Introduction

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Legal Certainty and Fundamental Rights

A Cross-Disciplinary Approach to Constitutional Principles in German and South African Law

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Introduction

I

As emerges from our preface above, this is the third volume arising from research collaboration between the law faculties of the University of Johannesburg and the Universität Augsburg. More on this, what we would term "proud", history is related in the introductions to the previous two volumes, and we leave it there, except for reflecting briefly on the final paragraph of our first joint publication, *Transnational Impacts on Law: Perspectives from South Africa and Germany (2017)*, in which we expressed the hope that "we will one day be able to look back on a series". Now, in the third publication arising from our collaboration, and with the fourth already being conceptualised, it is perhaps not inappropriate to celebrate the existence of our *Augsburger-Johannesburger-Schriftenreihe*, a *Reihe* which not only provides the opportunity for collaboration between established legal scholars from South Africa and Germany, but also actively encourages the participation of younger researchers.

II

Commenting on one of the South African contributions *Aqilah Sandhu*, one such younger researcher, refers to the "lively tension" identified by the legal philosopher, *Gustav Radbruch*, between justice and legal certainty stating as follows (p. 137 et seq., footnotes omitted):

> "He [*Radbruch*] stated ... that 'legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness [the German *Zweckmäßigkeit*] and justice'. He suggested resolving the conflict between justice and legal certainty using the famous formula that came to be known as the '*Radbruch* formula': 'The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law", must yield to justice.' A law, that does not even attempt to serve justice, that deliberately betrays 'equality, the core value of justice' is,

according to *Radbruch*, 'not merely "flawed law", it lacks completely the very nature of law' (i.e. 'statutory *Unrecht*')."

In constitutional states such as Germany and South Africa, this statement must of course be filtered by fundamental rights. Law violating fundamental human rights is, in principle, intolerable. This, perhaps, is the closest one can get to a general proposition running through the wide ranging and multi-disciplinary contributions contained in this book. Legal certainty is important, but fundamental rights and justice cannot be sacrificed on the altar of legal certainty.

III

The first contribution emerges from the highly publicised phenomenon of state capture in South Africa. *Hennie Strydom* and *Martha Bradley* paint a dismal picture of the future in their contribution "The Rise of the Neo-Patrimonial State in South Africa: From the Rule of Law to the Rule of Persons" (p. 19 et seq.). They relate how, especially the Zuma administration, established patrimonial networks in key state-owned enterprises and governmental institutions for personal gain in South Africa, which are largely still intact and unaccountable. Chillingly, in conclusion, they identify factors that may render efforts at dismantling this neo-patrimonial state ineffective. This has amounted to a shift from the rule of law to the rule of persons characterised, as *Stefan Lorenzmeier* puts it in his response (p. 43 et seq.), "by the co-existence and interaction between the formal, rule-based institutions of a modern state and the informal practices of governance encountered in patrimonial forms of authority" (p. 43). Since this type of shift from impersonal to personal power is not for the moment discernible in Germany or the EU, Lorenzmeier's response focuses more generally on the rule of law in Germany and the EU. A "stark contrast" emerges regarding "the way in which the rule of law is dealt with in the different legal systems" (p. 49) – a contrast that lies not so much in relation to legal rules than their application. Readers are confronted by the harsh reality that justice and fundamental rights may be threatened not only by over-emphasising legal certainty, but also by persons in power circumventing the rule of law for personal gain.

The next three contributions have an international-law focus. In the first of these, "Legal Certainty in terms of Head of State Immunity: The Article 27(2) Conundrum" (p. 53 et seq.), *Roxan Venter* and *Martha Bradley* plead the case for legal certainty regarding the accountability, before the Interna-

tional Criminal Court, of heads of state who have committed international crimes. The *factual background* of their contribution is the failure of Jordan to arrest President Al-Bashir when he visited the Hashemite Kingdom in 2017 and the ensuing proceedings before the International Criminal Court. The disregard of arrest warrants issued against Al-Bashir by member states to the Rome Statute, including by South Africa,[1] has strengthened the call for legal certainty in this regard. The *legal background* is what *Thilo Rensmann*, who responded to their contribution (p. 85 et seq.), terms the "Babelesque confusion regarding the proper foundations and limits of head of state immunity before international criminal tribunals" (p. 88). In this respect Venter and Bradley argue for the horizontal application of Article 27(2) of the Rome Statute, a view subsequently endorsed by the Appeals Chamber of the ICC in the Jordan matter on 6 May 2019. However, the hope of the authors that this decision would bring certainty to the interpretation of the treaty was dashed by the insistence of the Appeals Chamber to base its decision on customary international law, without evidence of either usus or opinio juris – the basic tenets of customary international law (an issue that is also explored by Roux and Hassen in their contribution discussed immediately below). Rensmann points out that this approach by the Appeals Chamber attracted much uncomfortable scholarly criticism of the ICC – criticism to which the Venter/Bradley/Rensmann cluster in this book now contributes meaningfully.

The focus remains on legal certainty and international crimes in the next contribution (p. 103 et seq.). Pointing to the fact that international tribunals have the difficult task of "maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order" (p. 130, footnote omitted) *Mispa Roux* and *Sabreen Hassen* examine core international crimes recognised in the Rome Statute and the Malabo Protocol with reference to the nulla poena and nullum crimen principles, as well as the basic requirements of customary international law – usus and opinio juris. In her comment on this contribution (p. 135 et seq.) *Aqilah Sandhu* explores the tension between legal certainty and fundamental rights (or legal certainty and the retroactive punishment of international crimes), the nulla poena and nulla

1 On South Africa's own shameful failure to arrest Al-Bashir when he visited the country in 2015, see *Hennie Strydom*, "Treaty-making and select foreign policy matters under constitutional and judicial scrutiny in South Africa" in Charl Hugo & Thomas M.J. Möllers (eds.), Transnational Impacts on Law: Perspectives from South Africa and Germany, (Nomos and Juta, 2017), (the first book in the Augsburger-Johannesburger-Schriftenreihe).

crimen principles in the European legal order, and, finally, the impact of supranational human rights bodies on domestic criminal law.

This domestic focus of Sandhu's comment focuses on the German twin-track system of sanctions which differentiates between penalties or punishments ("*Strafen*") and measures of correction and prevention ("*Maßregeln der Besserung und Sicherung*"). Although not the primary objective of her comments, they tie in neatly with another contribution in the book, namely that of *Murdoch Watney*, "Preventive Justice and the Dangerous Offender: Seeking Solutions to Protect Society" (p. 189 et seq.). Watney scrutinizes preventive justice measures internationally with reference to the law of England and Wales, Canada and Germany stressing the important call that such measures must be subject to universally accepted fundamental human rights.

Mispa Roux is also the author of the final international-law contribution, "The Significance of the *Erga Omnes* Obligation to Prosecute Genocide for Legal Certainty in International Criminal Law" (p. 157 et seq.). She makes the point that the domestication of international criminal law is important but that the erga omnes nature of gross human rights violations, such as genocide, may never be disregarded. The contribution shows the way in which the international community can comply with the erga omnes obligation to prosecute genocide and thereby ensure legal certainty in international criminal law.

The next contribution investigates fundamental rights and legal certainty in a very different context – the use of cannabis. As explained by *Kgomotso Mokoena* in her contribution, "The Legislative Possibilities and Challenges Relating to the Private Possession and Use of Cannabis in South Africa" (p. 221 et seq.), the possession, use and cultivation of cannabis for private purposes has recently been decriminalised by the constitutional court in South Africa. The court took the view that the prohibition constituted an unjustifiable limitation of the fundamental right to privacy. While supporting the judgment in principle she makes the point that it has raised a number of unanswered questions, and, specifically, the implications of privacy in this context. The impact of the judgment on the rights of employers to discipline employees as a result of positive drug tests of employees is a particular focus of her contribution. *Johannes Kaspar*, in his response (p. 239 et seq.), points out that in Germany it is not the use of, but the possession of and dealing in, cannabis that is criminalised (the purpose being the protection of society). Hence, the right to privacy does not feature. Exemption from criminal liability in Germany for small quantities arises on a procedural level, but, since the concept of "small quantity" is not defined, it has led to marked differences from state to

state, which is problematic in the context of the constitutional principle of equality. This leads him to the conclusion that further steps towards decriminalisation should be considered in Germany.

The focus moves to environmental law in the contribution of *Jenny Hall*, "Sustainable Development, Bureaucratic Implementation and the Need for Jurisprudential Certainty" (p. 257 et seq.). She argues that whilst sustainable development is the dominant approach to address environmental problems, environmental legislation does not provide, and is unlikely ever to be capable of providing, a level of detailed guidance on how it should be applied in the context of a particular decision with its own particular set of facts – i.e. on how to balance the three different facets of sustainable development, the social, economic and environmental. Against this background she explores the important potential role of South African courts to guide decision-making by the multitude of officials involved in environmental decisions and identifies some strengths and shortcomings in this regard. In response *Matthias Rossi* (p. 289 et seq.), deals with the statutory development of sustainable development in German and European environmental law, after expressing scepticism as to whether a clear line can be achieved in case law, since each case is based on its own factual circumstances and the decision is influenced by the submissions made by the parties. In his view, therefore, one should not expect to derive "abstract-general-legal principles from court rulings that might, beyond the concrete dispute, even clarify or avoid all other future issues of dispute" (p. 290). In his conclusion, co-titled "disillusion", Rossi cautions against overstating the value of the concept and warns against it being used as a "meta-argument that prevents the discussion of the concrete factual arguments" (p. 298).

The next cluster deals with fundamental rights in the context of labour law. The fundamental rights of vulnerable workers in the informal economy are considered by *Elmarie Fourie* and *Marius van Staden* in their contribution, "Labour Law, Vulnerable Workers and the Human Rights Paradigm" (p. 301 et seq.). They explore the role of judicial interpretation of statutes to extend key human rights to vulnerable workers (such as informal street vendors) – with specific emphasis on the fundamental right to human dignity. Their arguments lead to the conclusion that laudable developments in labour law have been achieved not only by "traditional labour law instruments", but also by "other legal regimes" (p. 330); hence they call for an interdisciplinary approach which will lead to labour law not functioning in isolation but in conjunction with administrative law, social security law, corporate law, family law and human rights. *Martina Benecke*, in turn (p. 335 et seq.), focuses on the right against discrimi-

nation. Her discussion centres on the *Allgemeines Gleichbehandlungsgesetz (AGG)* which had implemented the European Directives against discrimination, the prosecution of discrimination and the available sanctions, the potential claimants and defendants in discrimination cases, the prohibited grounds of discrimination and their significance, legal institutions against discrimination, and the abuse of anti-discrimination laws.

In the penultimate contribution, "Equality, Legal Certainty and Insolvency" (p. 353 et seq.), *Kathleen van der Linde* and *Juanitta Calitz* investigate whether there is a link between the fundamental or constitutional right to equality and the equal treatment of creditors in insolvency law. Their argument leads them to the conclusion that any correlation in this respect is superficial; the paritas creditorum principle, even in its eroded form pertaining only to concurrent creditors, represents formal equality as opposed to the substantive or transformative equality guaranteed by the constitution. They put forward the point, however, that it may be possible through judicial development of the common law or by legislative intervention, to design a set of general rules to counter the disparate effect of insolvency on vulnerable creditors. In his response (p. 383 et seq.) *Michael Kort* points out that there is no general principle in German civil or commercial law that debtors must treat their creditors equally, and that even in insolvency law the principle of equal treatment of creditors is not adhered to strictly. Creditors are instead divided into groups, some of which are privileged over others, and equal treatment of creditors applies only within a group. He considers various specific issues relating to the winding-up process of a German company, including some legal policy considerations, and concludes in summary that liquidators must focus solely on the purpose of the winding up, and not on any additional requirement of treating creditors equally.

The final contribution deals with the regulation of financial institutions in South Africa. The background is the decision to move from the silo model (in terms of which different types of financial institutions are regulated in all respects by different regulators) to the twin peaks model which differentiates between prudential and market conduct regulation. The Prudential Authority now has the responsibility for the prudential regulation of all financial institutions, and the Financial Sector Conduct Authority the responsibility for the market conduct of all financial institutions. This development is described by *Daleen Millard* and *Choene Jacqueline Maholo* in their contribution, "Market Conduct Regulation in Perspective: Triumphs and Tribulations post Twin Peaks" (p. 393 et seq.). As is evident from the title the focus is on the proposed market conduct regulation as envisaged by the Conduct of Financial Institutions Bill (the legislation

governing this aspect of the Twin Peaks model not yet having been implemented). They identify positive aspects but also warn that this new dispensation is likely to bring about an expensive bureaucracy that may not be conducive to promote the important cause of financial inclusion in South Africa. In response (p. 423 et seq.) *Thomas M.J. Möllers* shows that Germany also has such a two-tier system. Nevertheless, the Wirecard balance sheet scandal in the summer of 2020 demonstrates loopholes in the law governing the capital market. The German Federal Financial Supervisory Authority (BaFin) only works in public interest; cases involving potential criminal offences are handed over to the local public prosecutor's offices which may have little expertise in this particular field. In addition, there is no corporate criminal liability in Germany. De lege ferenda, it would be preferable to give jurisdiction over such cases to an Attorney General's Office. Alternatively, the BaFin should be given the power to impose regulatory sanctions on corporations rather than handing over the cases to the public prosecutor's office. On the European level, Möllers pleads for a significant expansion of the European Securities and Markets Authority's (ESMA) power.

IV

In paragraph II, we identified the golden thread binding together the wide-ranging and diverse contributions described above. We conclude by revisiting one *observation* and one *image*. The observation comes from the Fourie/Van Staden paper in which the authors plead that labour law should not be functioning (or studied) in isolation but in conjunction with administrative law, social security law, corporate law, family law and human rights. We believe that both sides of this sentence can be extended. This observation should not be restricted to labour law, and the list of conjuncts should similarly be extended. Different fields of law enrich one another, and good legal scholars need to venture out of their comfort zones to become great legal scholars.

The observation, however, must be extended further, as has been done in all clusters of this book, to include not only different aspects of the law of a particular jurisdiction, but also the law of other jurisdictions. Different jurisdictions can enrich one another. We believe this to be true also for Germany and South Africa.

This brings us to the image – the silo referred to in the Millard/Maholo paper. The point we wish to underscore with this image is essentially the

same: law is not to be sought in silos – neither in silos representing specific fields of law, nor in silos representing a specific jurisdiction.

We trust that *Legal Certainty and Fundamental Rights: A Cross-Disciplinary Approach to Constitutional Principles in German and South African Law* will assist all who read it to appreciate these fundamental truths.

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