

**THE SOUTH AFRICAN CONSTITUTION AS A REFLECTION
OF THE *SOCIETAS* UNDERSTANDING OF THE STATE:
AN OAKESHOTTIAN PERSPECTIVE**

by

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Abstract

This study is an application of the political theory of Michael Oakeshott aimed at enhancing understanding of the South African state. Oakeshott posits that the modern state is comprised of two separate modes of association, namely *societas* and *universitas*. *Universitas* refers to an association to attain a specific substantive purpose, while *societas* is an association based on common submission to the recognition of, and adherence to, prescribed formal laws. Each tends towards self-destruction when the character of a given state is reflected by that mode of association exclusively. The presence of both modes of association in tension with each other produces a stable state.

The South African state has been shown to reflect a dominantly *universitas* character, but, since a monopolar state cannot exist, it follows that the *societas* understanding of the state must also be present.

In this study, the Constitution of the Republic of South Africa, Act 108 of 1996, is assessed to determine whether it reflects a *societas* understanding of the state. Two formal conditions for a *societas* are identified in the work of Oakeshott, namely a system of rules and norms, and the recognition of this system as being authoritative. These formal conditions are employed as a benchmark against which to test the character of the South African Constitution.

Key words:

Oakeshott, *societas*, *universitas*, South African Constitution, character of a state

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Chapter 1:

Introduction

1.1 Background

This study aims to assess whether the Constitution of the Republic of South Africa, Act 108 of 1996 (the 'Constitution') (South Africa 1996), reflects the *societas* mode of association, as described by Michael Oakeshott.

Oakeshott (1975, 1976, 1991, 1993, 1996) claims that the modern state is characterised by a synthesis of two styles of association, *universitas* and *societas*. *Universitas* refers to an association aimed at the attainment of a specific substantive purpose, while *societas* is an association based on common submission to the recognition of and adherence to prescribed formal laws. (These terms are discussed in more detail below.) South African society, as an association of citizens, has been characterised as reflecting a predominantly *universitas* understanding of the character of the state (Wolmarans 2005, 2009). According to Oakeshott's theoretical framework, the further any association tends towards either of the two polar extremes of *societas* or *universitas*, the greater the extent to which it will succumb to the respective nemesis of that pole. This implies that, unless those aspects of society which reflect the *societas* understanding of the state are identified and enhanced, so as to bring South Africa to a better balance between the *universitas* and the *societas* modes of association, it is likely that the South African state will tend towards dysfunction and ultimately failure.

This study explores the proposition that the South African Constitution reflects a *societas* understanding of the state which, if appropriately enacted, can serve as a basis for steering South Africa towards greater stability. In order to conduct this research assessment, the formal conditions of a *societas* against which the Constitution can be tested are established, after which evidence of congruencies between these formal conditions and the Constitution are sought. Subsequently, there is a brief discussion of

how South Africa may be guided towards greater stability at some point between the two modes of association.

As an understanding of Oakeshott's dual modes of association framework is fundamental to an appreciation of it as a basis for an inquiry into the character of the state, his theory is briefly discussed below.

1.2 Research theme – Oakeshott on the two modes of the modern state

The character of the state has long been a prominent theme in political philosophy. It has attracted a vast amount of interest in the thought and writings of authors such as Locke, Hobbes, Hume, Rousseau, Montesquieu and Hegel, whose expositions vary in their theoretical complexity and sophistication. The motivations for their inquiries range from a purely intellectual exercise aimed at understanding observations made in a given society, to an attempt to define the optimal or most desirable arrangement for the purposes of attaining a particular social ideal. However, amongst the contemporary thinkers on the subject, few have made as significant a contribution as Michael Oakeshott (1901-1990). His expansive knowledge of both the historical and philosophical dimensions of the state, coupled with his ability to construct astute theoretical formulations, culminated in a body of works which is insightful, cogent, and theoretically defensible. Oakeshott, who was educated at Cambridge and held the chair of Political Science at the London School of Economics from 1951 to 1969, is remembered for his coherent and unyielding engagement with critics who sought to discount the relevance and authenticity of political philosophy against 'various forms of positivism and historicism, science and social science' (Franco, 1990:1).

From relatively early on in his career as a philosopher, Oakeshott established himself as a philosopher with a particular interest in 'character'. He employed this concept as the basis of his works, in much the same way that Aristotle used, as his basis, the argument that theorists are able to understand an occurrence within their experience only in terms of its specific postulates (Wolmarans, 2009:82-89). For Oakeshott, the postulates that

provide the basis for specific occurrences within the human experience, and more specifically the conduct of humans in relation to each other, are their various dispositions. He deemed the balance of these dispositions to signify their 'character' (Wolmarans, 2005:207). This premise does not imply that character dictates or determines particular types of conduct or occurrences, but rather that it highlights patterns and tendencies noticeable through the observation of, and reflection on, the conduct of humans over a given historical period. In other words, the actions and utterances of any individual may be observed and understood to be that person's response to a given set of circumstances according to his or her dispositions. It is these dispositions, then, which when held together, comprise people's 'character'.

When it comes to the state, the notion of character can be somewhat more problematic and ambiguous, but this is an area of critical importance to Oakeshott's thought. In this context, Oakeshott intends character to be understood in a similar way to the manner in which the term is used in the writings of Montesquieu, where it is referred to as the *esprit général*, or 'general mental character'. On Montesquieu's conception of 'general mental character', Oakeshott (2006:420-421) writes that it

...comprised the manners, the customs, the beliefs about the world, moral dispositions, and even the religious convictions of a 'people'...the important thing about this *esprit général* is that it does not spring from the activities of a government, and it is certainly not something imposed upon a people by its government...In short it is the 'natural' tie which constitutes the collectivity of the state.

An inquiry into the character of a state, therefore, consists of an investigation into the numerous observable interactions between agents in that state, how they relate to one another, and how they, in their association as a collective of individuals, relate to externalities according to the balance of their various dispositions. These dispositions are not imposed by any government, but are a product of individual 'historic self-understandings' (Oakeshott, 1975:325); nevertheless, their variety is limited, so that the

political activities of a state will inevitably follow an observable pattern over time, and it is this pattern which constitutes the character of that state (Wolmarans, 2009: 82-89).

As a precursor to Oakeshott's eventual theoretical framework describing the character of the modern European state, his lectures (published posthumously in the collection *Lectures on the History of Political Thought*, 2006) conclude that a state's character is inherently complex and ambiguous; it is always contingent on the decisions and dispositions of its citizens, and on individual conceptions of how members of the state ought to relate to one another and to the socio-political environment around them. Oakeshott expanded on this theme in his work *On Human Conduct* (1975) in which he used the notion of 'dual modes of association' to describe the character of the state.

1.2.1 Dual modes of association framework: *universitas vs societas*

The framework proposed by Oakeshott posits that the modern state is comprised of a synthesis of two separate styles of association, *universitas* and *societas*. Each of these two modes represents an extreme, or a pole, of the character of the modern European state. His expositions of the two styles are not unique or novel in themselves, as these notions have previously been independently explored in depth by thinkers such as Francis Bacon (cited by Oakeshott, 1975:289-291), Peter Chamberlen (cited by Oakeshott, 1975:291), Montesquieu (cited by Oakeshott, 1975:249-251), Jean Bodin (cited by Oakeshott, 1975:253-256), and Hegel (cited by Oakeshott, 1975:259). However, Oakeshott's work is set apart by his identification of the character of the state as being constituted of both modes of association simultaneously, and continuously, in tension with each other.

1.2.2 *Universitas*

The first of the two styles, or modes, of association is variously identified by Oakeshott through the terms 'enterprise association' (Oakeshott, 1975), 'the Politics of Faith' (Oakeshott, 1996), and most specifically '*universitas*' (Oakeshott, 1975). An *universitas*

consists of a group of people associated for the attainment of a specific substantive purpose, such as researchers seeking a cure for a specific ailment or a military unit seeking to conquer a foe, where all activities in this association must come under the umbrella of this goal. This implies a teleological understanding of the state (Oakeshott, 1996:23-30). The government of such an association is placed in a position of the utmost importance, as it becomes the entity entrusted to lead the association towards the attainment of its common purpose. All its activities and laws are thus aimed at, and legitimised by, the goal. It welcomes access to ever-increasing sources of power so that it can better lead towards the attainment of this goal (Wolmarans, 2009:90-102). In other words, rules and laws are judged in terms of their harmony with the common purpose; they are substantive in that the focus of *universitas* is on the specificity of their content in prescribing actions to be taken or prohibited in certain contingent situations, and not on what Oakeshott refers to as ‘adverbial’ considerations enshrined in their general form (Wolmarans, 2009:111-112). It is an instance of human conduct in which association is a means to an end (Sedgwick, 2013:7). Oakeshott (1975:214) puts it as follows: ‘It is persons associated in reaching joint conclusions which are decisions to speak or act in relation to the pursuit of a common purpose.’

1.2.3 *Societas*

Oakeshott calls the second of the two modes ‘*societas*’ (Oakeshott, 1975), which he also been variously termed ‘civil association’ (Oakeshott, 1975) and ‘the Politics of Scepticism’ (Oakeshott, 1996). In contrast to an *universitas*, a *societas* is comprised of individuals who are associated not in the pursuit of a substantive purpose, but by their common submission to the recognition of, and adherence to, prescribed formal laws. These are norms and rules which are deemed to be authoritative, and which have the form of general considerations to be taken into account when choosing some action in contingent circumstances, as opposed to specific substantive laws that are to be obeyed, as is the case in *universitas* (Wolmarans, 2009:111). For example, a *societas* may be typified by an association of professionals abiding by a formal code of conduct in practising their individual professions, or a school of students who adhere to the specific conditions of a dress code, of acceptable behaviour, and of punctuality while each studying their

individually selected subjects. The norms contained in the code of conduct are not contingent on the individual or on corporate pursuits occurring in the association (Oakeshott, 1975:201), but may rather be described as having a moral form.

Note that the use of the term 'moral' above and throughout the rest of this study refers specifically to morality of the type described by Oakeshott in *On Human Conduct* (Oakeshott, 1975:60-86). Moral rules and norms for him are informed by the 'superordinate purpose' of realising human excellence (Abel, 2005:46-48) as defined by the historical reflections of agents on what 'they have come to understand themselves to be' (Oakeshott, 1975:64). In this context, Oakeshott (1975:60) calls morality, or moral practice, 'the practice of practices; the practice of agency without further specification'. This pursuit of human excellence is not a substantive purpose, because human excellence can never be achieved through the performance of specific actions, nor can it be selected from a range of alternative pursuits (Abel, 2005:46-48). Indeed, according to Oakeshott (1975:60), moral practice

...is not instrumental to the achievement of any substantive purpose or to the satisfaction of any substantive want. No doubt there may be advantages to be enjoyed in subscribing to its conditions...but a moral practice, unlike an instrumental practice, does not stand condemned if no such advantages were to accrue.

To put it another way, morality through the practice of moral rules is not a substantive undertaking, but rather one which is essential to the realisation of 'civil order', for the general good of an association.

In elucidating the concept of moral practice further, Oakeshott (1975:60-70) compares it to a vernacular language which is built up and adapted over time and through human action to reflect a cumulative and dynamic understanding of how human agents ought to interact with each other and with the world around them. As with actual languages, it is possible to determine certain rules from this cumulative understanding we call moral practice; however, these rules can never represent the cumulative understanding in its

entirety. Rather they are general precepts distilled from the numerous considerations present in the activity of attaining human excellence (Wolmarans, 2009:62). Finally, Boucher (2005:97-99) notes that a further characteristic of moral rules is that they are 'solely and exclusively laws formulated by fellow human beings.' That is to say that they are artefacts which do not appeal to any higher standards or 'natural laws' as these higher standards may themselves come to be viewed as the source of some substantive purpose beyond the pursuit of human excellence.

Returning to the description of *societas*, it may be said that its terms of association consist of two parts. The first part is the existence of a formally defined set of moral norms and prescriptions which govern the realm within which decisions may be made, or actions may be undertaken on either individual or corporate bases. It is shown later in this study (see Chapter two) that this set of moral norms and prescriptions is referred to as *lex* by Oakeshott. The second part is the assurance that all members of the association subscribe equally to the same norms and prescriptions while engaging in their various pursuits. This assurance enables a *societas* to function as a system, but, unlike an *universitas*, it is not founded on the teleological promise of the attainment of a common substantive outcome (Oakeshott, 1975:141). In this mode of association, a government does not seek to impose uniformity in the pursuit of perfection, and it therefore rejects assent through force of power. Rather, in order to maintain the formally defined moral order under which citizens are freely able to pursue their individual enterprises, the government is authorised, by its citizens, to make and administer substantive provisions within its system of norms and prescriptions pertaining to cases where the norms and provisions of the formal system are not adhered to. This is termed the authority of a *societas* (Oakeshott, 1975:158-180).

1.2.4 Modes of association nemeses

Having described the two modes of association, Oakeshott (1996) cautions that each of them, if allowed to run unimpeded, will tend towards self-destruction. He explains this as follows:

Each is not less the partner than the opponent of the other; each stands in need of the other to rescue it from self-destruction, and if either succeeded in destroying the other, it would discover that, in the same act, it had destroyed itself (Oakeshott, 1996:92).

The basis of this assertion is the logical inadequacy of either mode of association to undertake the activity of governing on its own; Oakeshott describes this inadequacy as a 'nemesis' (plural, 'nemeses'). These nemeses are, for each mode, 'a confession, or a revelation of its own character' (Oakeshott, 1996:91) and, hence, the failure of a state that is either entirely an *universitas* or entirely a *societas* is not a mere likelihood that should be noted as a warning to inspire some or other action, but is a logical certainty.

The theoretical premise of an *universitas* is that the association is united in the pursuit of a singular, common purpose, and governance is the task of identifying and eliminating anything in contravention of that goal. However, if a state reflected only this character, the governing authority would ultimately be irrelevant, for if there were perfect unity within a state, there would be no contravention of its common purpose that would need to be identified and eliminated. In Oakeshott's (1996:94) words: 'When government is understood as an activity of limitless control, it finds itself with nothing to control.'

Alternatively, in the case of a *societas*, self-defeat will manifest only in probable self-destruction through definite instability. The reason for this distinction is that a *societas* in its ultimate form is not reflected in an absence of governance, but only through minimum governance (Oakeshott, 1996:105-106). Hence, unlike an *universitas* government, which ultimately dissolves itself by removing the need for governance, a *societas* government always remains necessary, but, through its inherent self-limitation against possessing excessive power, is rendered incapable of adapting to change and is thus unable to respond adequately to contingent situations, most notably in the face of emergencies which inevitably confront any government (Oakeshott, 1996:107-111).

In addition to being self-defeating in their extreme form, these two modes of association are by definition mutually exclusive; that is to say, subscription to either of the styles

precludes participation in the other (Oakeshott, 1975:266). Oakeshott (1996:113-114), in describing them as opposing one another, argues that ‘the opposition is oblique; they are partners, but they do not enjoy exactly the same standing’. At first glance it may seem counterintuitive that one mode of association can be at the same time mutually exclusive to, and the partner of, the other. However, Oakeshott suggests that each of these governance styles exists in a given society because they do not represent alternate forms or understandings of government but rather ‘the poles of the internal movement of our politics’ (Oakeshott, 1996:113). It is the presence of both modes together which balances the extremes, retains a tension, and pulls the society as a whole away from the brink of the individual modes’ nemeses, and this pull exerted by the poles of the two modes of association introduces a range of internal movement into the system, so that a society is always influenced by each pole to varying degrees (Oakeshott, 1996:113).

Oakeshott argues that the possibility, and plausibility, of this unique mix of two distinct modes of association is substantiated by another characteristic of the modern European state, namely its ambiguous and mixed political vocabulary. Terms such as democracy, governance, and ‘the people’, may be employed by either mode of association and yet represent drastically different conceptions to their respective audiences. Oakeshott (1996:118) explains that

...this polarity has given to our political activity its peculiar ambivalence and to our political vocabulary its characteristic ambiguity. If there were no opportunity of internal movement, there would be no ambiguity; and if the internal movement were governed by other extremes, then the ambiguity would be different from what it is.

1.2.5 The mean in action

Oakeshott’s reference to ‘internal movement’ in the passage above brings us to a final observation concerning his theoretical framework which is relevant to this study. Having determined the dual modes of association framework to be a valid and accurate representation of the character of the modern European state, Oakeshott (1996:118)

poses the question of whether or not there is a 'proper manner of being active for this particular political character'. He notes that our first impulse may be to attempt to impose a form of simplicity onto the system in response to our aversion for the inherently complex, but warns that this is a futile, if not impossible, endeavour. Rather, by accepting the predicament of an inherently complex society as it is, we are able to exploit its virtues and avoid its vices by navigating away from the system's extremes and rather occupying the middle ground, which he terms the 'mean in action' (Oakeshott, 1996:121-122).

Oakeshott uses this term to refer to a point on the spectrum between a pure *universitas* and a pure *societas*, neither precisely in the middle nor by any means fixed, at which the direction of political activities may be guided towards either of the styles of association as would be most appropriate to the given context in which a society finds itself. Oakeshott emphasises that the 'mean in action' is not simply an external principle based on some perceived virtue of the middle ground, but a principle contingent on the complex nature of the character of the state in itself. If the dual modes of association thesis were not valid, and accordingly the character of the state were described as one-dimensional, the 'mean in action' would be absurd; while a state comprised of two modes of association which is left to veer unfettered in a particular direction would collapse under the self-inflicted weight of the hegemonic political association's nemesis at its extremity (Oakeshott, 1996:121). Likewise, the prerequisite ambiguity which gives rise to the complex character of the state dictates that the 'mean in action' must be dynamic, constantly organically shifting and rebalancing in response to the prevailing political discourse. In short, the proper manner of responding to a situation where either *universitas* or *societas* have come to be the dominant pole in the character of a particular state would be to enhance the recessive pole so as to bring that state's character back towards the 'mean in action'.

Thus, to summarise, throughout his academic career, Oakeshott developed, as a major theme, an understanding of the character of the modern European state as a synthesis of two modes of association, which he named *universitas* and *societas*. Neither of these modes of association provides an ideal for a state on its own, as they both tend to be self-defeating in their ideal forms. However, the existence of both modes of association in a

single state, each of them exerting a pull on the other, prevents that state from drifting towards either extreme, and subsequently the failure of that specific association. In this system, the 'mean in action' represents a dynamic point on the spectrum between the poles of *universitas* and *societas* where necessity can guide the direction of political activity towards either of the poles without impedance. The pursuit of this point is deemed by Oakeshott to be the proper manner of acting for a state whose character is constituted according to the dual modes of association thesis.

The South African state, as is shown in the second chapter of this study, has been described in its current context as predominantly characterised by the *universitas* mode of association in terms of Oakeshott's theoretical framework (Wolmarans, 2009). Since a monopolar state cannot exist, and since South Africa is not typified by the dysfunction hypothesised at the extremity of an *universitas*, this implies that there must also be some adherence to the *societas* understanding of the character of the state present in South African society, and that it is therefore theoretically possible to steer the state away from an excessively *universitas* character towards the 'mean in action'. But what are these features of the South African state which reflect *societas* and how may they be identified?

When looking for the presence of a *societas* understanding within the South African state it is important to remember that for Oakeshott a *societas* needs to be recognised as primarily 'a legal and a governed association' (Oakeshott, 1975:202) and also that membership of a *societas* presupposes a formal legal relationship (Ademi, 1993:887). It thus follows that a quest for *societas* within South Africa should start by considering the most overarching and authoritative legal document in South Africa, the document from which is derived the formal legal character of the state itself, namely the Constitution.

1.3 Research question

In light of the above, by applying Oakeshott's framework to the South African state, the primary research question of this study is framed as follows. Does the South African

Constitution demonstrate adherence to a *societas* understanding of the South African state?

This study assumes that South Africa is currently characterised primarily by adherence to an *universitas* understanding of the state, but that there must also be features present which reflect a *societas* understanding. In addition, without having specific preference for *societas* but as is appropriate in the current context, these elements ought to be enhanced to bring South Africa closer to the ‘mean in action’.

Sub questions with regards to this study include whether or not it is appropriate to apply Oakeshott’s framework to South Africa in the first place and, subsequently, what exactly Oakeshott’s understanding of *societas* is? Furthermore, should it indeed be shown that the Constitution is reflective of *societas*, what is the nature of its authority such that it can be accepted as authoritative in a society in which it has already been shown that the *universitas* understanding of the state is dominant?

1.4 Literature overview

An overview of the literature which has informed this study is provided below. Oakeshott’s most comprehensive work on political philosophy is *On Human Conduct* (Oakeshott, 1975), in which he provides a systematic compilation of the many themes contained in his previous works. In the preface to his book, Oakeshott (1975:viii) remarks that the ‘themes explored here have been with me nearly as long as I can remember, but I have left the task of putting my thoughts together almost too late’. As his most comprehensive systematic work on political philosophy, *On Human Conduct*, and in particular its third chapter with detailed discussions pertaining to the origins of thought on both *universitas* and *societas*, will provide the basis for substantial sections of this study. This will be supplemented by Oakeshott’s 1953 essay entitled ‘The Politics of Faith and the Politics of Scepticism’ (reprinted in Oakeshott, 1996) which provides a comprehensive discussion of the complex character of the state, articulating both the Politics of Faith (*universitas*) and Politics of Scepticism (*societas*) modes of association,

their substantiation through an ambiguous political vocabulary, their respective nemeses, and the case for society to be guided towards a balance between the two.

In addition, given that the subject of this study is specifically related to the character of the state, additional material to assist in the understanding of the background of Oakeshott's inquiry into this topic includes *Lectures in the History of Political Thought* (Oakeshott, 2006), as well as the third chapter of *Morality and Politics in Modern Europe*, (Oakeshott, 1993).

The research question of this study has been developed primarily based upon Wolmarans's (2009) doctoral thesis *An Appraisal of the Post 1994 ANC-in-Government: An Application of the Political Theory of Michael Oakeshott* and the essay 'Characterisation of Politics in an African Context' (Wolmarans, 2005). These two sources are the preeminent writings with regard to Oakeshott's applicability to the South African context and the consequent identification of South Africa as predominantly characterised by an *universitas* understanding of the state. From these works it follows that, given that the South African state is not entirely dysfunctional, then according to Oakeshott's logic, there must also be a *societas* understanding of the state present within South Africa. It is from this basis that the identification of features of the South African state which reflect a *societas* understanding may be undertaken.

In addition to the primary material from Oakeshott, *The Sceptical Idealist* (Tseng, 2003) provides helpful insight concerning the formal conditions of *societas* and is utilised in this study to develop an appropriate means of testing whether or not the Constitution is reflective of the *societas* understanding of the state.

As far as a general evaluation of Oakeshott's political thought is concerned, the preeminent source is Paul Franco's *Michael Oakeshott. An Introduction* (2004). It provides an assessment and contextualisation of all the central themes of his political philosophy. In addition to providing some insights into Oakeshott as a person, it sheds light on the profound influence of Oakeshott's early theological interest on his later works, his reluctance to assign too pragmatic a role to the field of philosophy, his identification and

critique of Rationalism in the political sphere, and his special concern with the character of the state. Supplementary texts in this regard are *The Cambridge Companion to Oakeshott*, edited by Podoksik (2012) and David Boucher's chapter on Oakeshott in *Political Thinkers from Socrates to the Present* (Boucher, 2009:515-536).

Finally, given that this study is concerned with the South African Constitution as an expression of the *societas* understanding of the character of the state, the Constitution of the Republic of South Africa, Act 108 of 1996 (South Africa, 1996) constitutes a significant primary source for this study. In addition, and in order to assist in the understanding of the character of the Constitution, the articles 'Legal Intimations: Michael Oakeshott and the Rule of Law' (Ademi, 1993), 'The Rule of Law in the Modern European State: Oakeshott and the Enlargement of Europe' (Boucher, 2005), and 'Rationalism in Constitutional Law' (Nagel, 1987) will be utilised as secondary sources.

1.5 Research design

This study is a literature-based study in the field of Political Philosophy. It is a philosophical investigation into the meaning attached to the association we call the South African state, making use of concepts including character and morality to elucidate the dispositions on which this ascribed meaning is based.

While it is based extensively on the works of Oakeshott, it is not intended as a detailed critical appraisal of his *oeuvre*. This study provides an analysis of the South African Constitution in terms of the *societas* understanding of the state as described in Oakeshott's dual modes of association framework. In order to do this, the formal conditions of Oakeshott's understanding of *societas* will firstly be identified, following which various aspects of the Constitution, including both its prescriptive content and its authority as the highest law in the South African state, will be assessed.

The research uses literature available in the public domain. Predominantly, primary sources are used, consisting in the main of Oakeshott's works, but at times incorporating

secondary commentaries and published articles where clarification or elaboration are required. In the sections focusing specifically on the South African context, the Constitution is drawn on as the primary source.

1.6 Outline of the study

Following on from the introduction in Chapter one, this study proceeds in Chapter two with a discussion on the theory of Oakeshott's framework. The discussion is framed in two parts. The first part addresses a preliminary question, namely the appropriateness of applying Oakeshott's framework to the South African context and the second part identifies and discusses the formal conditions of a *societas* as identified by Oakeshott. These formal conditions will serve as the theoretical framework against which the Constitution can be compared.

The application of Oakeshott's theory to the Constitution is carried out in Chapter three where the formal conditions defined in Chapter two above are compared with relevant aspects of the Constitution and observable features of the South African state with the Constitution as its highest law. In addition, Chapter three presents a brief overview of some of Oakeshott's work on the 'trimmer' as a political participant whose actions guide the state towards the 'mean in action'. This discussion is presented in accordance with Oakeshott's formulation that the state should seek to avoid the nemeses of *universitas* and *societas* at the extremes of each of the two modes.

Chapter four presents a summary of the findings of this study and a conclusion.

Chapter 2:

Oakeshott on a *societas*

2.1 Introduction

In this chapter Michael Oakeshott's understanding of a *societas* mode of association will be explored in greater detail. The specific aim will be the identification of the formal conditions necessary for the existence of such a *societas*. These formal conditions can serve as the theoretical yardstick against which any features of a state posited to reflect such a *societas* understanding can be compared.

This theoretical framework will be compiled by expounding the two parts, or components, of *societas* implicit in its definition, namely its system of norms and prescriptions and its authority. Specific characteristics of each of these parts will be defined and discussed in turn so as to establish systematic criteria for application in Chapter three below.

Before turning to Oakeshott's views on *societas* however, a preliminary question needs to be settled first, namely the applicability of Oakeshott's analysis to a non-European state such as South Africa.

2.2 Oakeshott in a non-European context.

Given that Oakeshott developed his dual mode theory specifically in relation to the modern European state, its applicability to the South African context may be questioned. In other words, is it appropriate for Oakeshott's framework to be used as the basis of this study?

This question can be addressed by determining whether or not the application of Oakeshott's framework to a non-European context is expressly precluded by either Oakeshott himself or by the overall character of his political philosophy.

In respect of whether or not Oakeshott's framework may be applied to the South African state, Wolmarans (2009:137) argues that there is nothing to preclude the extrapolation of Oakeshott's framework for the modern European state to a broader or different context, such as that of South Africa. Oakeshott's understanding of politics, and consequently his state theory, are contingent on three conditions, namely a plurality of people in association with each other; the existence of a government or governing structure; and the recognition of the authority of the existing government. Although Oakeshott discusses these conditions as they originated and developed in Europe (Oakeshott, 2006:10), it has been shown that they do exist globally, therefore including states in Africa (Wolmarans, 2009:139-141).

After applying Oakeshott's framework to the African context, Wolmarans contends that the continent is predominantly characterised by states that tend towards the *universitas* mode of association, and that this appears to apply particularly to South Africa. For instance, Wolmarans (2005:210) argues that the authority upon which the administrations of modern African states base the legitimacy of their governance is highly contingent on their performance in 'the attainment of some perceived common goals', a reflection, if not the very definition, of the *universitas* understanding of the state. Wolmarans's (2009) consideration of the post-1994 South African state confirms his original assertion with specific reference to the African National Congress (ANC)-led South African government. In particular, he finds that the following four key ideas, each of which reflect a distinctly *universitas* character, have had a prominent influence on ANC rule since 1994, having been 'used to indicate the intent of its rule and to serve as an explanation for its conduct' (Wolmarans, 2009:190). These are the ideas nation-building and reconciliation; development, reconstruction, and transformation; the National Democratic Revolution; and unity and solidarity.

The South African state is thus characterised by a strong *universitas* mode of association. However, the mere fact that the South African state is not fully dysfunctional implies that the extremity of *universitas* has not been reached, and that there are, in fact, instances of *societas* exerting a pull against *universitas*.

In order to identify these instances of *societas* in the South African state, it is necessary to start by defining the formal conditions of *societas* against which a constitutive feature of the state can be compared. Where a comparative match is presented, that constitutive feature may be deemed to reflect a *societas* understanding of the state.

2.3 The formal conditions for *societas*

Societas is defined in Chapter one above as a morally founded association, based on a formal order, and comprising general rules and norms under which citizens have free agency to pursue their various and individually chosen enterprises. *Societas* is further defined in the same section as consisting of two components, the first of which is termed *lex*, that is a set of moral norms and rules which together constitute the formal order for the association, and, secondly, the recognition of *lex* as being authoritative. Tseng (2003:194) in his exposition of Oakeshott's *societas* provides some guidance on the analysis of these two components in order to determine the distinct formal conditions for the *societas* mode of association.

2.3.1 *Lex*

Tseng (2003:192) suggests that *lex* is better understood through an examination of the character of each of its three specific acts, namely legislation, adjudication and ruling. That is to say, the mere presence of these three acts does not in itself differentiate a *societas* from an *universitas*, which may also be argued to possess a system of laws which are legislated, adjudicated against and ruled in accordance with. The differentiation of *lex* from a system of law in an *universitas* lies rather in the character of each of its three specific acts.

2.3.1.1 *Legislation in lex*

In a *societas*, legislation is the process of formalising rules and norms; it is the enactment, amendment, or repeal of the conditions of the association which the associative

members accordingly agree to adhere to while pursuing their various and differing, self-defined satisfactions.

The process is formal, in that it complies with a specific form of action consistent with the norms of the association (Wolmarans, 2009:111); in other words, it is not simply an *ad hoc* activity of capricious law-making, but the instantiation of a process already recognised as authoritative from within the association.

However, simplifying the definition of legislation to a formal procedure alone does not sufficiently discern its specific role as a condition for *societas*. Again, it is of paramount importance to the understanding of *societas* that the types of rules formulated through legislation are not confused with the mere existence of rules and laws in and of themselves. Oakeshott (1975:318) makes this point clear by stating that *societas* is not simply typified by the rule of law, because *universitas* is itself characterised by adherence to rules and laws, albeit of an instrumental character; rather *societas* is typified by the rule of moral law, specifically, a moral law which gives credence to the mode of association embodied by *societas*. Therefore, in addition to identifying legislation as a formal procedure, something needs to be said about the character of the act of legislation in *lex*.

In *The Politics of Faith and the Politics of Scepticism*, Oakeshott (1996:80) draws a clear distinction between different constitutional frameworks, which he sees as being either sceptical or non-sceptical documents. Sceptical in this context refers to the 'Politics of Scepticism' nomenclature employed by Oakeshott as an alternative name to *societas*. Thus a sceptical document would reflect a *societas* understanding of the character of the state, whereas a non-sceptical one would reflect an *universitas* understanding of the state. He gives a useful example, when he notes that:

The *Declaration de Droits de l'Homme et du Citoyen* of 1789 is a sceptical document and is often in the pattern of the English *Declaration of Rights* of 1689. The version of 1793 has already begun to be infected with the politics of faith (Oakeshott, 1996:80).

Although he does not explicitly say so, one may infer from the body of Oakeshott's works that his assessment of the two versions of the French declaration of rights, from 1789 and 1793 respectively, is informed by a number of salient features which, upon comparison of the two documents, demonstrate the shift in sentiment during the French Revolution from support for the establishment of an ordered society based on equality and freedom to identification with a unified movement pursuing the singular and substantive purpose of 'welfare for all'. Firstly, features which point to a higher goal on which the latter declaration is based, in other words, a substantive purpose which supersedes the supremacy of a purely moral guideline, include

- the exclusion of the following statement from the latter declaration, whose inclusion in the earlier declaration emphasised the supremacy of the constitution as opposed to the supremacy of the government-instituted, common purpose:

...by being founded henceforward on simple and incontestable principles the demands of the citizens may always tend toward maintaining the constitution and the general welfare (quoted by Woloch, 2002a:s.p.); and

- the reference in the latter declaration to a 'natural' and not moral basis for its prescriptions:

Liberty is the power that belongs to man to do whatever is not injurious to the rights of others; it has nature for its principle, justice for its rule, law for its defense (quoted by Woloch, 2002b:s.p.).

Secondly, provisions which betray the instrumental character of the government as the leader of the people in pursuit of the higher goal envisioned are

- the inclusion of a common purpose into the latter declaration, with the very first provision stating that the 'aim of society is the common welfare. Government is

instituted in order to guarantee to man the enjoyment of his natural and imprescriptible rights' (quoted by Woloch, 2002b:s.p.); and

- the inclusion of the substantive provision in the latter declaration for any citizens deviating from the stated common purpose: 'Let any person who may usurp the sovereignty be instantly put to death by free men' (quoted by Woloch, 2002b:s.p.).

These examples demonstrate the subtle difference between the prerequisite moral, non-substantive, character of *lex* and the substantive character that legislation may adopt. It also shows us how readily the disposition of a society may tilt towards one or the other mode of association, depending on the prevailing interpretation of an ambiguous political vocabulary, often influenced by the views of leaders, and circumstantial variables such as the economic and political conditions of the day.

A further observation made by Oakeshott with regard to the character of legislation in *lex* is that it tends to be general, as opposed to specific. Kaliner and Teles (2004) discuss this observation from the perspective of the application of legislation to real world scenarios. They argue that a *societas* is not indifferent to the need for state interventions from time to time, as is often erroneously assumed by those who see a *societas* as lethargic, compared to the perceived efficiency of an *universitas* in taking substantive action. Indeed, while Oakeshott acknowledges that it is the nemesis of *societas* to be slow to act, or to react, as circumstances may require, he does not suggest that *societas* is prone to total inaction (Oakeshott, 1996:105). On the contrary, it is the nemesis of *universitas*, not *societas*, at its polar extreme to be devoid of any state interventions, as society attains the ideal of a fully unified enterprise association, harmonised in a singular purpose and without any deviations that need to be corrected. It is precisely in anticipating any number and variety of possible social interventions that the legislative provisions of *lex* are necessarily general in character. If these provisions were not general, the scope of possible interventions of the government would be limited and specific; they would not necessarily be applicable to the numerous potentially unforeseen circumstances arising out of the various individual decisions and pursuits of each member of society. Instead, general prescriptions establish a broad foundation, in terms of *lex* a moral foundation,

upon which the subsequent application of legislation, as required in response to a variety of specific situations, is made possible through the acts of adjudication and ruling.

Ademi (1993:883-885) elaborates on this by arguing that, in a *societas*, a constitution denotes the broad scope of the formal moral system, while legal rules (bills) derived from the constitution are a necessary bridge from the general scope to a specific one. Such rules thereby enable the particular enactment of state interventions without having to appeal to any authority other than that derived from the authority inherent in the general prescriptions of the constitution itself. Furthermore, such rules are non-instrumental, as they are not defined *ad hoc* according to their acquiescence with some common purpose, but are subject to scrutiny against the general prescriptions of the constitutional document.

In addition, the general character of legislation in *lex* ensures that the scope of any interventions is limited, so as not to exceed their generally defined formal boundaries (Kalliner & Teles, 2004). By contrast, in an *universitas* they would tend towards seeking to define the specific direction of an enterprise by rigorously correcting any deviation from the stated course, or attempting to create the conditions wherein substantive problems cease to persist.

A final feature of the character of legislation in *lex* is that, while the specific procedural requirements may vary from association to association, a common outcome of the legislative act across all instances of *societas* is a set of clearly defined rules which is known to, and generally observed by, its members (Oakeshott, 1975:130). The general observance of the outcomes of legislation in *lex* is directly related to its authority, which will be discussed later in this study; however, with regards to the necessary prerequisite knowledge of legislation, it may otherwise be stated that all who are obliged to adhere to the specified legislation must be cognisant of its existence, and it must be the same legislation which all other members of the association are obliged to adhere to. There cannot be any exclusivity of knowledge based on the position of any member within the association, nor can there be limited dissemination of legislation in the purported interests of a substantive plan or purpose (Boucher, 2005:101). On this point, Oakeshott

(1975:130) notes that the publication of the outcomes of legislation alone is not sufficient to characterise the type of knowledge that is required in a *societas*, for in addition to knowledge of the general prescriptions in *lex* which inform the act of legislation, knowledge of what comprises adequate subscription to this legislation in contingent situations is also required. This second type of knowledge is produced through the act of adjudication (Oakeshott, 1975:131), which will be discussed below. However, it is evident that without the basis of a knowledge of the general prescriptions upon which legislation is based, achieved by making them universally accessible to all members of a *societas*, subscription to these general conditions could only occur by chance and, as such could not be deemed to be the formal terms of association (Oakeshott, 1975:130). Therefore, unrestricted public access to the general prescriptions informing legislation, by all members of a *societas*, is a condition of legislation in *lex* as the formal terms of association.

Legislation in *lex*, then, can be described as having three specific defining characteristics. The first is that it is a formal act which strictly adheres to a well-established, pre-existing procedure based on the norms of the association. Secondly, it is characterised as being both moral and general, and lastly, all members of the association must have free and unrestricted access to the general prescriptions informing it.

2.3.1.2 *Adjudication in lex*

Adjudication, the second act entailed within *lex*, is the interpretation of the outcomes of legislation in *lex*, giving specific and appropriate meaning to these general norms and prescriptions as they relate to a contingent scenario. In adjudicating, a judicial court is presented with evidence from a plaintiff of an alleged utterance or action that has in some way contravened the norms and prescriptions of *lex*, as well as with evidence from a defendant rebutting these allegations. It then considers all of the evidence presented to determine the strength of each claim when weighed solely against the independent standard of the prescriptions of *lex* (Oakeshott, 1975:131-133).

The first characteristic of adjudication in *lex*, according to Oakeshott (1975:131), is that it is a process which must be prescribed, and hence authorised, from within *lex* itself. A process which is required to test evidence of actions and utterances in terms of how they relate to the norms and prescriptions of *lex* as the ultimate authority, cannot itself claim to derive authority from some other external source. The authority of *lex* is the only authority which can be recognised. Therefore, in much the same way as legislation in *lex* is a formal and not an *ad hoc* act, adjudication in *lex* must also be a formal act subscribing to normative procedures defined by legislation in *lex* and accordingly recognised as authoritative.

The second characteristic of adjudication in *lex* is that it must be an impartial activity. Oakeshott (1975:132-133) refers to the role of the adjudicator as the custodian of the norms of *lex*, stating that in this role the adjudicator cannot be an arbitrator between parties with various conflicting interests who are to be persuaded to accept some resolution as being the most desirable outcome, they can only weigh the strength of evidence being presented against the prescriptions of *lex*. Tseng (2003:194-195) elaborates on this point stating that, in line with the moral character of legislation in *lex*, adjudication in *lex* is not concerned with any merits in terms of progress towards a substantive purpose, but rather with upholding the moral considerations of the recognised norms and prescriptions. Since adjudication derives its authority directly from *lex*, in laying claim to this authority it must accurately and consistently reflect the spirit of the prescriptions of *lex* which cannot be deemed or construed to promote the interests of any particular instrumental purpose, but must be of a solely moral character. It follows then that adjudicative outcomes must also be non-instrumental (Tseng, 2003:194). Moreover adjudication cannot be the expression of the subjective opinions of the adjudicators, whether they are congruent with some form of social interest or not, but must be specifically referenced to *lex* itself (Boucher, 2009:531; Oakeshott, 1975:133-134). Adjudication in *lex* also cannot be an investigation into the intention of the legislators, as adjudication relates only to the meaning of *lex* in contingent scenarios and not to the substantive results of any adjudicative outcome which is consequently applied (Oakeshott, 1975:133-134). In other words, the intention of the legislators is irrelevant to adjudication in *lex*; the formally defined prescriptions as they stand are paramount.

To reinforce the characteristic of impartiality, there is the principle of consensus amongst a majority in cases where there are multiple adjudicators and a conclusion is not unanimously reached. Mouffe (2005:111) argues that consensus implies agreement on both the conclusions reached by adjudicators, and the language used in expressing them. Likewise, in the case of adjudication in *lex*, consensus implies agreement on both the meaning given to the prescriptions of *lex* in the contingent circumstances being adjudicated over, and on the prescription's general character in the first place. Therefore, if any of the adjudicators errs in such a way as to tend towards arriving at instrumental adjudicative outcomes which contravene either the general character of the prescriptions of *lex* or their meaning in a particular context (whether intentionally or simply by the application of alternative reasoning), consensus amongst the remaining majority of the adjudicators as to what the non-instrumental outcomes of adjudication ought to be will correctively guide the adjudicative process so that it will retain its moral character.

Adjudication in *lex*, then, can also be described as having two specific defining characteristics, namely its authorisation from within *lex* itself and its prerequisite impartiality to any substantive purpose outside of the moral prescriptions of legislation in *lex*. Therefore, it is these characteristics of adjudication in *lex* which adjudication in the Constitution will be compared to in this study to determine whether it reflects a *societas* understanding of the state.

2.3.1.3 *Ruling in lex*

The third and final act in *lex* is ruling. Ruling is the application of *lex* including the outcomes from the acts of legislation and adjudication. Alternatively stated, it is the act of either requiring or forbidding certain actions or decisions to be carried out by the members of the *societas*, so as to be congruent with the relevant prescriptions of *lex*, including where they have been given meaning in relation to some specific and contingent situation (Tseng, 2003:194-195). It is perhaps in this component that the distinction between *societas* and *universitas* is the most easily distorted, and where, if

such a distortion occurs, the influence of *universitas* would clearly come to dominate the tension between the characteristic modes of association of the state. Parekh (1979) highlights specifically the type of distortion which is likely to occur between the prescriptions of the office of *societas's* ruler and the position of *universitas's* manager:

Indeed, if civil rulers were to seek to persuade their subjects to obey the laws by pointing to their virtues, by promises of better things to come, or by reproaching, coaxing, cajoling, bribing or offering them a deal, they would 'cease' to be rulers and 'become managers' (Parekh, 1979:496).

The first characteristic of ruling is therefore that it is not a persuasive exercise aimed at changing the sentiments of citizens towards the desirability of specific prescriptions, but rather a matter of enforcing the requirements, either to take considered action, or to desist from taking a particular considered action, in a given set of circumstances as prescribed in legislation in *lex*, regardless of whether the citizens deem such prescriptions appropriate or desirable. Observance of legislative prescriptions is, in other words, obligatory under the same authority of *lex* as that which gives legitimacy to the acts of legislation and adjudication.

As discussed in the introductory chapter to this study, the fact that observance of *lex* is obligatory is critical to *societas*, as its terms of association are both the formal prescriptions themselves, and the guarantee to all citizens of mutual adherence to these prescriptions, which includes the provision of substantive protection from any ensuing injustices if this mutual adherence is contravened (Oakeshott, 1975:140-144). To put it another way, *societas* includes the expectation by citizens that their adherence is in like fashion reflected universally by all other members of the *societas*. This implies an expectation that requires a guarantee on the part of the state that any citizens who fail to subject themselves to the authority of *lex* will be subject to the appropriate and just consequences thereof, however severe such consequences may be.

The second characteristic of ruling to be considered, as noted by Oakeshott (1975:143), is that, as with legislation, and differentiating it from *universitas* management, rule is

limited in the extent and scope of its powers. In contrast to the situation within an *universitas*, where the unified purpose is paramount and, accordingly, any means necessary are appropriate in pursuit of it, *societas* clearly defines in *lex* exactly what the limitations of the act of ruling are. These limitations are disposed towards facilitating the temporary imposition of order on disordered circumstances in preference to seeking the elimination of the possibility of disorder all together. For instance, in the event of a breakdown of civil order in a *societas* resulting from any particular group of its members' failure to observe non-discriminatory prescriptions of *lex*, the act of ruling will entail the imposition of order through substantive action, such as policing, until the source of the disorder has been determined and addressed. However, the act of ruling never entails the imposition of a permanent homogeneity on society so as to prevent the occurrence of discriminatory civil disorder in the first place (Mouffe, 1992:31-32). These limitations on the powers which the act of ruling can employ are, of course, themselves prescribed in *lex*.

The discussion of *lex* as formal order, comprising the three acts of legislation, adjudication, and ruling, in and of itself does not present us with a full characterisation of *societas*. For that, we have to also consider the authority of the *lex*.

2.3.2 Authority

It stands to reason that the existence of *lex* does not fully address the second part of the terms of association in *societas*, namely authority. It has been demonstrated above that *lex* contains within itself substantive protection against non-adherence by members of a *societas* to the prescriptions of *lex*, but in order for *lex* to be formulated, interpreted and then, most importantly, applied, citizens must necessarily recognise it as authoritative. For instance, the rules dictating the passage of vehicles through an intersection are deemed to be authoritative by all drivers. That is to say that it is a precondition for driving on public roads that all drivers demonstrate both an understanding of these rules (which is tested in the process of obtaining a license), and consent to the jurisdiction of these rules over any drivers making use of the roads (which is demonstrated by a driver being in possession of a licence) as a benchmark against which their ability, and their right, to

make use of common roadways is measured. Furthermore, it is understood that the authority of the rules of the road is universal, that all other drivers on the road recognise the authority of the same set of rules and, accordingly, that their actions on the road are prescriptively limited. Alternatively, if no-one recognised the authority of road rules, their formulation, interpretation and application would be meaningless. Notwithstanding the fact that limited mechanisms for enforcement do exist, a traffic system devoid of acceptance of its rules as authoritative simply would not be able to function, and the formal order established to accommodate the operation of public roads would not be maintained. The authority of *lex* is thus clearly a necessary condition of *societas*.

It is a decidedly complex task to determine the character of this authority of *lex*; what exactly inspires its acknowledgement in the first place, and what informs the consensus around what ought to be acknowledged (Gerenscer, 2003). In fact, Oakeshott offers no definitive explanation of it in his works on *societas* and *universitas*, but in response to criticism at the lack of such an explanation, in *On Human Conduct*, Oakeshott (1976:355) states:

I said nothing about the constitution of this rule-making authority because no particular constitution is postulated: this constitution will reflect contingent beliefs about what is to be recognized as authoritative.

Oakeshott's point is that it is erroneous to equate the authority of governments, including the governments of a *societas*, with commonly accepted characteristics such as power, competency, or efficiency (Oakeshott, 2006:441-442). These do not have anything to do with the right to rule, but rather with the ability to rule. The only plausible inferences which can be made as to the right of a government to rule, its authority, is in relation to the manner in which it is constituted. Authority, therefore, does not have any particular character of its own: it adopts the character of the norms and prescriptions of the *societas*, the character of *lex* (Oakeshott, 2006:443-444).

Likewise, Franco (1990:189) distinguishes between the notions of an authority contingent on its being acknowledged as authoritative, versus that of an authority contingent on its

desirability in terms of its utility, justice, or appeal to some higher natural law. He also demonstrates that Oakeshott in his essay entitled 'The Rule of Law' categorically rejects the latter conception of authority, asserting that the authority of *lex* cannot be determined by any means other than its own prescriptions. It cannot be contingent on its real or perceived future benefits, as these benefits themselves are contingent on the universal acceptance of the authority of *lex* in order for them to be realised. Nor can it be based on some higher standard or law, as such a law would itself be subject to acceptance as authoritative and cannot be beyond the jurisdiction of inquiry or analysis. The authority of *lex* can only be contingent on the acknowledgement of all citizens that it is a just system of moral rules which are non-instrumental (Boucher, 2005:100), necessary, and binding to all (Ademi, 1993:883), and that through this mutual and universal acknowledgment, the rules are made authoritative (Tseng, 2003:196-197). In other words, the prescriptions of *lex*, through their accordance with the principles of justice inherent in *lex* itself, give rise to the authority of *lex* in such a way that it is self-authenticating (Boucher, 2005:100-101). When combined with the notion of *lex* as a set of formal conditions, the acknowledgment by all members of a *societas* of *lex*'s inherently self-authenticating authority constitutes the system which is the glue of social cohesion in *societas*; Oakeshott termed this system *respublica*.

2.4 Conclusion

In this chapter we have considered the applicability of Oakeshott's theory to the South African state outside of its original European context and found no reason why this would be inappropriate. Furthermore, literature in which such an application has been made has shown that the ANC-led South African state tends towards an *universitas* mode of association.

The main consideration of this chapter has, however, been the systematic identification and description of the formal conditions of *societas* categorised according to the two distinct components of *respublica*, namely its establishment and its subsequent maintenance. The first of these two components, *lex*, is a formally defined order based on

moral rules and norms, and is better understood through the three acts of legislation, adjudication, and ruling, each of which, in their own right, is an expression of this commitment to moral rules and norms. The second component comprises the continued, universal acknowledgement of the inherent authority of *lex* contained in its moral, self-authenticating character. If the South African Constitution reflects these conditions a convincing case can be made that the Constitution embodies a *societas* understanding of the state in South Africa.

Chapter 3:

The Constitution as a reflection of the *societas* understanding of the South African state

3.1 Introduction

In this chapter, the formal conditions of *societas* identified in Chapter two are compared to the Constitution in order to determine whether it exhibits a *societas* understanding of the state in South Africa or not.

To this end, the Constitution will be assessed to highlight the manner in which it is congruent with the formal condition of *lex*, as understood through the acts of legislation, adjudication and ruling. Likewise, an assessment of the Constitution's compliance with the formal condition of authority will also be undertaken by firstly describing how a society which rejects the authority *lex* can be identified and then comparing this hypothetical case with observable features of the current South African state.

In addition to considering the *societas* character of the Constitution, this chapter briefly introduces a significant consequence thereof. According to Oakeshott there is a proper manner of acting within a complex social system characterised by the poles of *universitas* and *societas* both in opposition to and in tension with each other, and this is the pursuit of the 'mean in action'. This chapter will thus conclude with some of Oakeshott's thought on how this 'mean in action' can be pursued and will serve to introduce it as a possible subject of further research into the application of Oakeshott's political philosophy within the South African context.

3.2 *Lex* and the Constitution

Does South Africa's Constitution conform to the first formal condition of *societas*, namely *lex*, as understood through the acts of legislation, adjudication, and ruling? Each of these acts is pertinently discussed in the Constitution. The question is whether they conform to

societas's understanding of legislation, adjudication, and ruling in *lex*. The first to be considered is legislation, which according to Oakeshott's appreciation of *lex*, is a formal act, moral and general in character, with no prohibitions or exclusions of access to it by any members of the society.

3.2.1 Legislation in the Constitution

With regard to the first condition of legislation in *lex* being a formal process, that is to say that it relates to the form which legislative outcomes take and not their substance, the following excerpts from the Constitution provide some guidance. The Constitution formalises the processes required for acts of legislation to be promulgated under South Africa's constitutional framework in a number of its provisions stating, for instance, in section 43(a) (South Africa, 1996)¹ that the national legislative authority of the Republic is vested in Parliament. Section 42(1) defines Parliament as comprising the National Assembly (NA) and the National Council of Provinces (NCOP) and section 42(2) goes on to stipulate that Parliament shall 'participate in the legislative process in the manner set out in the Constitution.' In other words, the act of legislating in South Africa may only be undertaken by Parliament and it may only be undertaken in so far as it reflects the form described in the Constitution. This formal description of is found most pertinently in sections 73-82.

A further demonstration of the formal nature of legislation according to the Constitution can be found in section 73(2)(a) which restricts the act of introducing legislation referred to as 'Money Bills', defined explicitly in section 77, to the Cabinet member directly responsible for national financial matters. Furthermore, section 73(5) stipulates that any act of legislation introduced to the NCOP must be referred to the NA for consideration and, if necessary, vice versa. Likewise, the Constitution may be amended only by legislating according to the prescriptions stated in section 74. This includes amendments to section 1 and section 74(1) only with a supporting vote of at least 75% in the NA and

¹ Unless otherwise indicated, all references to legislation preceded by the words 'section' or 'sections' refer to the Constitution of the Republic of South Africa, Act 108 of 1996 (South Africa, 1996).

the support of at least six provinces represented in the NCOP; amendments to chapter 2 only with a supporting vote of at least two-thirds of the NA and the support of at least six provinces represented in the NCOP; amendments to the remainder of the Constitution with a supporting vote of at least two thirds of the NA and the support of at least six provinces represented in the NCOP where the amendment is relevant to Provincial matters or the NCOP itself. It can be seen in these provisions, as a limited sample from a greater overall number of provisions, that the Constitution exhaustively defines exactly what constitutes a legislative process which is regarded as authoritative.

Aside from the procedural format to be adhered to, the Constitution also states in section 8(1) that the 'Bill of Rights applies to all law' and in Section (2) that 'law or conduct inconsistent with it is invalid'. This is reaffirmed by the provisions of section 80(1), which state that 'Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional'. In other words, in addition to complying with the formal procedures outlined in the Constitution, the act of legislation must also take on the form of the guiding moral principles contained within the Bill of Rights. For example, an act outlawing the belief in, and practice of, Buddhism would violate the formal principle of religious freedom stipulated in the section 15 of the Bill of Rights, as it currently stands, and could be declared unconstitutional, and therefore invalid. This declaration would be made by the Constitutional Court after considering an application brought to it by the NA.

The conclusion that follows from the examples provided above is that the Constitution does not contain a comprehensive collection of substantive prescriptions regarding every possible act of legislation that may be required. What it does provide is a set of guiding principles which must inform all legislation and, in order to safeguard these principles from capricious change, a formal procedure which must be adhered to in every legislative action.

However, as discussed in Chapter two, a legislative process which produces laws is not in and of itself sufficient to fully characterise legislation in *lex*: the moral, general character,

of the prescriptions informing legislation, as well as knowledge of and universal access to these prescription by all members of the association, are of equal importance.

The question of access to and knowledge of the general prescriptions of the Constitution can be readily addressed. At the adoption of the Constitution, over seven million copies in all eleven official languages were distributed freely and, consequently, anyone can obtain a copy of the Constitution in any of the official languages through a variety of media including the internet, at public libraries, and through the Constitutional Court (Constitutional Court of South Africa, 2005b). There are admittedly instances where South African citizens are ignorant of legislation, either within or emanating from the Constitution, but these instances are by no means imposed on citizens. They occur, rather, out of imperfections in the attempt to achieve complete dissemination. In addition to the publication of the Constitution, provisions are made in section 59 for the legislative process to be conducted in an open manner and for public involvement in the legislative process to be facilitated. The implication herein is a continual public exposure to the legislative process, and the principles which inform it, disseminated in most instances primarily through the media, but readily accessible to anyone in the public who would seek to be an observer.

However, the character of the prescriptions of the Constitution regarding legislation requires some further consideration. Can these prescriptions be characterised as moral and general?

As noted in the description of Oakeshott's usage of the term 'moral' in Chapter one, the prescriptions in the Constitution for acts of legislation are of human design, deliberate in their intention, and free from any reference to higher standards or laws. This is evident in preamble to the document which states that

We, the People of South Africa
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person;
and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (South Africa, 1996).

The purpose of the Constitution stated in the preamble is to lay the foundations for a society ‘in which government is based on the will of the people.’ Thus, the government as established by the Constitution, and legislation emanating from it are of human design. Furthermore, the act of adopting the Constitution is again attributed directly to the people of South Africa, and it is stated as a deliberate act with the intention of remedying past injustices and establishing the type of society in which the people of South Africa want to live. The Constitution, likewise, is held as the ‘supreme law of the Republic’. It does not accede to any other law or power nor is it subject to any substantive goal, it exists only to facilitate the creation and maintenance of a morally based South African state.

Morality, as discussed in Chapter one, is concerned with the ‘superordinate purpose’ of realising human excellence; a concept which is based on the historical self-reflections of agents as to who and what they understand themselves to be. Likewise, in the Preamble quoted above, the form of human excellence envisaged, and pursued, includes living in a society which espouses ‘democratic values, social justice and fundamental human rights’. Such a pursuit is not substantive because it cannot be achieved through specific actions, nor can it be selected from amongst alternatives. It is, however, a pursuit based on self-reflection; on the act of recognising the injustices of the past; on the search for and understanding of what the ‘people of South Africa’ consider themselves to be. The subsequent acts of honouring, respecting, believing and adopting all reiterate the

intention of realising this human excellence, as a non-substantive purpose, in which the 'people of South Africa' interact with each other and with the world around them, according to their cumulative and dynamic understanding of the proper manner in which they ought to do so.

The Bill of Rights in the second chapter expands on the principles stated in the Preamble to provide guidance as to their application, through legislation, in significant circumstances where either these principles were not acknowledged by governments based on earlier constitutions, or where they are deemed to be commonly encountered and therefore warrant general guidance. For instance, section 19(2) states that 'Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.' In other words, where free and fair elections were restricted to white South Africans only, during South Africa's Apartheid dispensation which was based on earlier constitutions, the moral principle of universal adult suffrage is a founding provision of the current Constitution and congruent with the form of human excellence described in the Preamble. As such it has been included in the Bill of Rights and must inform any legislation pertaining to elections in the state.

With regard to the general character of legislation in *lex* and its limiting of the scope of legislative interventions to ensure compliance with the general principles of *lex*; the Constitution makes provision in section 37 for a 'state of emergency' to be entered into under general conditions such as war, invasion, or natural disaster. The Constitution therefore provides general guidance to legislation covering a number of different potential situations, with war and natural disasters, for instance, requiring vastly different responses, but it does not specify comprehensive actions for any occurrence in particular. By doing so, not only is there no chance of an emergency situation occurring which is not accounted for in the Constitution, but whatever legislative intervention may be required, it is still subject to the limitations of the general prescriptions of section 37 and as such may not, in the interests of resolving an emergency, supersede the supremacy of the Constitution. For instance, in section 7 provision is made for the enactment of bills which derogate from the Bill of Rights, expressly forbidden under section 8 in any other circumstances, but this prescription also limits the enactment of such bills to a pre-

determined time frame and only as authorised by Parliament. It further restricts legislation of specific provisions in such a way that neither the state, nor any person, may be indemnified for unlawful acts, nor may any of the specifically named ‘Non-Derogable Rights’ be violated. Alternatively stated, it is not possible under any circumstances whatsoever, for legislation to be enacted under section 37 which contravenes the moral basis of the Constitution. Section 37 is but one example of numerous general prescriptions which limit the scope of legislation so as not to undermine the principles of the Constitution. Another similar example is the limitation placed on amending the Constitution in section 74 to various levels of majority vote in the NA and the NCOP depending on which section is being amended, again not prescribing what amendments may take place, but still preventing the President or any other organ of state from single-handedly circumventing the established moral principles of the Constitution as protected by Parliamentary oversight.

The character of legislation in the Constitution is moral and general. Its prescriptions are deliberate and of human design, devoid of reference to higher standards outside of the Constitution itself, and general in their definition, so as to allow for intervention in necessary, contingent situations without requiring absolute conformity with a substantive purpose. Accordingly, legislation in the Constitution is consistent with the three characteristics or criteria of legislation in *lex*, namely that it must be formal, accessible, and of a moral and general character.

3.2.2 Adjudication in the Constitution

In the South African state, adjudication takes place mainly in the courts, the responsibilities of which are defined in chapter 8 of the Constitution, sections 165 – 180. However, according to Oakeshott’s description of adjudication in *lex*, the first characteristic required is that it is a process which must be prescribed and authorised from within *lex* itself. If the Constitution is thus reflective of *lex*, this implies that adjudication has to be prescribed and authorised only from within the Constitution itself. To this end, Section 39 states that

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;...
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill (South Africa, 1996).

The authorisation of adjudication in *lex* is implicit here. Oakeshott acknowledges that uncertainty is part and parcel of the general character of *societas* (Oakeshott, 1975:131), but *societas* remains plausible and functional as a means of association because it recognises that there ought to be some means or procedure by which contingent specificity may be achieved (Franco, 1990:185). This foreknowledge and provision for achieving specificity is typified in the excerpt from the Constitution quoted above with the appearance of the very first word ‘When’. The assertion here is clear; there is no question as to whether or not the general prescriptions of the Constitution will have to be interpreted (‘if’), it is a given that they will be (‘when’).

In addition to implicitly authorising adjudication, the Constitution also states explicitly in section 165(c) that the ‘judicial authority of the Republic is vested in the courts’. The Constitution hereby stipulates that adjudication is a legitimate activity, which it authorises, since the assignment of judicial authority of course postulates that judicial activity is required in the first place, and that the task is accordingly assigned to the courts to fulfil the role of conducting this activity.

Having authorised the activity of adjudication, the Constitution also ensures that the courts cannot adjudicate according to any legal authority other than that vested in it by the Constitution. Sections 39(2) and 39(3) above state that, when adjudicating, all courts must promote the moral principles of the Constitution contained in the Bill of Rights and

that, in considering any legal authority outside of the Constitution, such an authority is valid only insofar as it is also consistent with these moral principles.

The remaining characteristic of adjudication in *lex* identified by Oakeshott is its impartiality. Sections 174 – 178 of the Constitution deal specifically with the appointment of adjudicators, where it is stated that they must, amongst other things, fulfil the requirement of showing impartiality in deliberating and adjudicating strictly in terms of the formal prescriptions of the Constitution. In this regard, section 174(2) states that ‘the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed’; such prescriptions speak to the potential pitfalls of racially or gender-motivated bias. The provisions in section 174(4) for appointments to be made in consultation with the leaders of all political parties represented in the NA from a list of candidates prepared by the independent Judicial Service Commission likewise allows for potential political bias to be mitigated. These prescriptions in the Constitution are reinforced by court rules and procedures developed in accordance with section 165(2), which states that adjudicators (court judges) ‘are required to be impartial and to uphold justice for all without fear, favour or prejudice’, and section 171, which prohibits adjudicators from being ‘members of Parliament, of the government or of political parties’, lest their role as adjudicator be influenced by political bias. In addition, the Bill of Rights explicitly states in section 9(1) that everyone is equal before the law in all respects, again reinforcing the requirement that when a matter is being adjudicated over with respect to the Constitution, no preference may be shown for any one party over another.

Regarding the pre-eminence of consensus amongst a majority in the discussion of the impartiality of adjudication as a formal condition for *societas*, a majority vote in a quorum of at least eight of the eleven appointed judges on the Constitutional Court is stipulated in section 167 of the Constitution for any adjudicative outcomes to be accepted as legitimate. This is in line with the principle that an error by any of the adjudicators in weighing the strength of the evidence before them against the prescriptions of *lex*, on an individual basis, is rectified through the more correct judgement conceded to by the remaining collective of the adjudicators presiding.

The presence and character of the adjudicative procedure in South Africa's Constitution is congruent with the conditions for *lex* which defines the formal system of a *societas* mode of association. The final component of *lex*, which is that of ruling, then remains to be considered in terms of the Constitution.

3.2.3 Ruling in the Constitution

A significant portion of the Constitution can be related to the final component of *lex*, namely ruling, in terms of enforcing its prescriptions. This is a telling indicator of its relative importance. It is helpful here to bear in mind Parekh's (1979:496) assertion, discussed above, that where there is a lack of clarity and of a clear conceptual distinction, ruling may easily become management, and, where this occurs, an association takes on the character of an *universitas*.

The first of the formal conditions of ruling in a *societas* described above is that ruling is not a persuasive exercise, but rather the enforcement of the obligatory prescriptions of *lex*. The Constitution provides for this, most pertinently, in section 2, which asserts the supremacy of the Constitution and states that 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. There is no attempt in the prescription above to justify the obligations imposed by the Constitution according to their desirability or utility, nor is there any attempt to persuade members of South African society to adhere to the Constitution in exchange for some reward. Ruling in terms of the enforcement of the prescriptions of the Constitution is to be carried out because these prescriptions are obligatory; no further justification is provided, nor is it required.

In addition, the guarantee of mutual adherence to the Constitution through the provision of substantive protection in cases where this adherence is contravened, can be identified in section 38, which states the following

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members (South Africa, 1996).

Allowance is made for any members of the association to bring an alleged violation of *lex* to the attention of the courts and, if the alleged violation can be proven, the courts will carry out the act of ruling through enforcing the prescriptions of the Constitution. Citizens are thereby guaranteed that their adherence is reflected by the adherence of all other citizens, on pain of substantive action being taken where alleged violations can be proven. As to the nature or severity of the substantive action to be taken, the Constitution does not prescribe this specifically, but does stipulate that it must be ‘appropriate’, a measure which is likewise determined by legislation and adjudication as directed by the Constitution.

The second formal condition discussed in relation to ruling is the limitation imposed on the powers of the ruling body in order to prevent abuse of the ruling function in pursuit of a substantive purpose, which is noted as likely to occur in an *universitas*. According to section 85(1) the executive authority, in other words the primary ruling authority, of the Republic, notwithstanding the limited role of the courts in ruling as described above, is vested in the President, and by extension in the National Executive (NE), of which the President is the head. Therefore, any limitations on the powers of the ruling body in South Africa may be stated as limitations to the powers of the President and the NE. The most overarching limitation on the powers of the President is perhaps the provision in section 89 for the removal of the sitting President from office by a two thirds majority vote in Parliament if they violate the Constitution or law, or if they are guilty of serious

misconduct. The President may therefore, under no circumstances, rule outside of the Constitution or the moral principles on which it is based and, in this regard, is subject to the scrutiny of Parliamentary oversight.

For instance, a specific provision in the Constitution delimiting the extent within which the President may rule includes section 88(2) which states that ‘no person may hold office as President for more than two terms’. Any attempt to do so would be unconstitutional and would warrant removal from office by a Parliamentary vote. Likewise, extraordinary powers conferred on the President which could potentially undermine the moral basis of the state as described in the Preamble to the Constitution, such as employment of the national defence forces in section 201(2), is limited by section 201(3) whereby the President is required to inform Parliament of the reasons and details behind the decision. Similarly, a state of national defence may be declared by the President according to section 203; however, without the appropriate approval by Parliament within seven days, the declaration lapses. The above examples, amongst others, demonstrate that the Constitution has been designed and structured so as to make provision for the limitation of powers associated with the function of ruling attributed primarily to the President and the NE.

To conclude the discussion on ruling, the last of the three acts of *lex*, it is clear that the Constitution contains prescriptions which, firstly, provide a guarantee of universal adherence to *lex* under pain of appropriate substantive consequences, and, secondly, limit the scope and extent of the powers afforded to the President and the NE in carrying out the act of ruling.

It is therefore possible to conclude that the Constitution, the founding document of South Africa’s constitutional order, adheres to the first of the formal conditions of the *respublica* in a *societas*, namely the establishment of the formal system of *lex* understood through the three acts of legislation, adjudication, and ruling. The second formal condition, namely that of the maintenance of the formal system through the authority of *lex* in *respublica*, is discussed in more detail below.

3.3 Authority

The discussion of authority as a formal condition of *societas* in Chapter two of this study postulates that its authority lies in the universal recognition of all of its members that it is a just system defined by its formal norms and prescriptions as contained in *lex*. If we extend this to the assessment of authority in identifying features of *societas* in South Africa's Constitution, we are left with the task of elucidating, not why citizens either do or do not acknowledge and adhere to *lex*, but rather, why they think they ought or ought not to. In general terms, '[t]his is a peculiar sort of question; its logic is the logic of right, not the logic of fact' (Oakeshott, 2006:441).

The reason that the above distinction between fact based and value based logic is important to this study is because the methodology employed thus far in the study has consisted of comparing the various characteristics of South Africa's Constitution directly with the respective characteristics required by the formal conditions of *societas*; for example, assessing whether or not adequate prescriptions exist in the Constitution for the adjudication of *lex*. These assessments are based on factual analysis. By contrast, an assessment based on conceptions of right or wrong is a subjective task, and one fraught with questions of context which require a hermeneutically constructed analysis of potentially limitless scope.

For instance, in his analysis of the authority of modern European governments, Oakeshott considers possible sources of authority, including divine endowment transmitted through hereditary lines, the supposed superiority of natural features such as a bloodline, knowledge, wisdom, and elitist distinction, and a composite general will of all subjects (Oakeshott, 2006:439-487). Such an analysis, in the case of South Africa, with its widely diverse history of different ethnographic currents, is a considerable undertaking on its own. Therefore, although it is a worthwhile endeavour for another discussion focused on such a research problem specifically, a more appropriate approach has been chosen for the discussion at hand.

Rather than to attempt to confirm the presence of the acknowledgement of the Constitution's authority by means of identifying in the Constitution and South African society characteristics that constitute consensus amongst citizens as to what may be acknowledged as authoritative, it may rather be asked what a lack of acknowledgment of the authority of the Constitution may look like, and is this lack of acknowledgement present in the observations that we make? In fact, this is precisely the approach employed by Oakeshott on numerous occasions in his works (Gerenscer, 2003:5), and more specifically in identifying what the authority of *societas* is contingent on. It cannot be an appeal to some higher standard, or on the desirability of its perceived future benefits, or some other commonly held misconception; therefore, in refuting the alternatives, its contingency on the universal acknowledgment of all citizens that it is authoritative is inferred.

What, then, are the hallmarks of the absence of acknowledgement of the authority of the Constitution? In contrast to his two modes of association framework, which posits that society occupies a position at some point between the two extremes of *universitas* and *societas*, Oakeshott seems to offer no compromise on acknowledging the authority of *respublica*. Citizens either fully assent or fully dissent (Gerenscer, 2003:8). For the sake of clarity, it needs to be explained that assent to the authority of *respublica* is not synonymous with agreement on the desirability or justice of its prescriptions, for that is the realm of *universitas*. Rather, it is the recognition that *respublica* allows for critical deliberation about the desirability of its prescriptions from within an authoritative system which, in turn, validates and authorises the outcomes of such deliberation, regardless of whether or not full consensus is achieved. This implies that, irrespective of whether or not there is agreement as to the desirability of specific laws, the authority of the system from within which the specific laws are developed is not compromised. However, returning to Oakeshott's formulation on the acquiescence of citizens, it is here that we are provided with a means of determining how dissent against a *respublica* can be identified and, accordingly, can characterise the state as not possessing the authority required by *societas*. Oakeshott explains this as follows:

Dissent from the authority of *respublica* is giving notice of a resolve to terminate civil association, and genuine dissentients are either secessionists who design to place their investment in civil discourse elsewhere, or they are disposed to destroy the civil condition in civil war (Oakeshott, 1975:164).

The apparent severity of Oakeshott's assessment cannot be overlooked, and certainly it is difficult to imagine that any actual society exists where all citizens assent fully to *respublica*, or rather, where any dissent, no matter how limited it may be, is recognised as civil war.

For instance, in the case of South Africa, does the fact that Orania exists as a small community of secessionists determined to realise the goal of self-governance negate the authority of the Constitution in the rest of South Africa? The residents of Orania² might not acknowledge the authority of the Constitution and accordingly claim to operate according to the prescriptions of their own *respublica* (Orania Beweging, 2013). Similarly, one could argue that those accused and convicted in the Boeremag Treason Trial³ resorted to attempting to instigate a racially based civil war to release themselves from any obligation to adhere to the Constitution. However, the absolute minority status of such instances must surely have some bearing on the consideration of Constitutional authority at hand. The Orania community had only 892 members in 2011 (Frith, 2013) and, in total, 22 members of the Boeremag were originally accused to face trial for high treason (South African History Online, 2013). While Oakeshott makes no attempt to explicitly qualify what proportion of citizens constitutes acquiescence or full dissent, the example he provides to illustrate the notion of dissentients' challenging the authority of a given system of governance is that of the American Revolution which, he notes,

² The controversy surrounding the establishment and continued existence of the Orania community is documented in both the local (Sosibo, 2014) and international (Tweedie, 2013) media. There are certainly other similar communities in South Africa, but Orania is commonly perceived to be the beacon for movements of its kind.

³ The Boeremag Treason Trial captured media attention in South Africa from the middle of 2003 until its eventual conclusion 10 years later. As with Orania, the Boeremag movement is not the only one of its kind in South Africa, but it is the most prominent.

...sprang from the belief that the government in Westminster had no authority over the colonialists, not from any objection to what the government in Westminster was doing. What was asserted was, not that tea should not be taxed, but that 'taxation without representation' was not legitimate, or rightful (Oakeshott, 2006:443).

The difference between the American Revolution and the two examples of Orania and the Boeremag members above is that the notion of illegitimacy in the American context was the prevailing notion and not merely the belief of fringe elements in a society. That the American Revolutionary War engulfed thirteen of Great Britain's North American colonies is testament to this fact.

With regard to the possibility of qualifying Oakeshott's seemingly uncompromising stance, Gerenscer (2003:7) notes that

...we may scale back our assumptions regarding consensus, to accept there are over-lapping, cobbled together, differing beliefs about authority that land us between "acquiescence" and "civil war". Political possibilities exist whereby the exercise of power by the state is questioned both to consider on what authority it undertakes its engagement and to bring to light those who disagree with such a claim to authority. Does this make authority weaker? Most likely. Does it destroy authority? No. Though it does heighten caution about the exercise of power and acknowledges that the state does act in ways that some subject to its power do not recognize it as authoritative.

It follows, then, that the answer to the question of whether or not the Constitution possesses the authority required for its prescriptions to be adhered to and, accordingly, for it to be confirmed as reflecting the *societas* understanding of the state, cannot be absolute in terms of the proportion of citizens who are acquiescent, but rather in the uncompromising character of the prevailing assent. In other words, is acquiescence the prevailing norm amongst citizens and is that acquiescence uncompromising, not in relation to specific substantive laws, but in relation to the Constitution as the formal legal framework from within which specific substantive laws are deliberated and confirmed?

As described above, occurrences of dissent from the South African Constitution do exist, but they are by no means a reflection of the prevailing sentiment amongst citizens. Where instances of dissent are found, they occur at the fringes of society and always with a very limited number of dissentients. There are no current or pending examples of successful attempts at secession where the authority of South Africa's Constitution has been acknowledged by the courts and the State not to have application to a specific community, and there is certainly no current state of civil war either nationally or in any specific areas within South Africa's borders. Instances of civil unrest that are larger and more far-reaching than those stated above do occur, but they are typically protests against poor delivery of services by the government, strikes in the labour sector during wage negotiations, or politically motivated rallies and marches concerned with defending or garnering support for specific political parties. They are aimed at exposing shortcomings in the act of ruling, or other such civil frustrations, and not at seeking to remove the authority vested in the various agencies to carry out these duties. Acquiescence is therefore observed in the form of the prevailing disposition of citizens in South Africa towards its Constitution.

As to the uncompromising character of this acquiescence, it is not uncommon for cases seeking interdicts against occurrences of civil disobedience to be brought before the courts which (as described in the previous section on legislation, adjudication and ruling) is where the adjudicative authority of the Constitution is vested. For examples of such instances in South Africa, one has to look no further than the labour unrest in the platinum mining sector since 2012, where on more than one occasion both the majority labour union and the mining houses have turned to the courts to adjudicate over and enforce a fair negotiating processes. For example, in May 2014, the Association of Mineworkers and Construction Union sought an urgent interdict to prevent the mining houses from bypassing the union by taking wage offers directly to their employees via individual communication channels such as cellphone messages (Gernetzky, 2014). The fact that there are both claimants and defendants in such cases indicates a mutual acknowledgment by all actors in the specific case where civil disobedience has occurred that the courts have the authority to adjudicate over and provide a ruling on their respective causes.

Indeed, the Constitutional Court, as the highest court in the land, has handed down rulings in a number of landmark cases spanning numerous sectors of society, without prejudice to position, or submission to any authority other than that vested in it by the Constitution. These cases include, for example, August vs. Electoral Commission in 1999 on the right of prisoners to vote, and the Minister of Health vs. Treatment Action Campaign in 2002 on the provision of access to healthcare for HIV-positive persons (Constitutional Court of South Africa, 2005a). In fact, on more than one occasion even the President has been subjected to the authority vested in the court, as was the case in 1995 with the Executive Council of the Western Cape Legislature and Others vs. President of the Republic of South Africa and Others regarding the 'legislative authority of Parliament and the delegation of powers' (Constitutional Court of South Africa, 2005a). It can thus be observed that nobody is deemed above adherence to the prescriptions of the Constitution, as adjudicated by the courts, and those who assent to its authority do so without compromise.

In summary, Oakeshott describes citizens as being either fully assenting or fully dissenting of the authority of a *respublica*. It follows, then, that if full dissent is not observed, as would be typified by either secession or civil war, full assent may be deduced. To this end, it is shown above that, in the absence of dissent as the prevailing attitude towards the authority of the Constitution, it is generally considered to be authoritative in the South African state.

The discussion on the Constitution is concluded at this point, as it has been demonstrated that it is congruent with both of the formal conditions of *societas*. It conforms to the conditions of *lex* and is generally considered to be authoritative, and thereby it has authenticity as reflecting the *societas* understanding of the South African state.

However, it is noted in the first chapter of this study that it seems counterintuitive for both modes of association to exist in a given society, while being mutually exclusive. In the case of South African society, this may lead to the assumption that, given its predominantly *universitas* character (Wolmarans 2005, 2009), the Constitution is either

not functioning as it ought to be, or it is being ignored all together and is, therefore, not authoritative at all.

A point that ought to be reiterated in this regard is that the character of the state, as understood by Oakeshott, is the balance of dispositions of its various members. For instance, in South Africa the *universitas* understanding of the state is informed by, but not entirely comprised of, the dispositions contained in the four key ideas discussed by Wolmarans (2009). Likewise, the *societas* understanding of the state is informed by, but not entirely comprised of, a disposition which regards the Constitution as authoritative. In each of these cases, there is a myriad of further dispositions which also contribute to the respective understandings of the state to varying degrees, and it is the overall balance of all of these dispositions together which gives the South African state its unique character. This is what makes Oakeshott's theoretical framework noteworthy, not his elucidation of each of the modes of association on its own, but the fact that he posits them to be in mutual tension with each other – opposites, but not precisely so; each exerting a pull on the other, but not to the extent that they cancel each other out. Therefore, South African citizens may well regard the Constitution as the most authoritative legal document of the state, but feel that it has limitations, for instance, with regards to the activity of defining policy, and that, in the current national context, a focus on defining policy ought to take precedence in the affairs of the association. In other words, South African society may well be predominantly disposed towards an *universitas* character, but in tension with this disposition is a *societas* character which also enjoys some standing in South Africa's style of governance and which is visible in, amongst other things, the presence and authority of the Constitution.

According to Oakeshott's formulation, navigating towards the 'mean in action' is the 'proper manner of being active for this particular political character' and it can thus be seen as necessary that the *societas* understanding of the state must be enhanced in order to counterbalance the dominant *universitas* understanding in South Africa. Although it is beyond the scope of this study to comprehensively investigate how this enhancement may take place, the next section briefly presents some pertinent points of Oakeshott's

thought on the subject, an area of study which should to be investigated in depth in future.

3.4 Towards the mean in action

To say that the *societas* understanding of the state ought to be enhanced in South Africa implies that there is some party that can carry out the activity of enhancement. Oakeshott acknowledges the implication that such a party has to be present, and incorporates it into his framework in the concept of moderation proposed by Lord Halifax in his work entitled *The Character of a Trimmer* (c. 1684) (Oakeshott, 1996:122-123). Oakeshott employs the metaphor of the trimmer to describe the type of political participant, a person or perhaps an institution, whom he favours to carry out the task of directing or guiding the political activity of the state in such a way as to approach the 'mean in action'. He explains that such a state, guided by the trimmer, would be one in which sudden or drastic changes in political activity are out of the ordinary, but where there is constant opposition to the prevailing direction, whether that be towards *universitas* or towards *societas* (Oakeshott, 1996:123).

3.4.1 The trimmer as a metaphor

According to Goodheart (2001), at the time when Lord Halifax wrote *The Character of the Trimmer*, the term 'trimmer' was generally understood to be derogatory, implying one who was despised as being unscrupulous and weak. Yet in Halifax's writings (cited by Goodheart, 2001), and thus in the Oakeshottian context, it is intended to be understood as one who is in fact noble and principled, a seeker of stability and peace, a buffer to dangerous extremes. This political role is most notably captured by Lord Halifax, who states that

This innocent word trimmer signifieth no more than this, that if men are together in a boat, and one part of the company would weigh it down on one side, another would make it lean as much to the contrary; it happeneth there

is a third opinion of those, who conceive it would do as well, if the boat went even, without endangering the passengers;... (quoted by Bellamy, 2002:98)

Therefore, a trimmer is not one who is concerned with the destination of the ship, as the captain would be, but only with its motion in a given direction; that it not be hindered or diverted from its prescribed course. In fact, the notion of a destination is typical of *universitas*, and it is one which proves troublesome to Oakeshott, who famously describes political activity as essentially having no fixed destination at all:

In political activity, then, men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting-place nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion (Oakeshott, 1991:66).

Freedom from the responsibility of having to determine the ship's destination thus releases the trimmer from the burden of having to appease citizens. In other words, citizens may elect to the role of 'captain' one who most closely reflects their own ambitions and desires for the society within which they live, and this 'captain' will accordingly be constrained so that the 'captain' cannot set a course that deviates from the populist ideal. By contrast, the trimmer is there simply to ensure that, in pursuing the course as determined by the elected 'captain', the ship is not wrecked by the extreme forces acting on it; the trimmer's primary concern is the safety and stability of the ship, not the allegiance or the loyalty of its passengers.

3.4.2 Role and responsibilities

The trimmer, then, has a specific task in guiding a society in the manner described above. In order for the trimmer to carry out this task, Oakeshott envisaged the trimmer in an *universitas*-dominated society as having the following specific responsibilities:

...first, to restore the understanding of the complexity of modern politics...secondly, to renew the vitality of political scepticism [*societas*] so that this pole of our politics can once more exert its pull...thirdly, in his participation in politics, he must dispose his weight against the prevailing current, not in order to make it flow to the opposite extreme, but to recall our political activity to that middle region of movement (Oakeshott, 1996:128).

These responsibilities are not trivial, and in order to carry them out, the trimmer requires knowledge of the complexity of the politics of the state and its polar extremes, as well as judgement on when and how to counter excessive pull in either direction (Oakeshott, 1996:124).

There is, then, scope in the South African context for a trimmer to guide the state away from its current dominant *universitas* character, by enhancing the features of the *societas* understanding of the state, such as the Constitution. Oakeshott provides some general guidance as to the responsibilities of the trimmer, as discussed above, but there is still substantial room for further investigation to determine who may be best suited to conduct the activity of trimming in South Africa and how the trimmer's responsibilities may be carried out.

3.5 Conclusion

In this chapter, the Constitution was discussed in relation to the formal conditions for *societas* defined in Chapter two. It was subsequently shown that the Constitution contains features and prescriptions which comply with the formal condition of *lex* as understood through the three acts of legislation, adjudication and ruling. Furthermore, identifiable features of a society which rejects the authority of *lex* are not evident in the current South African state, which in turn indicates that the Constitution also complies with the formal condition of authority in a *societas*. It is thereby concluded that the Constitution reflects a *societas* understanding of the character of the state which, in contrast to the dominant *universitas* understanding, is not concerned with the

attainment of a substantive goal, but rather with the establishment of, and adherence to, a formal system of moral norms and laws.

This chapter, additionally, summarised some of Oakeshott's thought as to how the enhancement of the *societas* understanding of the state ought to be pursued, which is deemed by him to be the proper manner of acting in a complex state, such as South Africa, which is characterised by dual modes of association. In particular, Oakeshott attributes this activity of enhancement to a political participant whom he calls the trimmer; yet substantial scope remains for research into this concept of a counterbalancing agent in South Africa and how they might go about carrying out the responsibilities associated with their role.

Chapter 4:

Conclusion

The aim of this study was to demonstrate that the South African *Constitution* adheres to the *societas* understanding of the state, as described by Oakeshott, and thus serves to counteract the predominantly *universitas* character which the South African state has been shown to have. To this end, the study was conducted using the following structure:

- Michael Oakeshott's conceptual handling of character was introduced as a key theme in his philosophy. Subsequently, his 'dual modes of association' framework was elucidated. This included providing an understanding of *universitas* and *societas*, the composition of the character of the state as both of these modes in tension with each other, their nemeses at their extremes, and the 'mean in action' as a middle region path away from either of these extremes.
- The existing literature was reviewed to demonstrate that South Africa is characterised by a dominant *universitas* understanding of the state. Given that South Africa is not completely dysfunctional, and based on the logic of Oakeshott, there must be some features of the South African state which reflect a *societas* understanding. Furthermore, based on Oakeshott's description of *societas* as primarily a legal association, it was then posited that the Constitution would be an appropriate starting point from which features reflecting a *societas* understanding of the state may be sought.
- In the main part of this study it was demonstrated that the Constitution does reflect a *societas* understanding of the state, firstly, by identifying the formal conditions for a *societas*, and secondly, by comparing the Constitution to these formal conditions to identify congruencies between the Constitution and *societas*.

Having completed all these phases of the study, it can thus be concluded that the Constitution adheres to the *societas* understanding of the state. This conclusion is based on the following main arguments:

- Oakeshott's 'dual modes of association' framework, as a means of describing the character of the state, posits the simultaneous presence of both the *universitas* and the *societas* modes of association within the modern state, the two existing in continuous tension with each other. *Universitas* is characterised as an association united around a common substantive purpose, while *societas* is characterised as an association united in adherence to formally defined moral norms and rules. Each of these modes of association tends towards self-defeat at its extreme, so that neither can be seen to represent an idealised association on its own. The fact that two mutually exclusive modes of association are also dependent on each other to avoid their logical self-defeat is substantiated by an ambiguous political vocabulary which allows for movement within a state of the dominant understanding of its character between the polar extremes of the two modes. This movement in turn postulates the 'mean in action' as a balanced understanding of the character of the state, comprised of the appropriate pull exerted by each of the two modes against each other.
- Prior work on the subject has demonstrated that Oakeshott's framework, which was originally concerned with the character of the modern European state, may also be appropriate to the South African context. By applying the framework to South Africa, it has previously been shown that the current South African state is dominated by an *universitas* understanding of its character. If it is assumed that a greater shift towards *universitas* implies a greater shift towards dysfunction (its nemesis), given that the South African state is currently not entirely dysfunctional, there must be some *societas* understanding of the character of the state also present within the association we call South Africa. Any number of possible features of the South African state may be identified as reflecting this *societas* understanding; however, the most appropriate feature to begin with is the South Africa's Constitution, since it serves as its most overarching and authoritative legal document.

- To enable an investigation into the Constitution's adherence to the *societas* understanding of the state, the formal conditions of *societas* need to be defined. These can be summarised according to the two distinct components of a *respublica*, namely its establishment as a formal system, termed *lex*, and the subsequent maintenance of that system through the universal acknowledgement of its authority. *Lex* is better understood through the character of its acts of legislation, adjudication and ruling, while the authority of *societas* is understood to be inherent to its self-authenticating, moral character.
- The South African Constitution displays congruency with the formal conditions of *lex* in *societas* as it contains prescriptions which formalise the norms and rules of South African society and, in addition, the prescriptions of the Constitution can be characterised as moral and general. Furthermore, access to the legislation contained in the Constitution and the legislative process itself is unrestricted for all citizens of South Africa.
- The adjudication process is authorised from within the Constitution, and therefore possesses the same normative authority as the Constitution itself. In addition, adjudication in the Constitution has also been shown to be an impartial activity, with a number of prescriptions pertaining to the composition and procedures which the courts must adhere to, and through the requirement for consensus between adjudicators as to the outcomes of the adjudicative process.
- It has been shown that the Constitution makes provision for ruling through the enforcement of its obligations, and not through persuading South African citizens that these obligations are desirable or serve some specific purpose, as would be the case in an *universitas*. Furthermore, the scope of the activity of ruling is limited to prevent it from acquiring the character of management found in *universitas*, which always seeks to eliminate disorder as opposed to providing a means of restoring order in contingent circumstances.

- The South African Constitution also exhibits congruency with the formal conditions of authority in *societas*. However, in this instance, congruency is not established through an analysis of the prescriptions of the Constitution, as authority cannot, by definition, be legislated. It may therefore be asked what dissent from the authority of the Constitution would look like, and whether such dissent is observable in South African society. Despite the existence of limited dissent in the form of attempted secession from the state, or civil disobedience against the Constitution, it cannot be inferred that dissent is the prevailing attitude of South African citizens. It is therefore demonstrated that the Constitution is accepted as authoritative.
- Having conformed to the formal conditions for both components of a *respublica*, the Constitution has been demonstrated to adhere to the *societas* understanding of the state.
- Therefore, even though South Africa currently tends towards a predominantly *universitas* character, there are features such as the Constitution which ought to be enhanced in order to direct the state away from the nemesis of *universitas*, and towards the ‘mean in action’.

The findings of the study as described above highlight an additional dimension of Oakeshott’s framework, namely that the state ought to be guided towards the ‘mean in action’ as a dynamic balance between *universitas* and *societas*, away from either of their nemeses. To this end, a brief overview of Oakeshott’s thought on who may be responsible for the act of guiding was provided as an indication of possible further research on the character of the South African state.

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