

FROM CONSTITUTIO ANTONINIANA TO CONSTITUTIONAL COURT

It is a striking honour to be invited to speak at this degree ceremony in the university which has so staunchly nurtured the ideal of academic freedom, including freedom of access for all qualified students whatever their background. It is the university where in 1939 in the shadow of war I was lucky enough to be able to embark briefly in what was to be a long career in academic life as student, teacher and writer. As a lawyer and legal historian I speak today in the first place about a turning point in legal history, and end by drawing a parallel between it and the contemporary situation in South Africa and, in the light of the parallel, make a positive suggestion. Do not be dismayed if the story at first seems rather remote from your concerns.

As we are all aware, the seeds of a radical idea may germinate for many years without yielding much surface change. Then in a sudden turn those who control a society's destinies see that the time has come to seize hold of the challenging idea and give it effect. They may express the new vision in a striking official speech or enact a new law. A word is spoken and nothing can again be the same.

Such a dramatic turn in the destiny of the Roman empire took place in 212 AD. The emperor Antoninus, nicknamed Caracallus (Caracalla) after a cloak which he had made fashionable, issued an edict conferring on all free inhabitants of the Roman empire the status of Roman citizens. He was then 26. This was the famous Antoninian edict (*constitutio Antoniniana*). Guesses about the population of the ancient world are very rough, but the edict probably trebled or quadrupled the number of Roman citizens. Apart from slaves, who on the best estimate were about fifteen percent of the population, the remainder, the vast majority, now acquired equal status as citizens of the most prestigious city in the ancient world. They were a diverse set of people, stretching northwards to the Scottish border, east to Iraq, south to the Sudan, west to Morocco. It made no difference where they lived or what was their sex, ethnic ties, culture, language or, if it comes to that, colour. The status of a privileged minority became overnight that of the majority. As Augustine put it, the aim was that what belonged to a few should belong to all.

The new citizens did not indeed enjoy political freedom any more than those who were already Romans. But they were admitted to civic freedom and equality before the law. No

office of state was now closed to them. They acquired a new name, Aurelius, derived from the emperor's name and a new legal system, Roman law, originally that of a smallish city state.

In some places it took a long time for the effects of the edict to be felt in the thinking of the ordinary citizen. But in the end consciousness of being Roman took deep root in the Greek-speaking east and the Celtic west as in the Italian heartland. This consciousness was to sustain the Byzantine empire, which was neither ethnically Roman nor Latin by culture, for a thousand years. The Byzantines kept their Roman names right up to the Turkish conquest of 1453. In the west consciousness of being Roman made the Christian church of the city of Rome dominant and has sustained it to this day.

Despite its dramatic quality contemporaries say little about Caracalla's edict, and what little they say is dismissive. The rich and elite throughout the empire were of course for the most part already citizens. Their status was being diluted. One ancient historian says that the emperor's motive was to increase the revenue from the inheritance tax. But the tax effect would have been marginal. Caracalla himself in another edict mentions a religious aim, that of increasing the number of worshippers of the Roman gods.

Leaving motives on one side let us turn briefly to the ideology of our edict. On a view of natural law derived from Stoic philosophy and current in the ancient world human beings were originally free and equal. Then war, slavery and the other ills of society came on the scene and curtailed that freedom and equality, though it was never obliterated. Caracalla's edict presupposes the survival beneath the surface of a society of people free, and in their humanity, equal. Slavery, though contrary to nature, could not be avoided but beneath and beyond it one could discern an underlying unity. At this period a cosmopolitan dynasty ruled the empire and a number of men in public life subscribed to this outlook. One of them was Ulpian, from Tyre in Syria, an able and energetic lawyer. Of him more later.

Even the most compelling idea can be effective only when the right conditions are present. There must be a political crisis such that those who have power and can give it effect believe not merely that it is right but that the time has come to insist on it. No less important, the idea can prevail only with the support of legal and administrative structures to implement it in

detail. It is worth while exploring briefly in relation to Caracalla's edict these converging conditions - idea, crisis and implementation .

I have said something about the idea. The immediate occasion for the edict was a political murder. Caracalla's father, the emperor Severus, had two sons, himself and a younger brother Geta. They were on very bad terms, but the old man wanted both to succeed him. His wish was at first respected. When Severus died at York early in 211 the brothers became joint rulers. But before the end of the year the imperial expedition had returned to Rome, where by signal treachery Caracalla had his brother murdered. Though he presented the murder as a pre-emptive strike, the guilt weighed on him. How could he expiate or at least distract attention from such a crime? The grand gesture of universal citizenship had an obvious appeal. The dynasty, was, as I said, cosmopolitan. Caracalla's father had come from North Africa, his mother from Syria. He himself was born at Lyon, then part of Gaul. His hero Alexander the Great, rising above ethnic considerations, had wanted Greeks and Persians to rule the world jointly. Then there was a democratic element in Caracalla's makeup. He enjoyed the rough life of an army drawn from all races and walks of life and was ready to share their hardships. The grant of universal citizenship would perhaps appease the Roman Gods and win the applause of subjects.

So the gesture was made. But it might have remained little more than that had it not quickly been translated into legal and administrative detail. The person responsible for this part of the project was Ulpian, of whom I will now say something. Coming from Tyre he was a protégé of the Syrian princesses who gave the dynasty much of its intellectual drive. Skilful and dynamic, we first meet him as one of Severus' lawyers drafting legal opinions for the emperor. Then on the emperor's death at York in 211 he opted in good time for the winning side, backing Caracalla to whom he refers in glowing terms. Ulpian accepted the realities of power politics, while his admired contemporary Papinian sided with Geta and paid the penalty.

Ulpian's legal philosophy we know from his writings. He believed in a universal natural law extending even to animals. He upholds equality before the law and, to the extent then possible, limits on state power, saying that while the emperor is not bound by law nothing becomes him more than to adhere to it. He vindicates the rights of the public, for example their right to use the beaches, attacking those private owners who unlawfully enclose the

seashore. To him the lawyer is, in a high-sounding phrase, like a priest of justice, committed to upholding genuine rather than pretended philosophy. In other words he takes seriously only those philosophical beliefs that the holder is ready to see put into practice.

Ulpian was not merely disposed to favour Caracalla's extension of the citizenship. His part in the project was, as is now clear, a central one. This the dating and character of his voluminous legal writings shows. About a third of million words by Ulpian have come down to us. This is only about a seventh of the more than two million words that he actually wrote. Close analysis of his corpus of work has shown that it was nearly all written in the five years immediately following Caracalla's edict, between 213 and 217. As to the content, Ulpian stresses how rational and universal is the law he expounds. The languages of Gaul and Syria, for example, can be used for legal transactions as well as Greek and Latin.

We can infer that this outburst of creative energy over the five-year period following Caracalla's edict was not a coincidence. Rather Ulpian's part in the policy of universalism was to restate the whole of Roman law for the benefit of the citizen body, and especially the newcomers who had not merely to be informed but to be convinced of its merits. So Caracalla's edict cannot just have been a sudden impulse by a beleaguered ruler, but rather something long debated and planned in detail.

Ingenious in finding ways of filling gaps in the law and of making it more rational, Ulpian's writing is so clear that his meaning is rarely in doubt. These qualities, along with the universalist philosophy and wise judgment that inspired his works explain why no other legal writer then or since has had so much influence both immediate and on later generations. To adapt the rigid laws of a rather peculiar city state so that they become the framework of a vast empire was an extraordinary feat. Even more remarkable, this reformulated Roman law took root not merely in the ancient, and via the universities in the mediaeval, world but in one form or another spread in modern times all over the world, including to a very special degree South Africa.

Which brings us home. You are being invited, as you realise, to reflect on the parallel between Caracalla's edict and the speech of F.W. de Klerk of 2 February this year, different in character as the two men happily are. Despite what is sometimes said history does, in part and with variations, repeat itself, especially when the earlier event is a remote causal ancestor

of the later. The State President expressed his determination to give effect to the twin values of racial equality and political freedom, of which freedom of association is a key ingredient, and ended the ban on organisations hitherto regarded as subversive. These values are aspects and extensions of those current in the ancient world. But they could be given effect as state policy only when the alternative ideologies of apartheid and class struggle had been so undermined by their failures that they no longer convinced even those officially committed to them. The strategic balance of power then shifted and accommodation became a genuine option.

So much for the idea and the crisis. My closing remarks are addressed to implementation. A new South African constitution, whether unitary or federal, will be a mockery unless it contains effective guarantees of the values of racial equality and political freedom asserted in the speech of 2 February 1990. This will inevitably mean restraints on legislative and executive power. But such restraints cannot in practice be monitored by the new Parliament or executive, whatever form they take, since these are the very bodies whose powers are to be restricted. Only a court can fulfil this role.

So some court must be given what in the old South African republic was called the testing power. But what court? There are really two possibilities. One is to follow the example of the United States and entrust constitutional along with ordinary jurisdiction to our highest court, the Appellate Division. The other is to set up a separate court to exercise constitutional jurisdiction.

Though I admire much of the work done by the Appellate Division since 1910 there are reasons why the second alternative would be better. Whether one speaks of revolution or rapid evolution the President's speech and the response to it make a radical change in the ideology of public life. But those who have served in state organs such as the army, police, civil service or judiciary will for the most part remain in post under the new dispensation. This is inevitable. Only a small number can initially be replaced; and many of those who remain will naturally, even if not consciously, tend to act as if nothing had changed. So it is all the more important that the body that will in the last resort set the law to the other organs of state should be a body freshly recruited and not just an existing court with extended jurisdiction. Constitutional adjudication is unlike ordinary adjudication in that it is strongly political, not in the party sense, but in that it requires judges who are sensitive to the ways in

which the values enshrined in the constitution can be translated into concrete rights and duties and in which a balance can be maintained between the different organs of government.

It is equally important that the court of last resort should be of a representative character which commands confidence. Our existing higher courts, despite their merits, are dominated by a single racial group and the judges are nominated by the executive. Moreover the ultimate court should be easy of access to those who think their constitutional rights have been violated.

On these points we can in my opinion learn from the experience of the Federal Republic of West Germany under the Basic Law of 1949. After the collapse of the Nazi regime the courts there were largely staffed by the same judges as before, who had displayed no great courage in opposing the tyrannical regime. Perhaps they could not have been expected to do so. In any event the framers of the new constitution resolved on an innovation: the successor state should be endowed with a new highest court, the constitutional court. This court was duly created and is separate and independent in regard to all other organs of the constitution. Though it consists of qualified lawyers, less than half its members are chosen from existing judges of the ordinary courts. More important, the judges are chosen by the two houses of Parliament, half by each house. The members of Parliament vote for the judges by a system of proportional or weighted voting to ensure that the judges they elect will not all be of the same political outlook. Judges hold office for twelve years and are not re-eligible. The court is not to be dominated by the elderly and its thinking is not to become petrified. So selection and conditions of tenure are not like those of an ordinary court. Moreover access to the constitutional court is direct. There is no need, as in the United States, for the citizen to thread his way upwards through a complex and costly maze of appeals.

Despite some initial criticism the German constitutional court has over nearly forty years promoted stability in political life and greatly contributed to the peaceful evolution of that country not merely by the decisions it has made but by the measured balance and tone of its pronouncements, not all of which are legally binding. There is no doubt that the reunited Germany will be endowed with a similar court. It is with no disrespect to our existing courts in South Africa that I express the hope that the new South African constitution in which the values of racial equality and political freedom are to be embodied will include provision for a constitutional court. The details must depend on how the new legislature and executive are

structured; but the new values will surely have a better chance of taking root in South African society if there is as the apex of the judicial hierarchy an independent court more politically sensitive than the ordinary courts have been, or have been able to be, hitherto.

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