
The Operation of Platonic Justice in the South African Constitution

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Abstract

Justice is one of the four Platonic or cardinal virtues. In his dialogues the Republic and the Laws, Plato presents a concept of justice far broader than the predominantly legalistic notions which we have received from Justinian's Roman law and from modern Western jurisprudence. This article examines Plato's notion of justice and shows that, far from being anachronistic, it plays a vital part in the South African Constitution. The operation of Platonic justice in a number of specific provisions of the Constitution is observed.

Plato's dialogues are rich in principles of justice, law and government. This body of principle is a precious inheritance from the ancient world, and one which has potent practical significance for our age. I shall seek to show this by examining the influence of Platonic justice on the South African Constitution.

The Constitution, like Plato's philosophy, proclaims ideals and values; it lays down standards which government, institutions and individuals are required to meet. Among these constitutional values, justice ranks highly, the more so given this country's history of injustice.

In so far as Plato is concerned, this article is based on two of his dialogues, the *Republic* and the *Laws*. The *Republic*, Plato's best-known dialogue, has justice as its central theme. The *Laws*, Plato's last and longest dialogue, displays his thinking on law and legislation in its most mature and concrete form. In so far as the Constitution is concerned, I shall treat it very much at face value, and shall have little or nothing to say about its intricacies and technicalities.

The question arises: Assuming that Platonic values such as justice are found to be at work in the Constitution, would that be fortuitous, or would their presence be the result of conscious adoption by the drafters? Advocate George Bizos, who was directly involved in the drafting of the Constitution, recently had this to say:¹

We had to make a break from the values and principles of the policy of apartheid. Now I want to assure you that we (the drafters of the Constitution) did not go through Plato page by page in order to see what to put in our Constitution, but of course we did have regard to other democratic constitutions throughout the world. Each one of them was permeated by the ideas of Plato, and possibly more in a derivative way than by actual reference to him. We were particularly influenced by the Platonic ideals that are expounded in his work, the *Laws*.

From this it is clear that Platonic influences in the Constitution are present there more by design than by accident.

In the *Laws*, Plato lays down a precise hierarchy of values which the legislator has to keep constantly in mind when enacting his legislation.² Foremost among these values are the four Platonic or cardinal virtues of wisdom, temperance, justice and courage. These virtues, and in particular justice, are examined and described in Plato's *Republic*,³ in relation to both the individual and the state.

Of all the models of justice which have come down to us from antiquity, the one which has become enshrined in the founding institutional works of both major Western legal systems, the Roman and the English, is not that of Plato. Instead, the definition which has prevailed is that of the Greek poet Simonides, as recorded and preserved in Plato's *Republic*,⁴ and transmitted to us by Justinian. According to this view, justice means giving to each his due, or what is proper to him. Simonides's notion of justice is a legal, and more particularly a judicial one: giving to each his due is about meting out punishments and rewards according to deserts. There is here a proportionality or balance which satisfies one's inherent sense of fairness. This definition lies at the root of both Roman and English law: it is the concept of justice favoured by both Justinian⁵ and Blackstone.⁶ Its influence on Western legal thought has been immense: it was adopted by the leading institutional writers of the Roman-Dutch law.⁷

What, then, is *Plato's* notion of justice, the notion on which this article is based? Justice, according to Plato, is to do the thing that is appropriate in any given moment, to the exclusion of everything else; it is to do one's own duty at the right time; it is to refrain from interfering in the function or work of another.⁸ Thus, for Plato, a bricklayer who performs the function of an accountant acts not merely inappropriately or inefficiently (as we might view it today), but unjustly. Justice, like the other Platonic virtues, operates as much at the individual level as in the state. Like the other virtues, it originates always in the individual, and from the individual it passes into the state.⁹ It is considerably wider in scope than the received notion of Simonides, considered above.¹⁰

Platonic justice as described above holds little appeal for modern jurisprudence. Yet, as I shall now proceed to show, the notion plays a key

role in the Constitution. The Preamble to the Constitution¹¹ opens with these words:

We the people of South Africa, recognize 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.

Neither in this Preamble, however, nor in the other provisions of the Constitution which speak of justice,¹² is the word used in the Platonic sense. In those provisions which refer to justice by name, the meaning is usually the familiar one of righting wrongs or redressing imbalances, transmitted to us by Justinian. Conversely, there are other provisions of the Constitution which do not mention justice by name, and yet they plainly show Platonic justice at work. It is to these provisions that I now turn.

Consider first s 41(1)(g), which imports the doctrine of separation of powers into the Constitution. This doctrine, often mistakenly attributed to later writers such as Locke and Montesquieu, is in truth founded squarely on Plato's notions of justice and temperance. The doctrine has exerted a powerful influence on the development of modern political science and constitutional law; it has become, formally at least, the most common feature of all constitutional systems.¹³

Section 41(1)(g) provides that all spheres of government must exercise their powers and perform their functions in a manner that does not encroach on the integrity of government in another sphere. Similarly, s 41(1)(f) provides that spheres of government and organs of state must not assume any power or function except those conferred on them in terms of the Constitution.¹⁴ In these provisions, we see Platonic justice at work, for staying within one's own sphere is precisely what Plato means by justice. It follows that if an organ of state is entrusted by the Constitution with a particular function, it would be not only unconstitutional, but also unjust for that organ to perform a function not so conferred. For example, the National Assembly is required to represent the people and to ensure government by the people.¹⁵ This it has to do by overseeing executive action. In practice, however, Parliament is being increasingly suppressed, negated, and circumvented by the executive, with potentially detrimental consequences for our fledgling democracy. Such manipulation of, and interference in the legislative function by the executive is plainly unjust in Platonic terms.

So much for s 41, which is couched in general terms. The Constitution also recognizes a more specific separation of functions.¹⁶ Thus s 43 vests the legislative authority of the Republic in the national sphere in Parliament; in the provincial sphere, that authority is vested in the provincial legislatures.

Sections 85 and 125 vest the executive authority of the Republic in the President, and the executive authority of the provinces in the premiers. Section 165 vests the judicial authority in the courts.¹⁷

These provisions are plainly consonant with Platonic justice. But while the various functions are separated in the Constitution, they are not always performed by different organs in practice. As in all parliamentary systems of government, the most glaring overlap is that the members of the executive are also all members of the legislature. Here we have a clear violation of Platonic justice.

This issue was raised in the First Certification Case,¹⁸ when the Constitutional Court declined to insist on strict application of the separation of powers doctrine. However, in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*,¹⁹ the Constitutional Court struck a firm blow in support of Platonic justice. The implication of the decision of the majority in this case is that whenever the executive is empowered to make, amend or repeal Acts of Parliament, the doctrine of separation of functions between the legislature and the executive will be undermined.²⁰ The Court held in effect that the executive may not legislate in this manner. The Constitutional Court has also stated that the right of access to the courts is aimed *inter alia* at protecting the independence of the courts and thus the separation of powers.²¹

There are other provisions of the Constitution which manifest an allegiance to Platonic justice. For example, the National Assembly and the National Council of Provinces may pass legislation relating only to matters falling within defined functional areas.²² But adherence to Platonic justice is by no means absolute, and the Constitution does contemplate some apparent departures from it: for example, the national executive may intervene where a province fails to fulfil its executive obligations.²³

Again, s 84 demarcates the powers and responsibilities of the President. Any action whereby the President exceeds these defined limits would amount to a violation of Platonic justice. Similarly, s 104(1) defines the legislative authority of provinces: the defined limits may not justly be overstepped by a provincial legislature. The powers and functions of Premiers are defined in s 127(1). Finally, s 181(1) contains a list of state institutions which strengthen constitutional democracy in the Republic. These institutions include the Public Protector, the Human Rights Commission, the Auditor-General and the Electoral Commission. Section 181(4) provides that no person or organ of state may interfere with the functioning of these institutions. We have here a clear constitutional directive in furtherance of Platonic justice.

It is obvious from the few examples discussed in this article that the operation of a number of key constitutional mechanisms is dependent on Platonic justice. These examples are by no means exhaustive.

Plato's philosophy is too often and too easily dismissed as idealistic and impractical. But, in truth, the examples given in this article show that Platonic justice is alive and well, and actively at work in our Constitution. If however, the Constitution is circumvented or ignored – and there are alarming signs that this is happening – the Platonic wisdom which it embodies will be lost to us. Such a loss would be immense.

Endnotes

- 1 Talk delivered at Plato Day 2001: Seminar organized by the School of Practical Philosophy, Johannesburg, 26 May 2001.
- 2 *Laws* 631b-e.
- 3 *Republic* 423d-434a. All four Platonic virtues can be shown to be at work in the Constitution: see Domanski *Platonic Influence in the South African Constitution* (2003) 66 *THRHR* 213-231. See also Domanski *The Role of Reason in Plato's Philosophy* (2001) 46 *Akroterion* 21-32. In this article, however, I am concerned only with Platonic justice.
- 4 *Republic* 332c.
- 5 I 1.1 pr.
- 6 *Commentaries on the Laws of England* Introduction 2.40.
- 7 See eg. Voet *Commentarius ad Pandectas* 1.1.7; Huber *Heedendaagse Rechtsgeleertheit* 1.1.4.
- 8 *Republic* 433f. See also Cicero *De Republica* 5.5. A recent judicial decision that bears on Platonic justice is that of Botha J in the Nevirapine case (*Treatment Action Campaign v Minister of Health* (TPD case no 21182/2001)). There the court ordered the respondents to make Nevirapine available in certain circumstances to pregnant women with HIV, and to their babies. While the decision is clearly in the public interest, judicial policy-making of this kind is a violation of Platonic justice: policy decisions of this nature are the domain of the executive, not the judiciary: for a judge to tell government what policy it ought to implement is a violation of the separation of powers doctrine. While a court may (and at times must) pronounce on the reasonableness of government policy, it may not make policy.
- 9 435e.
- 10 Thus in the *Republic* (at 433e), Plato points out that suits at law are always decided on the ground that a man may neither take what is another's, nor be deprived of what is his own. This is merely a paraphrase of Simonides's view (as reported in *Republic* 332c) that justice is the giving to each man what is proper to him. Thus Plato does not reject Simonides's definition, which he implicitly holds to be correct but too narrow. It emphasises only one aspect of justice, namely justice in the context of reward and punishment. In contrast, Plato's definition embraces all human activities, whether within or outside the legal sphere.
- 11 *Constitution of the Republic of South Africa Act* 108 of 1996.

- 12 See, for example, s 25(3), 122(3) and 173 of the Constitution. See also D H van Zyl 'Justice and the New Constitutional dispensation in South Africa' (1998) 31 *De Jure* 44-55.
- 13 I M Rautenbach & E F J Malherbe *Constitutional Law* 3 ed (1999) 87.
- 14 See also s 41(1)(e).
- 15 Section 42(3) of the Constitution.
- 16 See Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 3 ed (2000) 16-19.
- 17 At the local level, however, there is no clear separation. Both the executive authority and the legislative authority are, in terms of s 151(2), vested in the Municipal Councils.
- 18 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996(4) SA 744 (CC) para 111.
- 19 1995(4) SA 877 (CC) para 62.
- 20 Op cit note 16 at 17.
- 21 *Bernstein v Bester NO* 1996(4) BCLR 449 (CC), 1996(2) SA 751 (CC) para 105.
- 22 Section 44 read with Schedules 4 and 5 of the Constitution.
- 23 Section 100 of the Constitution.