## FORUM

# UNITING THE RECHTSSTAAT WITH THE ENGLISH KINGDOM

**SHAVANA MUSA - 11.07.2014**

The *Rechtsstaat* is embedded deeply within the Dutch constitutional culture. A product of centuries of societal and legal change, its resilience will most likely refuse to fall prey to the ever-globalising and technological world. But what is so pertinent in the legal system of a continental country like the Netherlands is, to a certain extent, alien to a common law country like England. *Rechtsstaat* is not a term associated to the legal state of affairs in England. Elements of the Dutch *rechtsstaat* can admittedly be found in the English legal system, most aligned to the rule of law, but the unique English history and legal makeup has meant that a *'rechtsstaat'* as the Dutch know it was never received across the Channel.

As a common law trained legal scholar currently living and working in the Netherlands, I find myself constantly battling my innate comparative disposition, as well as giving into my legal patriotism during endless discussions about the 'complex, disorderly and confusing' common law system with my civil law-minded colleagues. This brief comparative piece will touch upon a couple of issues that may be helpful in understanding why the English have never embraced a *'rechtsstaat'* culture like the Dutch. With the tug-of-war being played out between the national and the global, comparative methods are an effective way of not only learning about new systems, but allowing us to become far more analytical about one's own system. A country like England who is usually perceived as the stubborn brother in this European Union family has a legal historical development and context that is different to its continental siblings, and of which, in my mind, does deserve some attention.

The rule of law is a dominant aspect of the English constitution, which in the 19th century, Dicey propounded as vital and unique to England and of which comprised of three particular elements: equality before the law; supremacy of ordinary law; and an absence of arbitrary power on part of the State.[1] The rule of law however pre-dates Dicey and has existed as fundamental to the English Constitution for centuries prior. In attempting to equate the *rechtsstaat* with this crucial English principle, we already notice a huge linguistic difference: the absence of the 'state' within the rule of law. This is not down to an inability of finding an appropriate equivalent term, it stems from political strife plaguing England's legal evolution over the centuries. We only have to look at Charles I's – and his head's - downfall in the seventeenth century to get an impression of the long-running constitutional

battles between the different branches of government, which often included the 'head of State'.

Another especially important point, in attempting to explain the lack of a *'rechtstaat'* culture in England, relates to the rule of law's relationship to parliamentary sovereignty, where

Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized (…) as having a right to override or set aside the legislation of Parliament.[2]

This, to a certain extent, grates against the notion of the rule of law, where Parliament can in a sense allow an 'arbitrary power' through legislation. It infers that a very stringent rule of law, as part of a – generally speaking - *rechtsstaat* that saw the State as ancillary to the law did not exist in England. The early modern bourgeoisie in England were never in danger from uncontrollable state powers, as it essentially had control of the State, which continued through to the eighteenth and nineteenth centuries. The beneficiaries of enacted legislation in England and those that had hold of parliamentary reins were in effect one and the same persons.[3]

Today, parliamentary sovereignty is subject to much debate and a little distant from Diceyan principles, especially in light of European powers and related harmonizing legislation such as the Human Rights Act 1998 and landmark cases such as *Factortame**[4]*. Domestically speaking however, Jackson (2005)[5] is an illustrative case of where the rule of law was in fact favoured over parliamentary sovereignty. Although *obiter dicta*, Lord Hope described the rule of law as 'the ultimate controlling factor' in the English constitution and whilst Lord Steyn in the case did maintain the constitutional importance of parliamentary sovereignty, he did regard Dicey's conceptions as not fitting for a 'modern United Kingdom', with conjectures towards more democratic notions.

Nonetheless, many still do vehemently uphold parliamentary supremacy, which forms part of the larger discussion on the country's constitutional framework. However, it may be said that no judge has or would approve a statute that actually undermined the rule of law. As MacCormick puts it, rules of recognition should be 'rooted in custom and convention, the common acknowledge of mutual obligations of respect for the framework of an institutional normative order'.[6]

Although I could quite happily delve deeper into the points aforementioned, the aim of this piece was simply to touch upon a few minor aspects of the *rechtsstaat* in England, or lack thereof. The historical evolution of the English legal system is crucial in understanding how and why *'rechtsstaat'* as familiar to the Dutch - and more broadly speaking, as familiar to the Continent - was never implanted as such

in England. With the global sphere affecting domestic legal regimes much more than ever, comparative studies become even more pertinent, intriguing and undoubtedly allow us a better understanding of even our own legal systems.

[1]AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan & Co 1889) 171ff.
[2]Ibid 37ff.
[3]Gary Slapper and David Kelly, *The English Legal System 2014-2015* (Routledge 2014) 25.
[4]*R v Secretary of State for Transport ex parte Factortame Ltd and Others (No 2)* [1991] 1 AC 603 (HL)
[5]*R (Jackson) v Attorney-General* [2005] UKHL 56, [2006]1 AC 262.
[6]N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999) 138.