declaration of Independence (1776) that unalienable rights exist.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The constitution is supposed to protect the unalienable rights; the right of each individual to life, liberty and property.

The American experiment of replacing the unchangeable laws with an unchangeable constitution when applied in other parts of the world has not necessarily worked. The unchangeable law, the law above laws, has become but yet another changeable law at the behest of some or other majority. The sacred underlying, unchangeable laws no longer exist. Once again blue eyed babies can be put to death simply by saying so in the constitution. So in South Africa the view is firmly entrenched, if property is for example to be taken without compensation, ie institutionalised theft, all that is needed is that the constitution be changed. The constitution becomes yet another changeable law which finds its authority from some or other majority.

Legitimacy of the constitution

The legitimacy of the constitution thus does not rest on the majority vote of an assembly of persons. It rests on concepts such as ‘we the people’ or the recognition of unalienable rights.

Interests to be protected by the state

Ostensibly in any event, South Africa exists now within a constitutional dispensation. It is now accepted that Parliament is not sovereign; the laws made by Parliament are not sovereign laws.

Irrespective of the actual words of the constitution a country with a constitution is vastly different to one with a constitution. In theory at least the unalienable rights rule supreme.

The right to life, liberty and property are not granted or given by the state. The purpose of the state is to secure those rights. The position of the state was correctly summed up by John Locke as follows:

> Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the commonwealth from foreign injury; and all this only for the public good.

The state exists as the institutional manifestation of (self) defence, to defend rights of life, liberty and property. The *modus operandi* is to pass laws protecting property, negative laws, eg, 'do not steal', 'do not murder', where upon the state has the positive duty to enforce those laws. Thus laws exist in the public interest to protect the unalienable rights.

Forgetting history – hijacking the constitution

Increasingly the purpose and nature of the constitution is being forgotten – it is becoming yet another law. In the short life span of the South African constitution it has already been amended fourteen times! It no longer looks like the fundamental law – it looks like any other law. It is thus not surprising that Julius Malema believes that all that is required to take private property is to amend the constitution. All that is required to put blue eyed babies to death is to put it in the constitution.

States within states

An interesting development taking place in South Africa is what I call the formation of states within states. It has been recognised for some time, worldwide, that legislation is no longer made at the behest of the representatives of the people. It clearly does not happen in South Africa with its system of proportional representation where Parliament is populated by deployees of the Ruling Party.

Legislation is increasingly being passed to further the interests of specific groups and agendas, including those of the Ruling Party. This phenomenon was recognised some time back as the concept of regulatory capture. Much of the recent legislation has been creating empires, what I call states within states. Empires with their own administration (executive), own laws (legislature), own courts (judiciary), own procedures and enforcement mechanisims. In particular there has been an explosion of adjudicating bodies; special courts, tribunals, adjudicators, ombudsmen and so on. Adjudicators for Africa! What were regulators historically have become industry administrators or super-managers – managers above managers.

Take for example the insurance industry. The regulator has become the administrator of the industry. The industry is no longer an industry under the rule of law, it is one under management. Adjudicators such as ombudsmen do not consider themselves bound by the law of the land, they have their own laws. Nor do they see themselves with some limited mandate. These states within states soon migrate well beyond their mandate. In fact they define their mandates so broadly that it can in any event cover anything. It is the problem of the hammer and nail. If the only tool one has is a hammer then every problem looks like a nail. So their mandate soon expands to cover the universe of all perceived problems.

As will be seen the Competition Dispensation is an example of what I call a state within a state.

Summary of the fundamental Common Law constitutional rights

The fundamental principles of a constitution can be stated in terms of what I call the Common Law of the Constitution. These contain the general requirements applicable to constitutions. The fundamental common law of constitutional rights, relevant for our purposes, can be summarised as follows:

Everyone has the right:
"To be governed by (1) clear laws which are of general application and (2) tried by the ordinary courts of the land where guilt is (3) established through the production of objective evidence (4) beyond all reasonable doubt and (5) penalties be imposed in accordance with the principles of the *LexTalionisie*to fit the crime (6) in accordance with the fundamental rights."

Part B will apply this Common Law of Constitutions to the Competition Policy dispensation.

PART B: APPLICATION OF PRINCIPLES

Solving the right problem?

In this whole debate of competition, involving private companies operating in terms of Adam Smith's exchange economy, an issue which is completely overlooked is that the central economic issue today is not companies which operate at a profit but governments which operate at deficits. It is not profits which are the problem but deficits.

The stability of the world economic system is currently threatened by the deficits of countries such as Greece, Portugal, Spain, the USA, UK and so on. These deficits threaten the stability of the banking systems of many countries, to the extent which cannot even be determined at this stage. In South Africa it is not the price of bread which is the problem; it is the cost of government controlled monopolies and costs imposed by government institutions. These include the cost of electricity which is escalating beyond what many will be able to afford, and in

many cases now exceeds the cost of accommodation. The cost of municipal services that provide questionable value for money, which has long exceeded what most pensioners can afford; private firms having to compete with loss making government institutions propped up with taxpayers' funds. In a sense talking about a government institution set up to administer private companies has a surreal feeling about it. It is like being asked to attend a function to watch Nero playing his fiddle while Rome is burning.

Consideration of the elements of the fundamental common law constitutional rights

Clearly time will not permit a detailed examination of the application of all the Common Law constitutional rights to the competition dispensation. In particular a detailed discussion of some of the specific laws involved and the cases will take too long.

The competition dispensation fits within the state within state dispensation which I described above. A government institution with its own laws, investigating arm, courts and a mandate comprehensive enough to solve the world's problems.

Clear laws of general application protecting against externalities

The purpose of competition law is understood by Mr Justice Robert Bork when he noted that "the exclusive goal of antitrust adjudication is the maximization of consumer welfare". (Justice Bork 1993 *The Antitrust Paradox – a policy at war with itself)*

The laws are anything but clear and are not directed at externalities imposed on consumers.

The purpose of the Act is summarised in s2 which includes 'to promote the efficiency, adaptability and development of the economy', 'to promote employment and advance the social welfare of South Africans'; 'to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic', 'to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy', 'to promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons'.

When it comes to more specific provisions, things do not get much better. Dealing with mergers one aspect is whether or not the merger can or cannot be justified on 'substantial public interest grounds' (s12A(2)(b)). Public interest grounds include effect on (a) employment (b) small business, or a firm controlled by historically disadvantaged persons …' Public interest is a concept which has always lacked any clear meaning. The so-called public interest considerations set out in the Act are conflicting. If, for example, a merger will result in significantly lower prices, reducing the externalities imposed on consumers, but this reduction will also reduce employment, then the merger can be stopped. The increased costs to the consumer which are then permitted, are the very externalities which competition will reduce.

In any event, the mere fact that a decision is required to be made by individuals and not in accordance with laws, makes it clear that the competition system does not function in terms of the Common Law fundamental constitutional principles.

Competition law is not of general application. Specifically excluded is the supply of labour (s3). In other words labour can and does violate all the principles of competition. It is interesting to note that there appears to be a worldwide trend for government labour costs to be well in excess of private sector labour costs and that these are the main drivers of government deficits. In both SA and USA it is estimated that the average labour cost of the public sector is 45 per cent higher than the private sector. In the USA it is the Federal labour cost.

Laws which are supposed to be clear, unambiguous commands of the sovereign, but the specific legislative provisions in s2 of Act clearly fail this test since they have no clear or discernable legal meaning. What it does do, being vague and devoid of any clear meaning, is grant licence to the 'state' to do anything it chooses to do. Laws without any clear meaning end-up as cases without end. Referring to Anti-trust cases in the US, Mr Justice Bork who prosecuted these cases for a long time noted; 'The trial of such a case can go on endlessly … battalions of lawyers. Young lawyers became middle-aged lawyers without working on any other case. Junior associates displayed great ingenuity and energy to avoid being drawn into such black holes. The waste of time, money and talent was staggering' Bork (1993: 432).

Beyond a reasonable doubt

S68 of the Act declares that the standard of proof is on a balance of probabilities, the civil law standard. This is part of a growing tendency to resort to the civil standard of proof and for anyone who has studied civil law, especially the law of delict, the movement from the criminal standard of beyond a reasonable doubt to the civil standard will not be surprised. In many instances the civil standard is no standard at all.

Production of objective evidence – SA's silent revolution

What is not generally realised is that there has been a silent evidential revolution underway. The historical standard for evidence has been abandoned. Increasingly totally unacceptable 'evidence' is admitted and guilt or innocence is established on no evidence at all. This tendency is institutionalised in this Act 'The Tribunal may accept as evidence any oral testimony, document or thing whether or not given under oath or would be admissible as evidence in court.'

Ordinary courts of the land

English jurists regard as one of the great triumphs of the 19th century the restoration of the jurisdiction of the ordinary courts of the land. This has been completely reversed in the past few

decades with special tribunal, courts springing up all over the show. The competition dispensation is no different. In my state within the state model the competition dispensation has its own court.

Clearly the Tribunal does not meet the test of an ordinary court of the land. It is true that the Appeal Court is staffed by ordinary judges. It was proposed to staff this court with competition people but decided that that would be unconstitutional so six ordinary judges have been appointed. A special Appeal Court still does not meet the requirement of the ordinary courts of the land test. It is interesting to note how these state institutions claim to be creating their own jurisprudence. There is some truth in that. Where cases are not heard by ordinary judges applying the general law, the institutions set about conditioning or training 'their' judges. The Appeal Court should be abolished and appeal to ordinary courts allowed.

Fundamental rights

The fundamental rights are of course breached as a matter of course as is becoming very common; searches may be conducted without a warrant (s47); no right of silence (s56(3)).