

Author: K Malan

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

eISSN 1727-3781



2015 VOLUME 18 No 4

<http://dx.doi.org/10.4314/pej.v18i4.14>

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

K Malan*

1 Introduction

This discussion critiques the generally accepted doctrine of the rule of law and constitutional supremacy prevalent in contemporary constitutional states, including the doctrine as conceived in terms of the *Constitution of the Republic of South Africa*.

The critique proceeds from the view that law, more specifically positive law is essentially two-dimensional. On the one hand there is the dimension of justice; that is, law's justice, moral or critical dimension (and requisite). On the other hand there is law's factual dimension (and requisite). Both of these dimensions are essential for an individual norm to qualify as a norm of positive law. By the same token, on a comprehensive basis both dimensions are also essential requisites for a system of law to be in place. A clear understanding of the two-dimensionality of law provides the basis for the critique presented in the present discussion, which is focussed upon the factual dimension of law. It will be pointed out that the leading doctrine on the rule of law and constitutional supremacy prevalent in contemporary constitutional states is premised on a failure to account for the factual dimension; and that the doctrine in consequence obscures a clear insight into the factual dimension of law, and therefore obscures a clear understanding of the nature and content of (positive) law, including the constitution.

In Part 2 of this discussion law's two-dimensionality is expounded in brief with the specific purpose of elucidating the essential nature of the factual dimension. In part 3 important conceptual instruments in support of the arguments developed in this article are clarified. Thereafter, in part 4 I concisely posit, without arguing in detail, the basic thesis on the factual dimension of law. The thesis casts doubt on the claims of the

* Koos Malan. BA Hons (UP), BIur LLB LLD (UNISA) Professor of Public Law, University of Pretoria. Email: koos.malan@up.ac.za.

trite doctrine of the rule of law and constitutional supremacy. In part 5 the fundamentals of the doctrine concerned are set out, thus revealing the conflict between the factual requisite as conceived here and the trite doctrine. In part 6 I develop in more detail the thesis of the factual requisite of law, and further present a critique on the trite doctrine of the rule of law and constitutional supremacy. Part 7 concludes with some final remarks.¹

Let me stress at the outset that this discussion is not focussed on the interpretation of the norm formulations of the recognised sources of positive law by their authorised interpreters (which would obviously include the judiciary but also organs of the executive, the legislature and the state administration). Instead, the discussion is focussed on the actual conduct of sectors of government and the public, who do not (necessarily) claim to interpret these formulations or to have interpretive authority in terms of the recognised sources of positive law, but who, through their conduct, render existing law ineffective and in some cases replace it with new (substituting) law, as explained below.

2 Law's two-dimensionality

The notion of regarding law as basically two-dimensional has a long history. The basic contours of such a two-dimensional understanding of law might be as ancient as legal reflection itself.

In the first place, it must be pointed out that any concept of law without the notion of justice would be impossible. At the very beginning of the Digest (of Justinian's *Corpus Iuris Civilis*) the essential connection between law and justice (*ius* and *iustitia*) is proclaimed. With reference to the view of the classical jurist, Celsus, that the law is the art of goodness and fairness,² jurists are called upon to:

¹ The discussion does not subscribe to any one specific school of thought in legal philosophy. It draws substantively from the ideas emanating from Scandinavian and American Realism, but not to the complete exclusion of trends within either positivist (analytical) or natural law thinking. Besides, looking upon law as basically two-dimensional as outlined here rules out both exclusive accord with as well as total rejection of any specific concept within the broader corpus of legal philosophy.

² Mommsen and Krueger *et al Digest of Justinian* 1.

(c)ultivate the art of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear but also under allurements of rewards, and affecting a philosophy which, if I am not deceived, is genuine, and not a sham.³

The idea that justice is an essential element of law has been a significant driving force behind natural law thinking for ages. Hence, ideas on justice (and morality) have either been laid down as normative standards to qualify as (positive) law or as a moral yardstick to evaluate the quality of positive law. The chief tenet of natural law, Edgar Bodenheimer aptly explains, is that arbitrary will is not legally final.⁴ Thus Bodenheimer states: "There would, indeed, appear to exist some minimum postulates of justice which, independently of the will of the lawgiver, need to be recognised in any viable order of society."⁵ St Augustine states accordingly: "Justice being taken away then, what are Kingdoms but great robberies?"⁶ This means that law which is not just is no law at all.⁷ St Thomas of Aquinas declares that "a human law... in so far as it deviates from reason, is called an unjust law, and has the nature, not of law but of violence".⁸ In accord with this, church authorities during the Middle Ages, often supported by civilian authorities, rejected the validity of laws made by political authorities because they were considered to be in conflict with divine or natural law.⁹ The justice threshold might not, and in fact should arguably not be particularly high in order to safeguard the stability of legal systems by avoiding trivial claims based on allegations that the law of such systems is unjust and for that reason does not constitute positive law at all. Too high a threshold could give licence to lawlessness and chaos. However, there should at least be some threshold, because tyrannical decrees permitting an unbridled assault on life, limb or property should not be allowed to pass as law. Such a minimum justice threshold is necessary to ensure that not every expression of the will of the sovereign would qualify as law.

³ Mommsen and Krueger *et al Digest of Justinian* 1.1.

⁴ Bodenheimer *Jurisprudence* 216.

⁵ Bodenheimer *Jurisprudence* 216.

⁶ Bodenheimer *Jurisprudence* 22-23.

⁷ Bodenheimer *Jurisprudence* 265.

⁸ Quoted by Bodenheimer *Jurisprudence* 265.

⁹ Bodenheimer *Jurisprudence* 264-265.

In the second place, it is necessary to cast light on the factual dimension of law alluded to above. This dimension relates to the factor of effectiveness, the essential importance of which has been highlighted all along as an equally fundamental dimension of and prerequisite for positive law.

There is a widely held view that the proclamation of norms (norm-formulations in terms of the views developed in the discussion in part 3) by political authorities on their own is not sufficient to establish new law or to change existing law. This view goes back to at least the twelfth century Benedictine monk, Gratian, the author of the *Concordantia Discordantium Canonum* (c 1140), which formed the basis of the *Corpus Iuris Canonici*. In the beginning of the *Concordantia* it is stated that: "Laws are established through promulgation and validated when they are approved by the acceptance of the people."¹⁰ Hence, the promulgation of a law alone was not sufficient to turn it into law. It first had to be approved through the acceptance of it by those destined to be affected by it. As long as it remains unaccepted, it does not assume the status as a law. The Glossator, Azo (d 1220) echoed the same view when he stated that custom arising after a written law had been established could abrogate such written law. Commenting on *Digest* 1.3.32,¹¹ the Glossator jurist from Bologna, Odofredus (d 1265) maintained that the Roman people could still make law, and that their customs could therefore still annul existing law.¹² In this regard it is of particular importance to note what Thomas of Aquinas (1225-1274) had to say in "Treatise on Law" which is part of his magnum opus, *Summa Theologiae*. Thomas expanded on the work of the Civilian jurists since the beginnings of the Glossator school. According

¹⁰ Pennington "Law, Legislative Authority and Theories" 424; Carlyle *History of Medieval Political Theory - Vol 3* 48; Carlyle *History of Medieval Political Theory - Vol 5* 82.

¹¹ *Digest* 1.3.32 reads as follows: "Age-entrusted custom is not undeservedly cherished as having almost statutory force, and this is to be the kind of law which is said to be established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the populace declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be replaced not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude." Mommsen and Krueger *et al Digest of Justinian* 13.

¹² Carlyle *History of Medieval Political Theory - Vol 5* 49.

to him custom could and did create, abolish (change) and interpret law.¹³ To Thomas it was of particular importance that law could be created and changed (or abolished) fundamentally in two ways: firstly by words, and secondly by action. In the first case, law is laid down by the express promulgation thereof by a designated political authority who formulated new law (in words). In the second case, law could be lived by those to whom the law applies, by their consistently acting in a particular way.¹⁴ Specifically with regard to the changing of law, quite obviously including the changing of written law through consistent action, Thomas stated:

Wherefore it is sometimes possible to act beside the law; namely, in a case where the law fails, yet the act will not be evil. And when such cases are multiplied, by reason of some change in man, the custom shows that the law is no longer useful: just as it might be declared by the verbal promulgation of a law to the contrary.¹⁵

Such customary action contrary to officially promulgated existing written law does not amount to unlawful action but rather marks the fact that the officially existing law is no longer fitting. Instead of being unlawful (gauged against the yardstick of the officially existing formulations of the norms of law) the new customary action constitutes, supersedes and abolishes the officially existing written law and creates new law in its place.¹⁶ This obviously happens tacitly and is not overtly articulated as in the case of changes by way of written formulation. This, however, does not detract from the fact that it has the same consequence as amendments of written formulations.¹⁷

¹³ Van Drunen *Law and Custom* 37 *et seq*; also see Carlyle *History of Medieval Political Theory - Vol 5* 47.

¹⁴ Thus he declared as follows in *Summa Theologiae* 1.2.97.3: "Now all law proceeds from the reason and will of the lawgiver... Now just as human reason and will, in practical matters, may be made manifest by speech, so it might be made known by deeds: since seemingly a man chooses as good that which he carries into execution. But it is evident that by human speech, law can be both changed and expounded, in so far as it manifests the interior movement and thought of human reason. Wherefore by actions also, especially if they be repeated, so as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectively declared, for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of law, abolishes law and is the interpreter of law." (Quoted by Van Drunen *Law and Custom* 37-38).

¹⁵ Van Drunen *Law and Custom* 39, quoted from the same passage in *Summa Theologiae*.

¹⁶ Van Drunen *Law and Custom* 40.

¹⁷ Insights resonating and expanding on that of Thomas of Aquinas were repeatedly articulated afterward. Nicolas Vigelius (1529-1600) in a work of 1568 stated with reference to various

For Jacques Cujas (1522-1590), the great French Civilian jurist from the Humanist school, the determining requirement for the manifestation of law was actual conduct. No law was binding unless it was received by custom. Custom was decisive for law, and written laws did not bind men unless they had been accepted by the judgment of the people; that is, unless they had been approved by custom.¹⁸ Commenting on the famous definition of Papinian of the concept of *lex* in *Digesta* 1.3.1, Cujas stated that laws were binding for no other reason that they had been accepted by the *populus* and approved by custom.¹⁹ These views also resonated strongly in the Roman-Dutch tradition in a work no less famous than the *Commentarius ad Pandectas* of the author of equal fame, Johannes Voet (1647-1713). Voet argued, with reference to applicable Roman law texts, that it would be patently impossible for legal rules to prevent spontaneous change of the law through custom. Thus Voet stated:

It flows as just as much from what we have said that an earlier may not be abrogated only by a later law, but also by custom. It made no difference whether the people declared its wish by vote or by its very acts and doings. It has therefore very rightly been recognised that laws might be done away with or changed not only by the vote of the lawgiving power but also through disuse with the silent consent of everybody. It follows that this cannot be prevented by the clause not infrequently found, especially in municipal laws – "Custom to the contrary notwithstanding". These words must be taken as applying merely to past customs, and not to others to be brought in later. No private person can make a law for himself in his testament so as to disable himself from changing his earlier will. And owing to the constant change of times and manners, laws do not forever remain praiseworthy by reason of benefit like that with which they were originally brought into force. Thus it would clearly be incongruous to want to secure by a law that it should not be reshaped for the better whether by new laws or new customs such as right reason might recommend.²⁰

Many contemporary conceptions of law also in some way or other subscribe to this two-dimensionality.²¹ Hence, the assertion by the prominent contemporary legal

passages in the *Codex* and the *Digest* (amongst others D 1. 32. 3) that laws were abrogated not only by the will of the legislator, but also with the tacit consent of the *populus*. He eventually concluded that if custom was subsequent to written law, it prevailed over the written law. See Carlyle *Political theory from 1300 to 1600* Vol 6 306-7.

¹⁸ Carlyle *History of Medieval Political Theory - Vol 6* 314.

¹⁹ Carlyle *History of Medieval Political Theory - Vol 6* 314. *Digesta* 1.3.1 includes in the definition of statute *a communal covenant of the state*. The whole definition reads: "A statute is a communal directive, a resolution of the wise men, a forcible reaction to offences committed either voluntarily or in ignorance or a communal covenant of the state."

²⁰ Voet *Commentary on the Pandects* 1 III 37.

²¹ In line also with the distinction between norms and norm-formulations. For scholars drawing this distinction, see for example Aarnio *Essays on the Doctrinal Study of Law* (as referred to in this article); Niiniluoto "Truth and Legal Norms" 168-190; Neumann *Rule of Law* 29.

theorist, Robert Alexy that law, more specifically positive law, is essentially of a dual nature,²² on close examination falls within a well-established tradition of thinking on the fundamental nature of law. Alexy explains that law comprises on the one hand a real or factual dimension, and on the other hand, an ideal or critical dimension. Both of these dimensions must be present for law to be in existence. According to Alexy the central element of the real dimension of law is coercion or force. (As indicated later in 6 below, I differ in this respect from Alexy, in that on close analysis the real dimension is sustained primarily by voluntary conduct, while coercive enforcement imposed by agencies of the state plays but a secondary part, namely in the exceptional cases where voluntary obedience does not occur). On the other hand the ideal or critical dimension always includes a claim of moral correctness, which, if violated, implies legal defectiveness, and in extreme cases invalidity.²³ In this regard Alexy endorses the view of Gustav Radbruch that state-made law based on due enactment and enforcing state power does constitute law even if the rule is unjust and contrary to the general welfare, unless, however, the violation of justice is of such an intolerable degree that the rule becomes in effect "lawless" for its failure to meet the minimum standard of justice.²⁴ Alexy's explanation of the dual nature of (positive) law to accommodate both the real and the ideal dimensions clarifies two important issues.

Firstly, Alexy integrates a requisite minimum natural law element, that is, the element of justice or moral correctness, in the definition of positive law.²⁵ Hence, in terms of this perspective one need not depart from the positive law discourse into the realm of moral philosophy or natural law in order to engage with questions of justice, since the

²² Alexy 2004 *Ratio Iuris* 156-166; Alexy 2008 *Ratio Iuris* 281-299.

²³ Alexy 2008 *Ratio Iuris* 290.

²⁴ Alexy refers here to Radbruch "Statutory Lawlessness" 7. This thesis is sometimes referred to as the extreme injustice hypothesis. See for example Aarnio *Essays on the Doctrinal Study of Law* 55.

²⁵ This view also resonates to an extent with the view of Ronald Dworkin, positing that in addition to rules there are also deep-seated principles that encapsulate the broad political philosophy of the institutional history of the legal order and that serve as a comprehensive and coherent, contradiction-free, single, collective moral agent, and as such are the most important source of law, enabling principle-based decisions that give effect to the rights of legal subjects (involved in disputes) and making the exercise of discretion completely redundant. Dworkin *Taking Rights Seriously* 81-130; Dworkin *Law's Empire* 188. For Dworkin's distinction between principles (directed towards giving effect to rights) in contrast to policies, which are *statistically defined* and directed toward the achievement of broad public goals, see Dworkin *Law's Empire* 223, 243.

justice question is an indispensable element of positive law itself. This view resonates with the *Digest's* identification of *ius* with *iustitia*, as noted above.

On the other hand, taking into account that Law is a system of norms that specifically regulate the external behaviour of people,²⁶ Alexy accounts for the essential real or factual dimension of law alongside the ideal element. Hence, he maintains that law must be marked by the characteristic of effectiveness in order to qualify as law. However, by insisting on the ideal dimension alongside the real dimension as essential for positive law, Alexy avoids the crude or extreme positivist risk of reducing law to purely a matter of the exertion of sovereign power. Alexy's view of positive law therefore (unwittingly) amounts to a compromise between an extreme notion of natural law and (crude) positivism. To my mind, the crucial merits of this view, as well as its antecedents referred to above, are, however, not this compromise as such, but rather the fact that it provides the basis for a reliable ontology of law in tune with the long-standing tradition briefly outlined above. The dual nature of law suggests two interrelated yet distinguishable themes of reflection on and research into the essential nature of positive law, one pertaining to the ideal or justice dimension and the other to the real dimension. As noted above, the present discussion, in which I shall try to clarify the factual requisite of law, is focussed mainly on the factual or real dimension.

First, however, I need to juxtapose these two sub-inquiries by comparing some typical questions as well as the typical conditions in which the questions relating to these sub-inquiries will tend to arise. In doing so I hope, among other things, to cast light on the relevance of the questions that I seek to deal with, not only from a purely theoretical point of view but also from a practical perspective.

2.1. *Inquiries on the ideal (or justice) dimension*

The ideal dimension of law enquires into the degree of law's tolerance for injustice. A typical question that arises in this inquiry is how unjust a specific rule of "law" must be before it forfeits its claim to be law in terms of the ideal standards of law. On a comprehensive or systemic scale, the question is how unjust a "legal order" must be

²⁶ As underscored by Koller 2014 *Ratio Iuris* 156.

before it forfeits its claim to be a legal order in terms of the ideal standards of law, and thus for an order to qualify as a legal order. Another such question would be what the consequences would be if a specific "legal rule/norm" or "legal system" in general should forfeit its status as a rule/norm or system. In other words, when would a specific norm or a legal system in general, owing to a grave justice deficit, no longer qualify as being *legal*; and what would it be replaced with? All these questions are somewhat ontological in nature. They have to do with the essential properties of law. However, ordinarily they might incline to arise in an effective state, that is, a political order with well-functioning, more specifically effective institutions, capable not only of creating law but more particularly also capable of meticulously enforcing the law in each instance,²⁷ regardless of the justness of such a law and specifically in spite of the fact that such a law might arguably be gravely unjust.

2.2. *Inquiries on the factual dimension*

In contrast, inquiries into the real or factual dimension of law assess the degree of law's tolerance for ineffectiveness. A typical question that might arise in this inquiry is whether an individual legal rule or a legal order in general remains law (and a legal order) regardless of the level of compliance and effectiveness, or does it pass into non-existence once a certain level of non-compliance of the rule or ineffectiveness of the legal dispensation is reached. If the answer is in the affirmative, the ensuing question focuses on the degree of non-compliance or ineffectiveness: hence, how weak must the level of voluntary compliance or enforcement be before a specific legal rule or a legal order in general lapses into non-existence? Stated differently, which level must the un-remedied disobedience of law reach for such law no longer to be regarded as part of positive law? What are the consequences of such a lapse? What is the lapsed rule or the legal order replaced with? Since the factual or real dimension is also an indispensable dimension of law, these questions are also philosophical in nature as they involve general ontological questions concerning law. However, like the

²⁷ This assertion draws on the distinction by MacCormick 1974 *LQR* 104-110 between legal *institutions* in contrast to whether there would in particular *instances* be consequences when the institutions are disregarded. In such situations the adage *ubi ius ibi remediem* would effectively be in place. If not, if there are no remedies for the infringement of rights, the continued existence of such rights at positive law is called into question.

questions on the ideal dimension cited above, they will arguably be inclined to arise in specific social conditions, namely in conditions of a faltering state, that is, a state lacking high levels of law enforcement and / or lacking levels of voluntary compliance. Such a state may have good legal formulations, radiating justice and thus meeting the ideal element of law, yet severely lack compliance with the norm-formulations, in consequence of which it might forfeit the claim to be recognised as a legal system.

3 Conceptual clarification: *legal norms* and *legal norm-formulations*

The terms legal norm/s and legal norm-formulation/s are crucial for the present discussion and will often be used.²⁸ They are not equivalents, and it is important that their meaning and the distinction between them be clarified.²⁹ Legal norm-formulations are primarily a question of language. They constitute a distinctive mode of language, namely normative language which essentially seeks to articulate norms, even though they are not necessarily expressly phrased in normative terms. Typical of sentences that articulate such normative language is that they are susceptible to expressions in typical normative terms, such as the words "ought," "must," "may," "is required", "obligatory," "right", "permit to", "forbidden to", etc are featuring³⁰ – these words all have the same function in common, namely the function of a normative operator.³¹ The crucial point for the present discussion is that these norm-formulations are prescriptive but not descriptive in nature. They differ in their epistemological character from descriptive sentences in that, unlike descriptive sentences, they do not assert facts. They are not true or false depending on whether or not they correspond with the social facts to which they refer, but rather valid or invalid,³² depending on

²⁸ Legal norms and legal norm-formulation/s are used here as encompassing terms which refer to rules, principles, institutions of law, prohibitions, directives and permissions; more specifically, to norms and norm-formulations of constitutional law.

²⁹ Various scholars, though not necessarily using the words, draw a similar distinction. See for example Aarnio *Essays on the Doctrinal Study of Law*. A similar distinction is immanent in MacCormick 1974 *LQR* 103-106, who distinguishes between "institutions" and "instances"; Koller 2014 *Ratio Iuris* 157-159; Niiniluoto "Truth and Legal Norms" 168-190.

³⁰ Niiniluoto "Truth and Legal Norms" 175. Deontic logic is the name of the study of sentences containing normative expressions such as these words.

³¹ Koller 2014 *Ratio Iuris* 157.

³² Koller 2014 *Ratio Iuris* 157-158.

whether they are authorized by preceding and more comprehensive norms within the legal order.³³ They are imperatives without truth values.³⁴

The point, therefore, is that a legal norm-formulation is a prescriptive legal sentence consigned to writing and contained in an acknowledged source of positive law such as the constitution, legislation and case law that enunciates the norms of the common law. Legal norm-formulations relate to the ideal or critical dimension in Alexy's terms. They are, paraphrasing Lawrence Boule,³⁵ prescriptive and not descriptive in nature, indicating how people ought to act but not necessarily how they might actually behave in practice. Hence, a legal norm-formulation does not necessarily imply that the norm enunciated in such a formulation is effective; that is, that it is actually obeyed and / or enforced. On a sliding scale, the level of obedience and / or enforcement may vary from complete obedience and / or enforcement, on the one extreme, to complete disobedience and / or absence of enforcement, on the opposite extreme.

A legal norm in contrast to a legal norm-formulation is by definition effective. Hence, it is usually obeyed and / or enforced, even though not necessarily always. Unlike a legal norm-formulation, which by definition does not reveal anything about the actual effectiveness of the norm signified in such a formulation, a norm has a distinctive descriptive property and truth value. It describes a social reality in that in the normal course of events people, either voluntarily or under coercion by the relevant authorities, actually comply with the norm. The term "legal norm" therefore largely resembles what Alexy calls the real or factual dimension (and not only the ideal or critical dimension) of law.

Legal norms as conceived in this discussion are not dependent on express formulation, however. Actual legal norms sometimes do appear in linguistic form. They can exist without ever having been formulated in linguistic terms.³⁶ It must in principle be

³³ As explained for example in the systems of both Kelsen and Hart.

³⁴ Niiniluoto "Truth and Legal Norms" 175. A norm-formulation can also be viewed as something that, depending on whether or not it is adhered to, may be true or false: true, when it is followed and thus describing the actual state of social reality; and false, when it is not followed, and thus not representing social reality.

³⁵ Boule *et al Constitutional and Administrative Law* 20.

³⁶ Niiniluoto "Truth and Legal Norms" 180.

possible, however, to express them in the form of linguistic utterances, which can be represented through prescriptive or norm-expressive sentences.³⁷ Hence, a legal norm may be in existence in the absence of express formulation. As long as the members of a community habitually act in a particular way (*usus*) in the belief that they are legally bound to do so (*opinio iuris*), a legal norm, more particularly a norm of customary law, is in existence. Legal norms of this customary kind distinctively account for the descriptive (factual) property of law, since legal norms owe their existence to actual social conduct without the formal (linguistic) stamp of a preceding legal formation.

4 The basic thesis of the factual requisite of law

Given that legal norms as conceived above have an essential factual element, that is, since they are descriptive of social reality, knowledge of the actual content of law cannot be obtained solely with reference to legal norm-formulations, since such formulations do not necessarily have a descriptive property. Hence, in order to grasp the actual content of law, social research and political observation need to be conducted³⁸ in order to establish:

- to what extent the actual behaviour corresponds with the legal norm-formulations;
- whether there is regular conduct that deviates from the legal norm-formulations yet is viewed as binding by those who act in such a deviant way.

The results of such research may reveal the following:

- (a) Actual behaviour closely corresponds with a legal norm-formulation.
Transgressing behaviour occurs only by exception, but it is effectively remedied

³⁷ Koller 2014 *Ratio Iuris* 157.

³⁸ Any social research that could cast light on the degree of compliance or non-compliance with law could be relevant. This includes sociological and political science research as well the observations of sharp and experienced political commentators and journalists. In the final analysis, jurists have a dual part to play in research of this kind: first, to identify law (legal norm-formulations) that is suspect for its non-compliance, which will then further demand the attention of the experts; secondly, to consider on the basis of the results of such research whether or not a norm is in fact in place (ie, taking into account the level of compliance) or has been replaced by new substituting law, or has simply fallen by the wayside as explained below.

by measures of enforcement as described in the norm-formulations. In that case, the formulations provide a reliable description of the actual state of law as articulated in the legal norm-formulations concerned. The transgressing behaviour is actually unlawful in terms of the existing norm-formulations.

- (b) A norm-formulation is transgressed on a large scale. The transgressors' flouting of the norm-formulations is accompanied by regular and consistent deviating behaviour (*usus*) and the deviators, moreover, regard themselves as being legally bound to act in the way they are acting (*opinio iuris*). In that case, such behaviour constitutes a new substituting norm and therefore new substituting law. In that scenario it is my contention that the legal norm-formulation in question does not reliably signify a legal norm (existing positive law) any more. The norm has then lapsed because its requisite factual dimension has fallen by the wayside and it has, moreover, been replaced by new, substituting law.
- (c) A norm-formulation is transgressed on a fairly large scale. However, unlike the situation in the second scenario the transgression is not accompanied by consistent and regular deviating conduct and / or the deviators do not believe that they are legally bound to act in the various deviating ways in which they are in fact acting. Still, unlike the situation in the first scenario, enforcement might be haphazard, thus allowing deviators to get away with their transgressions. The purported norm (law) as described in the norm-formation is in part unsettled but unlike the situation in the second scenario, no new norm and therefore no new law has come into being. In that case there is legal uncertainty. A legal *lacuna*, or *non liquet*, that is, an area not regulated by an existing legal norm of positive law – a legal no-man's-land – is opening up.

In principle this thesis is equally applicable to the norm-formulations in a supreme constitution, which, like law in general, are also not immune from the operation of the factual dimension.

5 The current doctrine of the rule of law and constitutional supremacy

It should now be apparent that there is a tension between the factual requisite of law as enunciated in the present discussion on the one hand, and on the other hand the

doctrine of the rule of law, the supremacy of the constitution. More specifically, it should be clear that insight into the factual dimension of law gives the lie to essential claims of the prevalent doctrine of the rule of law and constitutional supremacy. As the discussion of the thesis of the factual requisite further proceeds, the outlines of the tension will become clearer. It will be argued that the doctrine is inappropriate because it impairs instead of promotes insight into the nature of law as such, and more specifically because it obscures a reliable insight into the actual state of the law at any given time, on the stability of law, and on how law changes.

This argumentation should, however, not be regarded an assault on the notions of the rule of law and constitutional supremacy as such, as these notions are indispensable for well-functioning legal orders and the effective legal protection of individuals and communities. However, the notions of the rule of law and constitutional supremacy also assume the character of a comprehensive doctrine which does not only fulfil the proper function of signifying the complex of norm formulations of law and the constitutional order, but also improperly purports to describe the actual state of the law and the constitution. In that capacity they assume the character of a descriptive doctrine instead of a notional framework comprising the core norm-formulations of a political society (currently mainly the state). In doing so they thwart the acquisition of reliable insight into the actual state of the law that would emerge only from a clear understanding of the dual nature of law in general and the factual prerequisite of law in particular. Moreover, the doctrine of the rule of law and the supremacy of the constitution may also be functioning as a soothing yet deceptive device, beguiling people into believing that what is proclaimed in the formulations of the law and the *supreme* constitution is a reliable reflection of the actual state of the law, while that might in fact not be so.

In the following part of this article I first set out the triad of beliefs upon which the doctrine is based. Thereafter I discuss the linguistic strategy – the doctrine's language – that is enlisted to inculcate trust in the doctrine.

5.1. The doctrine's triadic premise

The doctrine of the rule of law and constitutional supremacy is premised on the following triad of beliefs, namely the belief:

- in the omnipresence of positive law emanating from the designated law-making and law-interpreting bodies of the state as defined in their legal norm-formulations;
- that the law and the constitution are formulation-driven and are thus formal-static in nature;
- in the actual supremacy of the law (and the constitution) as expressed in its legal norm-formulations.

These beliefs are now explained.

5.1.1 The omnipresence of positive law as expressed in its legal norm-formulations

The law, more particularly positive law, captured in the relevant norm-formulations, is viewed as an omnipresent system of legal precepts in terms of which all human behaviour can be measured, controlled and remedied. The view is specifically state-centered, since the conviction is that the state institutions designated by the norm-formulations of the constitution as law-making bodies (mainly the legislature, and to a limited extent the executive - through subordinate legislation and administrative rule-making) and the courts (through judicial interpretation) entirely exhaust the function of law-making and changing the law. Beyond that, the belief is not only that no law may be made or changed but that no law is in fact made or changed. Yes, the norm-formulations are interpreted by the designated interpreters, but that gives meaning to what is imminent in the text; it obviously does not replace the formulations. The claim of the omnipresence of law logically stems from the doctrine of the rule of law. The law forfeits its claim to any capability to rule in favour of forces beyond the control of law.³⁹

³⁹ It should be quite obvious that that is so because state courts never proclaim a *non liquet*; they never say that they have run out of legal answers. A court might rule a matter moot or as yet not ripe for adjudication, but it never says that there is no law that can provide answers. If it does it inflicts a death blow to the doctrine of the rule of law. An adjunct to this is the conviction that the

This belief accords with the generally avowed premise upon which present-day constitutional states are based. This premise is so firmly inculcated that it tends to be generally assumed without reflection. Occasionally, however, it is explicitly articulated. Ronald Dworkin's exposition of law provides arguably the purest and best known exposition of the omnipresence of positive law. Dworkin proposes that law consists of principles alongside rules that enable law to maintain such a lacuna-free omnipresence that the need for exercising a discretion simply never arises. There are in all cases principles capable of providing a legally-based correct solution.⁴⁰ Aharon Barak's view of law is similar. Barak declares: "Our universe is full of fundamental principles. There is no corner of our lives not controlled by them."⁴¹ Barak further declares that every dispute is normatively justiciable and then elaborates as follows:

Every legal problem has criteria for its resolution. There is no "legal vacuum." According to my outlook law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be "imprisoned" in the framework of the law. Even actions of a clearly political nature – such as waging of war – can be examined with legal criteria, as evidenced by the laws of war in international law. The mere fact that an issue is "political" – that is, (seemingly) predominantly political or could have far-reaching political consequences – does not mean that it cannot be resolved by a court of law. Everything can be resolved by a court in the sense that law can take a view as to its legality.⁴²

law is capable of providing a (legally-based) correct answer to all questions. That is not to say that the answers would always be correct, but if incorrect, it would not be law's fault but that of the erring, misinterpreting decision-maker.

⁴⁰ Dworkin *Taking Rights Seriously* ch 4 and 7.

⁴¹ Barak 2002-2003 *Harv L Rev* 84-85.

⁴² Barak 2002-2003 *Harv L Rev* 98. Barak's views resonate with those of Dworkin on principles. These views are at the root of the dominant doctrine on the rule of law and constitutional supremacy. These views, more particularly those of Dworkin, have drawn sharp criticism from Hart, who in my view quite aptly described Dworkin as "*the most noble dreamer of them all*" for his (Dworkin's) belief that the norm complex of law was sufficient to provide a right answer for all legal questions, thus avoiding the need ever to resort to discretion". See Hart "American Jurisprudence" 138-141.

5.1.2 Formulation-driven: the formal-static nature of the law and the constitution

Law captured in legal norm-formulations is contained in its own sovereign corpus, clearly distinguishable from other modes of social control and independent of social and political forces.⁴³ In terms of this view, which in Western legal culture has its roots in the papal revolution in the eleventh century,⁴⁴ law essentially assumes a static-formal character.

By *formal* it is meant that since law, captured in the legal norm-formulations, may be amended only in terms of the relevant precepts of positive law, ordinarily provided for in the amendment provisions of the constitution, changes in the law can occur only in strict compliance with such amendment provisions. Using the terms of HLA Hart, this would be called rules of change.⁴⁵ By *static* it is meant that the law (regarded by the doctrine as the complex of legal norm-formulations of positive law) remains unchanged until a norm-formulation is amended or repealed (and replaced) in terms of the prescribed amendment provisions (which are obviously also legal norm-formulations) of the constitution.

In consequence of this, law captured in the legal norm-formulations has an integrity that makes it impervious against social and political forces. These forces cannot change the law, at least not directly,⁴⁶ that is automatically, in ways other than those prescribed by the amendment provisions. The law as noted, may – and can – only be changed in accordance with the law's (and the constitution's) own prescribed amendment procedures duly signified in the relevant norm-formulations, adhered to by the bodies that the formulations of the law and the constitution designate to execute the function of amendment. Hence, (the corpus of) law, that is, *the totality of all legal norm-formulations*, has its own sovereign existence and grows

⁴³ Malan 2012 *De Jure* 276-280. Also see in general Berman *Law and Revolution*.

⁴⁴ Berman *Law and Revolution* 99 *et seq.*

⁴⁵ Hart outlined his system of secondary rules (alongside primary rules) in order to constitute an actual legal order in Hart *Concept of Law* 79 *et seq.*

⁴⁶ If conceded that the populace or forceful sections of the populace could change the law directly, the principle of constitutional supremacy would succumb to its direct opposite, namely popular sovereignty (or merely to unbound political force) and thus the rule of law would succumb to socio-political forces that trump the law. For the tension between constitutional supremacy and popular sovereignty see Malan 2015 *THRHR* 248-268.

independently in terms of its own rules, and independent of forces outside the corpus of law.

In terms of this formulation-driven view of the law, law and the constitution come into existence and are changed solely on account of the law-making and amending activities of the law-makers (legislatures and constitutional-making bodies) combined with the interpretive activities of the courts. Hence, full knowledge of the law can in principle be acquired solely by consulting the norm-formulations of the acknowledged sources of positive law emanating from these bodies and from the bodies designated by the state constitution to interpret the formulations. The legal norm-formulations of the positive law are therefore perceived to provide the full and reliable picture of the law. In consequence every legal activity – the business of lawyers – is document-based and a matter of interpretation. Lawyers, being prisoners of language, in the words of Aarnio⁴⁷ have to identify the relevant authoritative documents containing legal norm-formulations which they must then interpret. When new law is to be created the services of lawyers are enlisted, and once again their activities are document-centred; that is, a matter of norm-formulation. The lawyers have to draft new documents containing new authoritative legal norm-formulations. Finding the law never requires anything beyond these legal norm-formulations. More particularly, it does not require social inquiry in order to establish what the law factually entails, since the legal norm-formulations are perceived to provide the full answer to all questions on the content of the law. By the same token, the curricula of legal education are also equally formulation-conditioned. Thus, the exclusive focus is on establishing the relevant norm-formulations and on the interpretation of the formulations.

5.1.3 The actual supremacy and the descriptive quality of the law as expressed in its legal norm-formulations

The norm-formulations perceived to reliably represent the full scope of positive law and the constitution are not independent of social realities, nor do they maintain a distant and passive relationship towards social realities. On the contrary, their

⁴⁷ Aarnio *Essays on the Doctrinal Study of Law* 131.

relationship with these realities is distinctively active. The law is regarded as being signified in the norm-formulations and as being effectively in control of these realities. It regulates, commands and standardises all conduct of those under its jurisdiction, including the conduct of the agencies of the state. The law (as signified in the formulations) is in itself the supreme social reality. This belief is captured in the notion of the supremacy of the law, at present most prominently in the refined modification of legal supremacy, namely constitutional supremacy as encapsulated in modern state constitutions.⁴⁸ The supreme constitution is believed to be actively regulating not only the law outside the constitution (mainly legislation) but also social reality. The notion of legal (and constitutional) supremacy highlights three intertwined dimensions of (positive) law, namely its constitutive, descriptive (truth) and prognostic dimensions.

The norm-formulations are regarded as reliable reflections of the actual state of the law. In its turn the law, mirror-imaged in the formulations, is the supreme social reality that actually regulates these realities. Conditioned by the doctrine of supremacy of the constitution, norm-formulations that are prescriptive (contained in prescriptive sentences) undergo an epistemological metamorphosis and become descriptive; that is, sentences that (pretend to) describe social realities (truths). Hence the norm-formulations are believed to describe social realities, or as Karl Llewellyn said: "...the verbal formulations of the oughts describe precisely the is-es of practice."⁴⁹ Hence, once again in the words of Llewellyn, the paper rules of the oughts are assumed to govern people's conduct.⁵⁰ Thus, the written legal norm-formulations, more specifically those of the supreme constitution, are particularly highly valued – supremely valued. These formulations essentially describe a prognosis of future social realities.⁵¹ Indeed, when it comes to the constitution, this phenomenon reaches its zenith. By virtue of the constitution's having proclaimed its own supremacy, Van der Hoeven⁵² quite aptly in my view suggests that lawyers are really inclined to believe

⁴⁸ In conjunction with strict amendment requirements. For example s 2 read with s 74 of the *Constitution of the Republic of South Africa*, 1996; s 79 of the *Basic Law of the Federal Republic of Germany*, 1949; s 2 read with ss 255-257 of the *Constitution of the Republic of Kenya*, 2010.

⁴⁹ Llewellyn *Jurisprudence* 17.

⁵⁰ Llewellyn *Jurisprudence* 17.

⁵¹ Van der Hoeven *De Plaats van de Grondwet* 251, 248.

⁵² Van der Hoeven *De Plaats van de Grondwet* 504.

the bold claim of the supreme constitution: namely, that to subject political power effectively to the law in fact makes law impervious to it. Even in the face of strong evidence that is not the case - that is, that the "supreme" constitution has been overcome by political forces that are stronger than the constitution - they still stick to the belief in the supreme law of the constitution. The conviction is that the norm-formulations of the constitution are actually ruling, and will be ruling in future. Dutch jurist J Van der Hoeven thus states:

The constitutionalists seek to achieve their objectives on account of a very high value that is placed upon written law. They are convinced that human conduct, including conduct by government, can be regulated by legal norms.⁵³ (Own translation)

With reference to the position in the United States, Griffin goes on to say:

Lawyers tend to regard the Constitution as a set of ultimate normative standards appropriate for judging any political practice. The Constitution occupies so much normative space that it is hard to see anything else. The Constitution is "a machine that (goes) of itself" and policy disasters and even constitutional crises are not evidence of a failure of the document, but only that Americans have failed its high expectations.⁵⁴

This assertion is in fact equally applicable to many other states, particularly also to South Africa since the beginning of the constitutional transition in 1994.

To the extent that the realities are incongruent with the norm-formulations, the effect of the law would be to change such realities in order to conform with the formulations. Hence, to the extent that norm-formulations do not as yet describe social realities, they would at least be correcting and thus (re)constituting these realities so as to bring them into step with the norm-formulations. Legal norm-formulations that do not describe social realities would therefore at least reliably predict future realities.

The doctrine of the rule of law and constitutional supremacy is hard-pressed (in principle as a matter of fact) not to make the following concessions that would unsettle it.

⁵³ Van der Hoeven *De Plaats van de Grondwet* 496. The original Dutch reads: "De constitutionalisten trachten hun doelstellenigen te verwerklijken, gelijk wij zagen, vanuit een zeer hogere waardering voor het geschreven recht. Zij menen het menselijk handelen ook op het terrein van gezag en gezachsoefening door rechtsnormen te kunnen regeren."

⁵⁴ Griffin "Constitutionalism in the United States" 43-44.

Firstly, any concession that law's norm-formulations are not omnipresent. Such a concession would imply that certain areas were not regulated by law and therefore not under the rule of law.

Secondly, any concession that the law (and the constitution) is not formulation-driven. Any such concession would allow for the possibility that law could lapse into non-existence and be replaced with new law through events other than formal amendments of the law as prescribed by the acknowledged norm formulations of positive law, more specifically those of the constitution. Such a concession would further surrender the determination of the content of the law to the unpredictable quirks of social forces. That would amount to a concession that the norm-formulations perceived to be signifying the actual state of the law were in fact not the supreme social reality as the doctrine claims them to be. The current persuasions of the rule of law and the supremacy of the constitution are forced to reserve the privilege of calling something "law" to the institutions of the constitution. Van den Bergh thus states:

In the legal ideology of the liberal constitutional state the privilege to call something "law" is strictly reserved for designated institutions. Freedom means the supreme rule of law and only of the law. Custom is no autonomous but at most a derivative source of law.⁵⁵ (Own translation)

Not to do so would, on close analysis, allow people to take the law into their own hands⁵⁶ and thus for law to be made, undone or replaced by the actors other than those bodies designated by the state constitution to make, change and interpret the law.

It should therefore be obvious that any concession enabling sectors of the public or state agencies acting outside their official mandates to make binding law would be out of the question.

Thirdly, any concession that law (more specifically the constitution) is not the supreme social force, but one force among many others. Such a concession would surrender

⁵⁵ Van den Bergh *Wet en Gewoonte* 44. The original Dutch reads: "In de rechtsideologie van de liberale burgerstaat is het privilege om iets 'recht' te noemen streng voorbehouden aan welomschreven instellingen. Vrijheid betekent heerschappij van de wet en de wet alleen. De gewoonte is geen autonome, hoogstens nog een afgeleide bron van recht."

⁵⁶ Van den Bergh *Wet en Gewoonte* 46.

the supremacy of law to the uncertain vagaries brought about by other social forces and even to the reign of one or more such forces. In that way the foundation of the rule of law and constitutional supremacy would make a self-defeating concession to legal realism and to unbridled politics that is beyond the control of the law, thus surrendering the principle of the rule of law and the supremacy of the constitution to the volatility of socio-political forces.⁵⁷

5.2 The doctrine's faith-strengthening language

Being formulations, legal norm-formulations essentially exist in language. Legal norm-formulations constitute the language of law. They consist of ought-propositions, that is, prescriptive propositions that set out ideal types of conduct on how those under the jurisdiction of the legal order concerned should be acting and correspondingly ideal situations that would be in existence if they would be acting as required in the norm-formulations. Legal language on close analysis is specifically not a complex of descriptive propositions. Thus Karl Olivecrona aptly observed that legal language is not a descriptive but a directive, influential language.⁵⁸ Hence, as already shown in 3 above, norm formulations are not descriptive, asserting and thus being true or false (depending on whether or not they correspond with the social facts they refer to), but rather valid or invalid.⁵⁹ In line with this, specifically in the field of constitutional law, Lawrence Boule remarks that constitutionalism – the doctrine of the rule of law and constitutional supremacy – is a prescriptive and not a descriptive doctrine that indicates how state power should be exercised and not how it is actually exercised in practice.⁶⁰

However, in spite of its essential normative character, legal language has a distinctive inclination to misrepresent that which is normative as if it were describing social realities, that is, as if it were describing facts. This we may call the doctrine's language. What happens is that normative sentences take on a descriptive mode, being written and read as social realities. Niiniluoto explains this phenomenon and gives appropriate

⁵⁷ Van den Bergh *Wet en Gewoonte* 6.

⁵⁸ Olivecrona *Law as Fact* 253.

⁵⁹ Koller 2014 *Ratio Iuris* 158.

⁶⁰ Boule *et al Constitutional and Administrative Law* 20.

examples.⁶¹ A person is said for instance to have a right (the language being in descriptive mode as a social truth) instead of its being said (more honestly as it were) that people ought to act in a particular way towards other people. Olivecrona also spotted this phenomenon of prescriptive or ideal formulations often being draped in the phraseology of factual rather than normative sentences,⁶² thus pretending to be descriptive while disguising the contents of such sentences as social facts. In turn Llewellyn notes that normative legal sentences quite regularly have a descriptive appearance,⁶³ and that they thus purport or pretend that whatever is required in the norm-formulations is actually happening and so constitutes an actual reality. He states:

I think that such precept-on-the-books... tacitly contains an element of pseudo description along with its statement of what officials ought to do; a tacit statement that officials do act according to the tenor of the rule; a tacit prediction that officials will act according to its tenor.⁶⁴

Kelsen also recognised this deceptive propensity of norm-formulations to assume the guise of factual descriptions.⁶⁵

As noted above, a statement that someone has a right to something has the appearance of a factual statement that purports to describe a factual situation. When for example a constitution or human rights instrument states that everyone has the right to equality, human dignity, life or freedom of movement, etc such statements are seemingly not normative. They do not indicate how (normatively) they ought to be acted out, and thus leave open the question of how people do in fact act. Such propositions have a misleadingly descriptive quality,⁶⁶ as though the relevant legal interests that the norm-formulations purport to protect – equal treatment, human dignity, life and free movement, etc. – are in fact consistent social realities. Conditions that ought to be but are not necessarily in existence are represented as factual realities – actual truths. Legal norm-formulations so consistently and definitely convincingly

⁶¹ Niiniluoto "Truth and Legal Norms" 176, 177, 179. Such sentences are often referred to as normative propositions.

⁶² Olivecrona *Law as Fact* 217.

⁶³ Llewellyn *Jurisprudence* 23.

⁶⁴ Llewellyn *Jurisprudence* 23.

⁶⁵ Kelsen *Pure Theory of Law* 7.

⁶⁶ In this regard see Niiniluoto "Truth and Legal Norms" 175-180.

communicate this deceptive factual message that those exposed to them tend to trust the message and to believe in the actual existence of such factually represented conditions. Hence, these formulations act as a means by which (abstract) norm-formulations (ideals) are assigned an almost tangible (factual) existence. In consequence, as Olivecrona argues, the formulations may be regarded as transposing agents between the real (or factual) world in which there are no supreme constitutions, rights and duties, and a super-tangible world where these things are so in existence.⁶⁷ Norm-formulations therefore have the propensity of purporting to describe a pleasingly salutary law-abiding reality, something which these formulations are obviously not capable of achieving, regardless of whatever rhetorical strategies might be employed in seeking to achieve it. As Llewellyn quite bluntly yet not without merit asserts:

"Rights" adds nothing to descriptive power. But it gives a specious appearance of substance to prescriptive rules. They seem to be about something.⁶⁸

Drawing on the terms proposed in 3 above, in the eyes of those exposed to the doctrine's language norm-formulations transpose the conduct required in such formulations into actual realities. In so doing this language acts as faith-strengthening rhetoric convincing the reader that the norm-formulations describe factual truths,⁶⁹ (that is, that they create and sustain actual realities of whatever is articulated in such formulations). Hence, the doctrine's language is premised on the (tacit) belief that it has the ability to create effects merely on account of articulating such (desired) effects.⁷⁰

⁶⁷ Olivecrona *Law as Fact* 223.

⁶⁸ Llewellyn *Jurisprudence* 13.

⁶⁹ Olivecrona *Law as Fact* 222.

⁷⁰ The magical quality of language – its ability to create realities – is possibly as old as law itself. Referring to practices in Roman law Olivecrona explains how formal legal language accompanied by rituals was regarded as capable of creating new realities. Olivecrona *Law as Fact* 222. Thus, legal language was perceived as capable of calling the required effects into existence solely on account of the proclamation of these effects using the prescribed legal phrases. The term *law* itself has compelling effect. What comes under the official appellation of law, Olivecrona notes, carries with it the implication that the rules of conduct contained in the text are binding on everybody. Olivecrona *Law as Fact* 133.

This distinctive faith-strengthening trait of the doctrine's language is the mainstay of the doctrine of the rule of law and constitutional supremacy.⁷¹

By disregarding the indispensable ideal (or critical) dimension of law and representing law instead as definitive facts, the doctrine's language inculcates faith in the doctrine, that is, in law's omnipresence, its formulation-driven, that is, its formal-static nature and in the supremacy of the law laid down by the designated law-making bodies of the state in general and the constitution in particular. Stated in the terms of the conceptual framework that I have proposed in 2 above, this means to say that the doctrine's language represents legal norm-formulations as if they were actual, fully-fledged norms, that is, as if the norm-formulations were effective and therefore actually obeyed and / or enforced. On a systemic scale involving the whole constitutional order, the effect of the doctrine's language is similar, yet more comprehensive. The doctrine's language represents the constitutional order as though it were a factually incontestable reality in which the entire complex of norm-formulations of the constitution consisted of fully-fledged norms, actually effective and supreme; that is, actually obeyed and / or enforced.⁷²

6 Exposition of the factual requisite of law and critique of the doctrine

In terms of the thesis of the factual requisite of law, the questions as to what the law, including the constitution, entails, and to what extent it has remained stable and / or has changed, cannot, as the doctrine of the rule of law and constitutional supremacy claims, conclusively be answered solely with reference to the full complex of legal norm-formulations of the sources of positive law. These norm-formulations, regardless of how bold and dapper they are in phrasing, provide only the *prima facie* indication of the practical consequences of the law and the constitution. There might be formulations suggesting the existence of rights, but no remedies in the event of any

⁷¹ The constitutional discourse specifically also in South Africa is permeated with such faith-strengthening language widely used among lawyers and the general public such as *rights* that are *guaranteed, entrenched or enshrined* in the *Constitution*, and these rights are referred to as constitutional *guarantees*. The Constitution itself is described as *entrenched or enshrined*.

⁷² Ironically the effect of norms being portrayed as facts is to expose the trite doctrine of the rule of law and the supremacy of the constitution to the same classical criticism that has always been levelled against natural law - namely that they confuse the *is-es* with the *oughts* and portray the latter as if they were the former.

violation of a right, and if there is no remedy for the infringement of a right, the "right" in those un-remedied circumstances can arguably be said not to have been in existence at all. And there might be formulations attesting to the existence of legal institutions, yet wide-spread instances where there are no binding legal consequences flowing from these institutions. And there might be formulations relating the tale of the constitution's magnificent supremacy, yet widespread deviating conduct belying that tale. Hence, there might be words speaking of the existence of law, yet not (sufficient) corresponding action – deeds – for these formulations to have real consequences in the lives of people.

In order to acquire a reliable indication of the actual content of the law and the constitution, the socio-political realities have to be studied. Hence, the actual behaviour of politicians, the state administration and the public in general has to be assessed. The extent of actual compliance or deviation from the norm-formulations, and not the legal norm-formulations themselves, will reveal the actual changing content of the law at any given time. Therefore I agree with Llewellyn that:

...the most significant aspects of the relations of law and society lie in the field of behaviour, and that words take on importance either because and insofar as they are behaviour, or because and insofar as they demonstrably reflect or influence other behaviour.⁷³

In consequence, the field of study of law should go way beyond the legal norm-formulations of the acknowledged sources of the positive law. Bingham thus notes in rather blunt terms that the field of study of law should be "...far wider and more complex than an imaginary system of promulgated or developed stereotyped rules and principles."⁷⁴ This resonates with the warning of Eugen Ehrlich against a reductionist theory of legal sources in terms of which the boundaries of the law are confined to the formulations in the sources of the law laid down by the designated agencies of the state. A more realistic and expanded approach to legal sources would be looking for the actual prevalent norms of the law beyond the acknowledged sources, namely also in the socio-political forces, which in the final analysis constitute

⁷³ Llewellyn *Jurisprudence* 105 *et seq.*

⁷⁴ Bingham 1912 *Mich L Rev* 11.

the law.⁷⁵ If one suspects that the norm-formulations do not reveal a reliable picture of the totality of the law and that such a complete picture might be forthcoming only once the socio-political forces are also explored, yet proceeds to limit oneself to the formulations as if they were the only sources, legal science would descend into mere dogma or doctrine.⁷⁶ The scientific endeavour has then been undertaken on a basis that does not pursue knowledge and insight but prohibits it. Thus, Ehrlich is of the view that the methods employed by modern legal science cause substantial parts of the law to become unknown (or obscured).⁷⁷

In the field of constitutional law, Griffin warns that the disregard of non-textual changes to the constitution could weaken one's insight into the actual functioning of the constitutional dispensation.⁷⁸

Both Ehrlich and Griffin obviously underscore the importance of attending to socio-political factors in order to gain knowledge about what the law and the constitution really entail.

Whether or not the legal norm-formulations signify true norms, that is, whether they signify actually effective positive law, therefore depends on forces outside such law and arguably often not recorded in the norm-formulations. These forces determine the level of compliance with norm-formulations; the degree of effectiveness of the law purported to be signified in the norm-formulations, and hence, finally, the extent to which such formulations reflect the actual state of positive law. On close analysis these forces are basically twofold: the first level is that of consistent voluntary adherence to the law (the norms signified in the norm-formulations) by the public and the state itself. The second consists of coercive action taken by the designated agencies of the state to remedy instances where there was not voluntary compliance.

Franz Neumann, focussing on the latter, states that the question whether legal norm-formulations really denote actual effective law, or in his words, whether law is in fact sociologically valid, depends on:

⁷⁵ Ehrlich *Fundamental Principles* 84, 501-502.

⁷⁶ Ehrlich *Fundamental Principles* 41.

⁷⁷ Ehrlich *Fundamental Principles* 489.

⁷⁸ Griffin "Constitutionalism in the United States" 56.

... whether the coercive machinery the "state" provides for coercion on behalf of those legal norms, and whether it has such a power that on the average it can be expected that the legal norm will be fulfilled.⁷⁹

Important as the coercion might be for law's effectiveness and hence for law's factual dimension, it is wrong to over emphasize the coercive measures of agencies of the state as if that were the primary factor for securing the effectiveness of law and thus for sustaining law's factual dimension. Edgar Bodenheimer levels criticism against this approach which he refers to as an academic preoccupation with sanctions which leads to a false view of the law.⁸⁰ The overemphasis on coercion by state agencies stems from a view of the law in terms of which too much is ascribed to the state, not only in regard to the making of law but also in regard to its effectiveness. In this respect I am in agreement with Peter Koller, who is of the opinion that the factual dimension is based on widespread acceptance and voluntary behaviour.⁸¹ I am also in agreement with Edgar Bodenheimer, in whose opinion coercion is meaningless and the threat of coercion impotent if the majority of the populace are unwilling to obey the law.⁸² Bodenheimer maintains that the primary guarantee for the efficacy of a legal order must be the acceptance by the community and that compulsive sanctions are merely secondary and auxiliary. In this regard he states as follows:

A reasonable and satisfactory system of law will be obeyed by most members of the community... Compulsion is used against a non-cooperative minority; in any normal and effectively working commonwealth the number of lawbreakers against whom sanctions must be employed is much smaller than the number of law-abiding citizens.⁸³

Voluntariness and consensus are the backbone of a well-functioning legal order. Thus Bodenheimer is spot on in stating:

We are justified, therefore, in taking the position that the necessity for primary reliance on government force as a means for carrying out the mandates of law indicates a malfunctioning of the legal system rather than an affirmation of its validity and efficacy. Since we should not define a legal system in terms of its pathological manifestations, we should not see the essence of law in the use of compulsion.⁸⁴

⁷⁹ Neumann *Rule of Law* 12.

⁸⁰ Bodenheimer *Jurisprudence* 274. In this respect Bodenheimer alligns himself with the views of George Paton.

⁸¹ Koller 2014 *Ratio Iuris* 163.

⁸² Bodenheimer *Jurisprudence* 273.

⁸³ Bodenheimer *Jurisprudence* 273. Also see Malan 2004 *THRHR* 474-479.

⁸⁴ Bodenheimer *Jurisprudence* 274.

If on close analysis of the socio-political realities it is established that a legal norm-formulation is not factually effective, because of a lack of voluntary compliance or because of major glitches in the coercive apparatus of the state, or of both, the conclusion should be that there is in fact no norm and therefore no positive law on the issue that is articulated in the norm-formulation in question. In that scenario law is devoid of its factual dimension, which is one indispensable half of law's dual wholeness. This is but a half-reality, namely only the ideal or critical side – only the norm-formulations – while the factual or real side – actual effective norms – which is the other vital half of law, is absent. Since the simultaneous presence of both dimensions is required to constitute law, there is no law at all.

In analysing the socio-political realities, two points of focus might be distinguished. In the first place, the spotlight is on the behaviour of public office-bearers; that is, broadly on government and the public administration. In the second place, the spotlight is cast on the behaviour of (segments of) the public in general vis-à-vis the norm-formulations of the officially recognised sources of positive law. In both cases, the level of consistent voluntary adherence and the level of effective law-enforcement by state agencies are decisive. These two points of focus are now discussed in turn with reference to three scenarios. The scenarios call attention to the phenomena of what are here called lapsed, substituted and substituting law.

6.1 *Substituting law arising from the behaviour of public office-bearers*

In scenarios of this kind, the conduct of public office-bearers, in particular of officials who are part of the state administration, shows a pattern of deviation in conflict with the norms of positive law as articulated in the relevant legal norm-formulations. The deviating conduct assumes a fixed pattern either not yet provided for or clearly disallowed by the legal norm-formulations of positive law. In pursuing the new practice office-bearers genuinely judge themselves to be legally bound to follow that pattern; that is, to behave in that particular manner because they ought to do so. Hence, their actual behaviour – *usus* – is accompanied by *opinio iuris*. Once that occurs, new substituting law comprising both the factual and the ideal components of law's dual structure is quite obviously in the process of being created. Its establishment can be

prevented only if effective measures to enforce the law articulated in the legal norm-formulations (which is now under pressure from the substituting new practice) can still be taken. However, if the relevant state agencies are not able to do that, or if they are acquiescent in such behaviour, thus tacitly consenting thereto (*tacitus consensus superioris*)⁸⁵ the disobeyed norm lapses into non-existence. In the latter case, the new law replaces the old one with government as a passive, participating party. The old law ceases to exist as part of positive law and is replaced by the new law that has resulted from consistent, deviating conduct. If the old norm was part of the constitution, it ceases to be part of it, and is by the same token replaced by new constitutional law that has arisen from consistent deviating conduct. The replaced law may be called substituted law and the new law substituting law. This substitution occurs in spite of the fact that the norm-formulation that purports to signify an effective norm of positive law is still there. It also occurs in spite of asserting the constitution's supremacy and relying on a stability that forbids constitutional amendments or allows for constitutional amendments only upon compliance with strict amendment procedures. The norm-formulation in this scenario is misleading, because it is a misrepresentation of the law that is actually in existence. The substitution that has taken place is not reflected in the legal norm-formulations that still have the appearance of the substituted instead of the substituting law. What has occurred in this scenario is that the law has changed without the legal formulation (the text) having effectuated such a change.

6.2 Lapsed law resulting from the behaviour of public office-bearers

In this scenario, public office bearers transgress the norm articulated in legal norm-formulation on a large scale without, as in the first scenario, engaging in consistent deviating behaviour. Or there may be consistency in their deviating behaviour, yet without the *bona fide* belief that they are legally bound to act in that way. There is *usus* but no accompanying *opinio iuris*. In this scenario, the existing law lapses without having been replaced by new law and a legal vacuum, that is, a field not governed by any positive law – a *non liquet* – is opening up. Since government – the legislature

⁸⁵ Insightfully explained by Van den Bergh *Wet en Gewoonte* 39.

and the executive – might be acquiescent in such behaviour and thus be consenting to it, there is *consensus superioris*, which means that government is passively a party to such law, which may include the lapsing of "supreme" constitutional law into non-existence.

6.3 *Substituting or lapsed law arising from the behaviour of (segments of the) public*

What occurs in this scenario is not different in principle from what happens in the previous two, yet is arguably even more incongruent with the trite doctrine of the rule of law and the supremacy of the constitution because the collective agent that creates substituting law or causes existing law to lapse is not agencies of the state but segments of the public; that is, the source of the substituting law, or of the law's falling by the wayside due to conduct is not only the law-making and law-changing (and interpreting) bodies of the state, but also sectors of the public. The behaviour of segments of the public might stray on such a large scale from the positive law as articulated in the legal norm-formulations and the state may so widely fail to effectively enlist its coercive apparatus to remedy such deviations or transgressions (or such apparatus may simply not be in existence) that the positive law once again simply lapses. Depending on the actual socio-political realities, this may occur for longer or shorter periods and over smaller or larger territorial areas within a particular state. On condition that the *usus* and *opinio iuris* requirements for substituting (customary) law be met, such deviating behaviour may, as in the case of the scenario above, also give rise to substituting law, yet arguably in practice less readily than in cases where the agencies of the state through their action are the changing agents.

Conduct that deviates from the law is typical of even the most smoothly functioning constitutional dispensations. It should be clear, therefore, that not all transgressions or deviating conduct would cause the existing law to lapse or to be replaced with new law. Hence, it is obviously not suggested that all deviations call the continued existence of legal norms into question. The outcome of such deviance is a matter of the degree of non-compliance or ineffectiveness, not of ineffectiveness or non-compliance as such. Precisely for that reason I indicated at the outset in part 2 that

questions surrounding the factual dimension will tend not arise in smoothly functioning states with low levels of non-compliance, but rather in weak states with rapidly changing social and political conditions, and thus with low levels of voluntary obedience of law where the institutions of law enforcement are faltering and weak.⁸⁶

The need for considering the above scenarios can be traced back to the insightful observations of Georg Jellinek, who states that the factual continuously breeds new law.⁸⁷ Hence, a realistic assessment of the law that is actually prevailing requires scrutiny of the factual; that is, an assessment of what really occurs in terms of the actual conduct of government and the public. This would avoid the risk of being misled by the norm-formulations of the formally recognised sources of the law, on the actually prevailing condition of the law, especially when these formulations are in the misleading guise of descriptive sentences - that is, truth-asserting sentences as described in part 5 above. A distinction has to be drawn between what one might call the constitution of the formulations in contrast to the actual constitution. The latter, which is an expression of the actual relations of power, might be independent of the formal legal position.⁸⁸ In line with this approach the Dutch jurist H Hijmans, quoted by Van den Bergh, declares that the most important source of the law is not the recognised sources of legislation, custom, legal science or case law, but living reality itself, which carries within it its own law.⁸⁹ Hence many norms in terms of which action takes place fall outside the documentary framework and the complex of the formally

⁸⁶ This view of the fate of law invokes the perspective that positive law and a well-functioning constitutional state presuppose the existence of a "perfect" imbalance of forces between the existing positive law on the one hand and the forces that either transgress without necessarily trying to replace the existing law (eg crime) or forces that expressly seek to replace it (forces that seek to destabilise the government and / or the state). Once the challenging forces grow stronger, and compliance with the existing law gets haphazard, resulting from less voluntary adherence and / or weaker enforcement by state agencies, that imbalance gets unsettled and the relationship moves in the direction of a balance of these forces, which causes the gradual lapse of the "existing" law or, depending on the strength and success of the challenging forces, constituting new (substituting) law. See Malan 2004 *THRHR* 474-479.

⁸⁷ Jellinek *Algemeine Staatslehre* 340, 368; also see Ehrlich *Fundamental Principles* 86.

⁸⁸ Jellinek *Algemeine Staatslehre* 341.

⁸⁹ The original Dutch text reads: "Ik zou mijn meening bij voorkeur aldus willen uitdrukken dat de voornaamste rechtsbron niet is de wet noch de gewoonte en evenmin de rechtswetenschap of de rechtspraak, ...maar de levende werkelijkheid zelf. Deze draagt haar recht in zich, en de rechtsorde is één haarer zijde." Van den Bergh *Wet en Gewoonte* 93. Van den Bergh does not state which work of Hijmans he quoted from.

recognised law and the constitution. A reliable reflection of the actual constitution must therefore account for these non-formally recognised practices.⁹⁰

It is significant that in spite of his pure theory of law that limits the analysis of positive law to the norms validly ordained by designated organs of state to make and amend law, Hans Kelsen expressly acknowledges the operation of the factual dimension in his analysis of the positive law. It might even be more apt to say that Kelsen, in spite of his pure theory of law, cannot in the final analysis escape the law-creating and law-substituting force of the factual dimension when he acknowledged that the validity of norms depends in part on their effectivity, so that there has to be at least a minimum degree of obedience of the law for the law to remain valid.⁹¹ Hence, a norm that is never obeyed is no longer valid⁹² and therefore ceases to be a norm of positive law. It is possible, says Kelsen, that a norm may forfeit its validity due to consistent disobedience. Kelsen declares:

If effectiveness in the developed sense is the condition for validity not only for the legal order as a whole but also for a single legal norm, then the law creating function of custom cannot be excluded by statutory law, at least not as far as the negative function of desuetude is concerned.⁹³

The same is true for Hart, who formulates

(t)wo minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.⁹⁴

JAG Griffith is specifically alive to the operation of the force of the factual dimension. He maintains that everything done in the belief that legally it ought to be done (that is, with the necessary *opinio iuris*, which has a binding effect on people, is (included in) the constitution, regardless of what the text – the norm-formulations of the statutory instrument – that goes by the name constitution provides. In this model the

⁹⁰ See further the discussion of Andrews *Constitutions and Constitutionalism* 21-22.

⁹¹ Kelsen *Pure Theory of Law* 11, 211-212; Kelsen *General Theory of Law and State* 119.

⁹² Kelsen *Pure Theory of Law* 213.

⁹³ Kelsen *Pure Theory of Law* 213.

⁹⁴ Hart 1994 116.

ever altering constitution undergoes consistent changes, as the constitution is finally that which is actually happening.⁹⁵ Thus Griffith bluntly declares, to my mind not without merit: "Everything that happens is constitutional. And if nothing happens that would be constitutional also."⁹⁶

What emerges clearly from this exposition is that a reliable grasp of the actual state of the positive law at any given time requires that the behaviour of state agencies and the public continuously be considered. That may show that some ostensible rules of positive law are but paper rules, as Llewellyn⁹⁷ called them; that is, that some apparent norms are in fact no more than formulations (words and sentences) but not actual norms, and on that score not actual positive law. On the one extreme, in the smoothly functioning state with stable socio-political conditions the norms are largely voluntarily obeyed, and they are enforced by state agencies in the exceptional cases where they are not. Thereafter, however, follows a sliding scale of increased disregard of the norms up to the point where conforming conduct is so haphazard that only the norm-formulations – the paper rules – remain. Once a certain level of disregard is reached, the norm lapses and only the formulation remains. A norm-formulation gets increasingly misleading as the actual deviating behaviour increases. It reaches the zenith of its deception when deviating conduct is at its worst. In spite of the fact that the dominating socio-political forces, which once produced conforming conduct, have lapsed in favour of new forces and accompanying deviating conduct, the norm-formulation still falsely pretends that the lapsed norm – the substituted law – is in existence. It might be quite difficult to reliably determine whether the norm-formulation reflects the actually existing law, or whether under the cloak of these formulations the (old) law has already lapsed or has been replaced by new substituting law. The reason for this difficulty is that these changes occur largely tacitly. Unlike formal amendments (of the text of the constitution or legislation), they are not reflected in the changed text of the law, although they may in fact be much more profound than those that are recorded in the text. Thus Steven Griffin states:

⁹⁵ Griffith 1979 *MLR* 19.

⁹⁶ Griffith 1979 *MLR* 19.

⁹⁷ Llewellyn *Jurisprudence* 21 et seq.

One need not believe in rule-of-law constitutionalism to think that the changes in the role of the national government in the regulation of the economy proposed by President Roosevelt were so fundamental that they should have been authorized through appropriate constitutional amendments. The New Deal changes were likely the most significant changes in the constitutional system made in the twentieth century, yet one cannot tell from the text of the Constitution that any changes occurred at all.⁹⁸

Hence, new law, including new constitutional law, may be in existence in place of the substituted law long before it is actually realised that the change has in fact taken place.⁹⁹

In a state in which the leading socio-political forces underpin the legal norm-formulations of positive law (including the constitution) the behaviour of the inhabitants and public office-bearers will largely correspond with these formulations. The norm-formulations will therefore largely be a reliable reflection of the actually prevailing law in such a state. In such a scenario, we have what in trite terms could be described as a well-functioning constitutional state (*Rechtsstaat*). In the event of an inquiry into what the law in such a situation entails, it will suffice to consult the norm-formulation of the acknowledged sources of positive law. By the same token, a reliable image of the constitution could then be acquired solely with reference to the formulation of the statutory instrument(s), more in particular the constitution act and its interpretation by the relevant authoritative bodies – primarily the courts. Knowledge of the law and the constitution could in that case be acquired solely by consulting the legal norm-formulations of the acknowledged sources of positive law. On the basis of the assumption that the sources of law are fully constituted by the whole collection of norm-formulations of positive law, legal education in such a state consists entirely in systematically acquainting law students with such formulations.

But here is the rub – the first rub: at the moment of their promulgation the legal norm-formulations might correctly reflect social behaviour. However, from the time of their promulgation there might be discrepancies between the dominant socio-political forces and the accompanying behaviour by office-bearers and segments of the public, the latter being underpinned by dominant socio-political forces in the politico-

⁹⁸ Griffin "Constitutionalism in the United States" 51.

⁹⁹ Van den Bergh *Wet en Gewoonte* 42.

constitutional dispensation concerned, but not reflected in the norm-formulations. In that case, the legal norm-formulations might reflect a misrepresentation of the law from the moment of their promulgation.

Here one has to be alive to the fact that the legal norm-formulations at the time of their promulgation reliably record the actual socio-political forces and accompanying behaviour does not mean that the formulations will remain such a reliable record in future because legal language – legal norm-formulations – are directive and influential, as Olivecrona has reminded us (and as we have seen in parts 3 and 5.2),¹⁰⁰ yet not able to arrest and rigidify existing socio-political forces and social behaviour.¹⁰¹ The law, more specifically the constitution, operating in the domain of politics, is particularly prone to changing power relations and social behaviour. For that reason it might reliably record the power relations of the immediate past¹⁰² yet be unable to predict the future. Norm-formulations might be promulgated in highly fluctuating social conditions in which socio-political forces and the accompanying behaviour would soon be at variance – possibly patently at variance – with the norm-formulations, and this could cause a swift lapse or supersession of the law signified in formulations.

In both of these scenarios actual behaviour will have to be assessed first in order to establish the degree of equivalence (or discrepancy) between the norm-formulations and such behaviour. Until that enquiry is concluded, no decisive conclusion can be reached on what the law and the constitution actually entail. By the same token, a sound constitutional state cannot be proclaimed to be in existence solely with reference to the norm-formulations of the constitution's text and the interpretations thereof by the designated agencies of the state. The norm-formulations (the ideal dimension) of the law and the constitution must, as it were, be verified with reference to the actual socio-political forces and accompanying behaviour before reliable conclusions may be reached on what the law really entails. The norm-formulations are therefore but the first *prima facie* indications of what the law entails. The outcome of the inquiries into the actual behaviour of the public and office-bearers underscores

¹⁰⁰ Olivecrona *Law as Fact* 253.

¹⁰¹ Van der Hoeven "De Waarde van de Grondwet" 41.

¹⁰² Röling *International Law* x.

the fact that the law and the constitution, irrespective of the imposing context of the omnipresence and supremacy of the law, might in fact not necessarily be as omnipresent and supreme as the doctrine of the rule of law and constitutional supremacy profess. In the final analysis, it might be argued that although constitution-making and law-making bodies are capable of defining and controlling legal norm-formulations, the actual content of law and of the constitution is determined in addition by a raft of socio-political forces (alongside the formulations) as manifested in accompanying behaviour.¹⁰³ Thus, Stephen Griffin remarks with respect to the constitutional order of the United States of America that more constitutional truth can be obtained by examining the way government operates than by reading the document.¹⁰⁴

Here we encounter the second rub: that jurists are clearly not well placed to conduct the kind of socio-political inquiry which is necessary to acquire insight into actual social behaviour. In fact, the weakness of jurists in this field was commented on in rather forthright terms by Karl Llewellyn, a renowned jurist himself, when he noted that lawyers are admirable in word techniques and on the facts of a particular case but helpless and even childish in their social bearings when it comes to broad social facts. The reason for this is that the activities of jurists are text-based - that is, formulation-conditioned. Their attention is directed to the text, which they interpret not to the socio-political forces outside the text, which are the terrain of social scientists and astute political observers. Jurists are assigned texts-collections of legal norm-formulations, which they perceive to embody the law. They are not required to and are not schooled in assessing the actual sociological validity of the text; that is, in the actual effectiveness of law. They simply interpret the text to the best of their ability, assuming that it signifies actual law, regardless of whether or not deviating behaviour has reduced it to mere formulations instead of actual norms. Hence, whereas lawyers are particularly well-positioned to pronounce on the meaning of the legal norm-formulations, that is, on law's ideal dimension, they are particularly ill-positioned and

¹⁰³ See in this regard the observations by Jacob *et al Courts, Law and Politics* 36, concerning the criminal justice system.

¹⁰⁴ Griffin "Constitutionalism in the United States" 56.

untrained to pronounce on the factual or real dimension of law. And since the factual dimension is crucial for determining the actual state of the law, it might appear to be rather ironic that jurists are often not as well-equipped as might generally be accepted to say what the law really entails. This startling statement obviously holds true only in situations where there are material discrepancies between norm-formulations (the ideal dimension) and the actual norms (the factual dimension), which, however, might be a common and wide-ranging occurrence.

7 Conclusion

A clear understanding of the factual requisite of law underscores the need for continuous social observation and inquiry in order to reliably fathom the trends in social behaviour and thus the actual state of the law. If we fail to do that, we run the risk of misleading ourselves with acquiring "knowledge" of the façade of law and an apparent constitution that differs from the actual constitution and fails to provide reliable insight into the actual state of the governing process.¹⁰⁵ That risk looms large if the doctrine of the rule of law and the supremacy of the constitution is incorrectly perceived as being descriptive or factual in nature instead of as an ideal or prescriptive doctrine.

As indicated, the legal norm-formulations – the ideal dimension of law – cannot be relied upon to access reliable knowledge of the actual state of the law. Therefore jurists should when circumstances require – when there are indications of conduct that materially deviates from the norm-formulations – seek assistance from social scientists and political observers in a joint effort to acquire reliable knowledge about the factual or real dimension of the law and so to acquire knowledge of the actual (changing) state of the law. This is particularly important in view of the fact that changes made to the constitution through direct yet often tacit conduct instead of by way of constitutional amendments (in terms of the trite formal-static view of the law and the constitution described above) by both state and non-state actors might in fact

¹⁰⁵ Sartori 1962 *Am Pol Sci J* 861.

often be much more profound and significant than formal amendments to the law and the constitution.¹⁰⁶

Legal education should also highlight the inadequacy of the legal norm-formulations and the accompanying need for knowledge forthcoming from social inquiry.

It stands to reason that the ability of the state to effectively enforce the law through coercive measures is a crucial focus of the research on the factual dimension. However, it would be wrong to have a limited statist focus when such research is undertaken, because non-state actors – sectors of the general public – might also be important collective agents in determining the actual state of the law. Their behaviour might help to stabilise existing law. However, it might also cause such law to lapse or even to be replaced by substituting law. The focus should therefore also be on the behaviour of non-state actors. That suggestion is specifically pertinent in weak states with ill-established and malfunctioning institutions.

¹⁰⁶ See in this regard, for example, the research done by Ackermann 2007 *Harv L Rev* 1738 *et seq*; Griffin "Constitutionalism in the United States"; Tushnet *Constitution of the United States of America* 239-279; Van der Hoeven *De Plaats van de Grondwet*; and various authors in Mcloughlin and Walker *Paradox of Constitutionalism*.

BIBLIOGRAPHY

Literature

Aarnio *Essays on the Doctrinal Study of Law*

Aarnio A *Essays on the Doctrinal Study of Law* (Dordrecht Springer 2011)

Ackermann 2007 *Harv L Rev*

Ackermann B "Oliver Wendell Holmes Lectures: The Living Constitution" 2007

Harv L Rev 1737-1812

Alexy 2004 *Ratio Juris*

Alexy R "The Nature of Legal Philosophy" 2004 *Ratio Juris* 156-166

Alexy 2008 *Ratio Juris*

Alexy R "On the Concept and the Nature of Law" 2008 *Ratio Juris* 281-299

Andrews *Constitutions and Constitutionalism*

Andrew WG *Constitutions and Constitutionalism* (Van Nostrand Toronto 1968)

Barak 2002-2003 *Harv L Rev*

Barak A "A Judge on Judging: The Role of the Supreme Court in a Democracy"

2002-2003 *Harv L Rev* 19-162

Berman *Law and Revolution*

Berman H *Law and Revolution: The Formation of the Western Legal Tradition*

(Harvard University Press Cambridge MA 1983)

Bingham 1912 *Mich L Rev*

Bingham JW "What is the Law?" 1912 *Mich L Rev* 1-25 (reprinted in Summers

BS *American Legal Theory* (Dartmouth Aldershot 1991)

Bodenheimer *Jurisprudence*

Bodenheimer E *Jurisprudence: The Philosophy and Method of Law* (Harvard

University Press Cambridge MA 1974)

Boulle *et al Constitutional and Administrative Law*

Boulle L *et al Constitutional and Administrative Law* (Juta Cape Town 1989)

Carlyle *History of Medieval Political Theory - Vol 3*

Carlyle RW *A History of Medieval Political Theory in the West - Vol 3: Political Theory from the Tenth Century to the Thirteenth Century* (Blackwood Edinburgh 1928)

Carlyle *History of Medieval Political Theory - Vol 5*

Carlyle RW *A History of Medieval Political Theory in the West - Vol 5: Political Theory from the Thirteenth Century* (Blackwood Edinburgh 1928)

Carlyle *History of Medieval Political Theory - Vol 6*

Carlyle RW *A History of Medieval Political Theory in the West - Vol 6: Political Theory from 1300 to 1600* (Blackwood Edinburgh 1936)

Dworkin *Taking Rights Seriously*

Dworkin RM *Taking Rights Seriously* (Duckworth London 1977)

Dworkin *Law's Empire*

Dworkin RM *Law's Empire* (Belknap Cambridge MA 1986)

Ehrlich *Fundamental Principles*

Ehrlich E *Fundamental Principles of the Sociology of Law* (translated from the original German by WL Moll) (Harvard University Press Cambridge MA 1936)

Griffin "Constitutionalism in the United States"

Griffin SMG "Constitutionalism in the United States: From Theory to Practice" in Levison S *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press Princeton NJ 1996) 200-220

Griffith 1979 *MLR*

Griffith JAG "The Political Constitution" 1979 *MLR* 1-21

Hart *Concept of Law*

Hart HLA *The Concept of Law* (Oxford University Press Oxford 1994)

Hart "American Jurisprudence"

Hart HLA "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream" in Hart HLA (ed) *Essays in Jurisprudence and Philosophy* (Oxford University Press Oxford 1983) 123-144

Jacob *et al Courts, Law and Politics*

Jacob H *et al Courts, Law and Politics in Comparative Perspective* (Yale University Press New Haven 1996)

Jellinek *Algemeine Staatslehre*

Jellinek G *Algemeine Staatslehre* (Julius Springer Berlin 1919)

Kelsen *General Theory of Law and State*

Kelsen H *General Theory of Law and State* (translated from the original German by A Wedberg) (Russel & Russel New York 1961)

Kelsen *Pure Theory of Law*

Kelsen H *Pure Theory of Law* (translated from the original German by M Knight) (University of California Press Berkeley CA 1967)

Koller 2014 *Ratio Iuris*

Koller P "On the Nature of Norms" 2014 *Ratio Iuris* 155-175

Llewellyn *Jurisprudence*

Llewellyn KN *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press Chicago Ill 1962)

Malan 2004 *THRHR*

Malan K "Die Reg se Afhanklikheid van Mag: Magswanbalans as Voorwaarde vir die Positiewe Reg en die Regstaat" 2004 *THRHR* 474-479

Malan 2012 *De Jure*

Malan K "The Rule of Law Versus *Decisionism* in the South African Constitutional Discourse" 2012 *De Jure* 272-305

Malan 2015 *THRHR*

Malan K "Die Dinamika van die Hedendaagse Oppermagtige Grondwet Beskou in die Lig van Voor- en Vroegmoderne Opvattinge van Regsoppergesag en Populêre Soewereiniteit" 2015 *THRHR* 248-268

MacCormick 1974 *LQR*

MacCormick N "Law as Institutional Fact" 1974 *LQR* 102-129

Mcloughlin and Walker *Paradox of Constitutionalism*

Mcloughlin M and Walker N (eds) *The Paradox of Constitutionalism: Constituent Power and the Constitutional Form* (Oxford University Press Oxford 2007)

Mommsen and Krueger *et al Digest of Justinian*

Mommsen T and Krueger P *et al The Digest of Justinian* (Latin English translation edited by A Watson) (University of Pennsylvania Press Philadelphia PA 1985)

Neumann *Rule of Law*

Neumann FL *The Rule of Law: Political Theory and the Legal System in Modern Society* (Berg Warwickshire 1986)

Niiniluoto "Truth and Legal Norms"

Niiniluoto I "Truth and Legal Norms" in MacCormick N *et al World Congress on Philosophy of Law and Sociology: Conditions of Validity and Cognition in Modern Legal Thought* (Steiner Stuttgart 1985) 168-190

Olivecrona *Law as Fact*

Olivecrona KN *Law as Fact* (Steven and Sons London 1971)

Pennington "Law, Legislative Authority and Theories"

Pennington K "Law, Legislative Authority and Theories of Government 1150-1300" in Burns JH (ed) *The Cambridge History of Medieval Political Thought* (Cambridge University Press Cambridge 1988) 424-453

Radbruch "Statutory Lawlessness"

Radbruch G "Statutory Lawlessness and Supra-Statutory Law (1946)" (translated from the original German by B Litschewski and L Paulson) 2006 *OJLS* 1-11

Röling *International Law*

Röling BVA *International Law in an Expanded World* (Djambateen Amsterdam 1960)

Sartori 1962 *Am Pol Sci J*

Sartori G "Constitutionalism: A Preliminary Discussion" 1962 *Am Pol Sci J* 853-864

Tushnet *Constitution of the United States of America*

Tushnet M *The Constitution of the United States of America: A Contextual Analysis* (Hart Oxford 2009)

Van den Bergh *Wet en Gewoonte*

Van den Bergh GCJJ *Wet en Gewoonte: Historische Grondslagen van een Dogmatisch Geding* (Deventer Kluwer 1982)

Van der Hoeven *De Plaats van de Grondwet*

Van der Hoeven J *De Plaats van de Grondwet in het Constitutionele Recht* (Tjeenk Willink Zwolle 1958)

Van der Hoeven "De Waarde van de Grondwet"

Van der Hoeven J "De Waarde van de Grondwet" in Boukema PJ and Meuwissen DHM (eds) *Grondwet en Grondwetsherziening* (Tjeenk Willink Zwolle 1976) 496-520

Van Drunen *Law and Custom*

Van Drunen D *Law and Custom: The Thought of Thomas Aquinas and the Future of the Common Law* (Peter Lang New York 2003)

Voet *Commentary on the Pandects*

Voet J *Commentary on the Pandects (Paris Edition 1829)* (translated from the original Dutch by P Gane) (Butterworth Durban 1955)

Legislation

Basic Law of the Federal Republic of Germany, 1949

Constitution of the Republic of Kenya, 2010

Constitution of the Republic of South Africa, 1996

LIST OF ABBREVIATIONS

| | |
|--------------|--|
| Am Pol Sci J | American Political Science Journal |
| Harv L Rev | Harvard Law Review |
| LQR | Law Quarterly Review |
| Mich L Rev | Michigan Law Review |
| MLR | Modern Law Review |
| OJLS | Oxford Journal of Legal Studies |
| THRHR | Tydskrif vir die Hedendaagse Romeins-Hollandse Reg |

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

K Malan*

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

* Koos Malan. BA Hons (UP), BIur LLB LLD (UNISA) Professor of Public Law, University of Pretoria. Email: koos.malan@up.ac.za.

(*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.