
Aristotle and the South African Constitution: the Presence of the Past

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Abstract

The aim of this paper is to show how Aristotle's early scholarly thoughts and writings influenced the present democratic constitution of South Africa. His ideas on the concept of justice classified into (a) distributive justice (b) commutative justice and (c) retributive justice were found to be useful in the drafting of the new South African Constitution of 1996. Chapter Two of the new constitution exhibits a remarkable similarity with Aristotle's suggestions about the implementation of democratic principles. In this paper much attention is paid to chapter two of the new constitution (Bill of Rights) and its implementation in the new South Africa. For instance, in terms of distributive justice, he advocates the distribution of offices, rights, honours and goods to members of the community on the basis of geometrical equality and equality which takes into account the peculiar inequality of the subjects considered for the distribution. The criterion which should be used to determine equality is personal merit and not race. This issue is well emphasized in the Equality Clause of the new South African Constitution. A host of Aristotle's other early scholarly thoughts and ideas are discussed in this paper in relation to the new South African Constitution.

1. Introduction: Aristotle's background and the intellectual climate of his time

Historical records show that Aristotle was born in 384 B.C. at Stageira, a little city of the Chalcidici peninsula, still called, almost by its ancient name, Chalcis, and died at the age of sixty-two. Demosthenes was one of his contemporaries with whom he was very close. His manhood witnessed the struggle which ended in the establishment of the Macedonian Monarchy as the dominant

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power in Hellas, and his later years saw the campaigns in which his pupil, Alexander the Great, overthrew the Persian Empire and carried Greek Civilization to the banks of the Jumna (Howie 1968:10-16). Aristotle's father Nicomachus was a court physician and his early connection with medicine and with the rough-living Macedonian court largely explains the predominantly biological cast of Aristotle's philosophical thought. History shows that at the age of eighteen Aristotle was sent to Athens for higher education in philosophy and science, and entered the famous Platonic Academy, where he remained as a member of the scientific group gathered around the master for twenty years, until Plato's death in 347 B.C. (Taylor 1955:6-13). Aristotle left the Academy, owing to his increasing dissatisfaction with the idealistic trends of the philosophy it represented and in the same vein, the following factors can be attributed to the reasons why Aristotle left the academy. In the first place, after the death of Plato grave differences on important points became gradually more apparent to Aristotle. As a matter of fact, Aristotle's own point of view became more distinct from that of the Platonic school. The second reason is that Plato was succeeded, in 348-7 B.C., by Speusippus, who clearly represented the interest and tendencies of Platonism with which Aristotle was most dissatisfied. This tendency revolves around the fact that Speusippus tried as much as possible to turn philosophy into mathematics and Aristotle was not happy with this tendency. The third reason can be attributed to the outburst of anti-Macedonian feeling at Athens due to the fall of Olynthus and the destruction of the Greek confederacy. This destruction made Athens an uncomfortable residence for an alien with Macedonian connections (Ross 1923:2-3). For some years he travelled extensively, visiting among other places the island of Lesbos and developing his scientific studies. According to Taylor (1955), about 343 B.C., Aristotle received an invitation from Philip, the king of Macedon, to act as tutor to his son, Alexander, who at that time was thirteen years old. Aristotle was thrilled and welcomed the opportunity to apply his developing political ideas to the education of one who was destined for a position of great power and influence.

His influence on the Macedonian Court may well have been exercised through his friendship with Antipater whom, we are told, Alexander appointed as regent when he was engaged in distant conquests and who became one of the most influential men in Greece.

At Athens, Aristotle established his own school of philosophy, the Lyceum and this school became a rival to the Academy which was earlier established by Plato. In terms of geographical location, the Lyceum was situated outside the city in a grove sacred to Apollo and the Muses, a place which Socrates himself is said to have loved. Aristotle's habit of teaching his students while they walked here together led to the Aristoterian philosophy becoming known as the "peripatetic" school.

This school attracted a number of distinguished students and collaborators, among them his friend, Theophrastus, who wrote a large number of philosophical and scientific works. It was Theophrastus who was to succeed Aristotle as Head of the Lyceum when, owing to some suspicion of his Macedonian connections, Aristotle left Athens forever in 323 B.C., the year of the death of his former pupil, Alexander the Great. Aristotle later settled in Chalcis in Euboea, the parent city of his native Stageira and died there in 322 B.C. (Ross 1923:6-7).

2. Aristotle and Plato

There is no doubt that Plato in his teaching had much influence on his students. Aristotle was one of those students who not only admired the knowledge of Plato, but gained a lot of ideas from his scholarly lectures. The scholastic acumen of Plato is clearly seen in most of his works which are still relevant in our present day society.

For instance, the concept of justice as analysed by Plato influenced Aristotle in dealing with the concept as we shall discuss later in this paper. Those who drafted the present South African Constitution clearly illustrated how Plato's ideas on justice influenced the present Constitution. George Bizos, who participated in the drafting of the South African Constitution, argues as follows: "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 for other democratic Constitutions throughout the world. Each one of them was permeated by the idea 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*" (Bizos, 2001).

The above point was well analyzed by Domanski (2004) in his recent article on the operation of Platonic Justice in the South African Constitution. In the case of Aristotle and his analysis on the concept of Justice, one of the Constitutional court Judges – Justice Abie Sachs – has also argued that Aristotle's ideas on justice are relevant in the drafting and implementations of the present South African Constitution (Abie Sachs 2000).

Justice Abie Sachs shows in one of his public lectures that courts dealing with issues of basic rights and justice must be prepared to develop thoughts along the philosophical background of Aristotle. This conforms the universal acceptance of Aristotle's ideas on the concept of justice which the various courts of law strive to implement.

According to Aristotle the concept of equality implies at least two things. The just, then, must be both intermediate and equal and relative (i.e for

certain persons). And qua intermediate it must be between things (which are respectively greater and less), qua equal, it involves two things, qua just, it is for certain people. The just, therefore, involves at least four terms; for the persons for whom it is in fact just are two, and the things in which it is manifested, the objects distributed are two.-And the same equality will exist between the persons and between the things concerned; for as the latter – the things are related, they will not have what is equal, but this is the origin of quarrels and complaints when either equals have and are awarded unequal shares or unequals equal shares.

In this perspective Aristotle argues that this is plain from the fact that awards should be according to merit; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of Oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence (Ross, 1925).

In light of these discussions, South Africa would seem to have a mix of these – there is political (voting rights) equality according to one's citizenship; there is proportionate amount given to one (through inheritance and returns on investments for which one perhaps did not work) according to one's wealth; and there are proportionate rewards for excellence or achievements. The law cases discussed in this article show that in any situations where the above distributive justice has not been carried out, there is bound to be conflicts between the parties involved.

3. Aristotle and the new South African Constitution

In this paper we intend to examine the practical influence of Aristotle's ideas in relation to the new South African Constitution. The reason for discussing his ideas is partly to show the presence of the past and to confirm that his philosophical ideas discussed in 322 B.C. are still found to be useful in our present day society. As a matter of fact, this paper attempts to show that we need historical, legal and philosophical materials to understand and provide solutions to the problems facing our present society. To eliminate such materials in understanding our society is like pretending to study the process of birth but ignoring motherhood.

In view of this, an attempt will be made to analyze Aristotle's concept of justice with special reference to the concept of equality as embedded in the Bill of Rights in the new South African Constitution. Before discussing this in detail it is perhaps necessary to briefly review South African Law during the Apartheid era. This will enable us to critically evaluate the new constitution in light of Aristotelian philosophy.

3.1 South African laws during the apartheid period

During the Apartheid period, there was a lot of discrimination. The law differentiated between groups of persons on the basis of a variety of factors, such as race, sex, age, domicile, religion and a host of other elements. A practical example of one such discrimination can be seen in terms of S14(7) of the Public Service Act 54 of 1957. With regard to sex this act states that a female civil servant, not being a member of the South African Defense Force, the South African Police Force, the Prison Service or the Bureau of State security, loses her job when she marries, unless the Minister or Administrator of the government department or province concerned, upon the recommendation of the public service commission directs otherwise. On the other hand, the civil service did not discriminate against married males in its employment.

With regard to religion, discrimination was also embodied in the law, as all white children attending public schools in South Africa were, by virtue of S2 of the National Educational Policy Act 39 of 1967, compelled to undergo Christian National Education. Parents who wished to base the education of their children upon a non-Christian religion had to resort to unsubsidized private schools. Another sphere in which discrimination was inscribed in the law is the Reservation of Separate Amenities, Act 49 of 1953, which made provision for separate facilities for different racial groups in or upon any public premises or public vehicle. In terms of S3 of the Act such separate facilities did not need to be equal, and persons in charge of public premises or vehicles were instructed to provide facilities for one racial group without providing similar facilities for any other racial group.

The implementation of Criminal Law was also based on discrimination. For instance, one had to be a Bantu to be subject to curfew regulations. The many statutory offences provided for by the Bantu (Urban Areas) consolidation Act 25 of 1945 could be committed by Blacks only. These offences included entering upon or into or remaining on land or buildings within an urban area outside a location, Bantu hostel without the permission of the owner or lawful occupier of such land or building, and entering or remaining in a white urban area without the consent of the secretary of Bantu Administration and Development. A Bantu must show on demand any permit, license, certificate or other document, including a reference book, which the law required him to hold or to possess. It was also a crime to possess Bantu beer on or in any private site, premises or farm without having first obtained the consent of the owner or lawful occupier of such site, premises or farm.

The above examples amounted to injustice in terms of Aristotelian philosophy. His concept of justice and the ways in which it has influenced the new South African Constitution will now be discussed in the following perspectives.

4. Aristotle and the Concept of Justice

Aristotle argues that justice consists in equality of treatment. It involves an equitable distribution of goods among members of the community. He is of the opinion that this just distribution must be maintained by law against any violations. He distinguishes between distributive, commutative and retributive justice. In terms of distributive justice, he advocates the distribution of offices, rights, honours and goods to members of the community on the basis of geometrical equality and equality which takes into account the peculiar inequality of the subjects considered for the distribution. The criterion which should be used to determine equality is personal worth or merit. As a matter of fact, equals must be treated equally and unequals must be treated unequally (Ross (ed) 1925).

This element of equality is entrenched in chapter 2 (Bill of Rights) section 9 of the present South African Constitution and it can be summarized in the following terms:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

This issue of equality is a fundamental value of the present constitution. The apartheid order which the constitution replaces was based on discrimination and the denial of equality as I have earlier pointed out. It should be recalled that South Africa's long history of state-sanctioned inequality makes the commitment to equality a burning issue in the new constitutional order. The extent to which the state is interested in implementing the Equality Clause is shown by the following few cases to be discussed.

In view of subsection 9(1) (equal protection and equal benefit) which is primarily concerned with differentiation and subsections 9(2)-(5) which deal with unfair discriminations, the constitutional court has held that differentiation must be rationally connected to a legitimate purpose. If no such rational relationship exists, the differentiation will deny equal protection

and benefit of the law and will therefore infringe section 9(1). It is also argued that even when a rational relationship does exist, the differentiation may still fall victim to the equality clause if it amounts to unfair discrimination.

It can be clearly shown here that the approach of the constitutional court to unfair discrimination was first set out in *Prinsloo vs Van der Linde*. In this case, the court argued that the form of discrimination relates to discrimination based on race and gender. These forms of discrimination are presumed unfair in terms of Section 9(5) until the contrary is established.

With regards to the enforcement of criminal law, we have earlier shown that the law was not equally applied to both black and white during the apartheid era. With the new constitution (Equality Clause), there is equal enforcement of the Criminal Law. The right to equal protection includes the right to equal enforcement of the criminal law. This argument has been raised in a number of cases dealing with the enforcement of various laws.

In the case of *Baloro vs University of Bophuthatswana*, a case where the university refused to promote a foreign lecturer simply because of his race and social origin, the Supreme Court held that the university's moratorium on promotion of foreign academic staff, while promoting members of staff who are South African citizens, amounted as unfair discrimination and it is a gross violation of Section 9(3) of the new constitution. A host of other obnoxious laws implemented during the apartheid period are now being amended by the various courts in light of the new constitution.

The second type of justice according to Aristotle is retributive justice, which guarantees and protects the rights of individuals against illegal attacks and restores disturbed equilibrium. If harm has been suffered, it must be compensated. Here the equality postulated is arithmetical, being unconcerned with the subjective qualities of the person, but principally concerned with the computation of losses suffered.

In chapter 2 section 25 the following property clauses are entrenched:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application (a) for public purposes or in the public interest (b) subject to compensation, the amount, timing, and manner of payment of which must be agreed, or decided or approved by a court.
3. The amount, timing, and manner of payment of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected.
4. The state must take reasonable legislative and other measures, within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.

5. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.

A host of other clauses include the protection of individual's property. This property clause contains a number of provisions relating to the restitution and redistribution of property. For example section 25(7) grants a right to restitution of property to persons and communities dispossessed of property as a result of discriminatory legislation after 1913. The extent of the right to restitution of land, or to redress in the form of alternative land or compensation where restitution cannot be made, is set out in the Restitution of Land Rights Act 22 of 1994.

It can still be recalled that Aristotle's idea on retributive justice which guarantees and protects the rights of individuals against illegal attacks and deprivation of individual in the utilization of his or her property guided the United Nations in the drafting of Article 17 of the Universal Declaration of Human Rights in 1948 (Johnson and Symonides, 1998).

Article 17 states that:

- Everyone has the right to own property alone as well as in association with others.
- No one shall be arbitrarily deprived of his/her property.

Article 17 of the Universal Declaration of Human Rights greatly influenced Section 25 of the South African Bill of Rights. This section 25 shows that the property clause embraces the real rights recognized by the law of property, rights in terms of ownership, mineral rights, servitude, etc. It also includes the right to use something and exclude others from it, the right to transfer something to another and the right to instruct another person not to use one's property, for instance in the case of a trade mark or for the protection of intellectual property.

At this juncture, let us examine the issue of intellectual property and evaluate how successful the Courts in South Africa have protected the use of intellectual property to conform with Article 17 of the Universal Declaration of Human Rights which of course was derived from Aristotle's idea on distributive justice.

In South Africa, one of the most recent court cases in this regard is that of *Joburgers and Dax Prop cc vs McDonalds*. In South Africa, McDonalds was the registered proprietor of various trademarks including the name McDonald's Big Mac, and Golden Arches Devile (the "McDonald's trademarks"). These various trademarks were registered in 1968, 1974, 1979, and 1985. In 1993, Joburgers Drive Inn Restaurant filed an application for

the expungement of the above trademarks because at the time of registration, McDonald's had no bona fide use thereof for the five years period preceding the date of the application for expungement. Joburgers went further to indicate his interest in using the McDonald's trademarks.

McDonald's opposed Joburgers' application, and went so far as to launch an urgent application in the Supreme Court for an injunction to stop Joburgers from using McDonald's' trademarks. At this point in time, the Supreme Court was said to have granted a temporary injunction in favour of McDonald's while awaiting the outcome of the expungement application.

In 1994, Dax Prop cc also filed applications against McDonald's trademarks and brought an application before the Supreme Court for the expungement of the trademarks on the same grounds as Joburgers. In response, McDonald's brought a counter-claim for trademark infringement.

It is interesting to note the main defences raised by McDonald's in both cases. In the first defence, McDonald's argued that at all material and relevant times it had always had a bona fide intention to use its trademarks in South Africa. In the second defence, McDonald's relied on the Trademarks Act (No. 62 of 1963), condoning the non-use of a trademark where such non-use was due to special circumstances in the trade. McDonald's made it clear that the American Anti-Apartheid Legislation against South Africa amounted to such circumstances.

On 1 May 1995, South Africa promulgated a new Trademark Act (No. 194 of 1993). Section 35 of this Act makes provision for the protection of "well known" foreign trademarks so as to help South Africa conform with article 6 bis of the Paris Convention on International Standards in Protection of Individual Property. In view of this article, McDonald's brought a further application for an injunction against Joburgers and Dax Prop from using the trademarks of McDonald's, arguing that McDonald's was a "well known" foreign trademark in South Africa.

However, the court's decision was not favourable towards McDonald's, for various reasons. Firstly, it was argued that McDonald's did not prove to the satisfaction of the court that its trademarks were "well known" in South Africa. In view of this judgement, McDonald's appealed to the Appellate Division of the Supreme Court. The Appellate Division's interpretation of Section 35 ("well known") was quite different, pointing out that South Africa had followed the "hard line approach" in passing off proceedings in which it was necessary to establish, in addition to a reputation, a good will in South Africa before a claim in respect of passing off could be found. The court went further to buttress the fact that section 35 was enacted for the purpose of protecting foreign trademarks which had a reputation in South Africa but had not yet established a good will in South Africa by commencing business.

The second point emphasized by the Court was that section 35 remedied the fact that South African common law as set out above did not enable South Africa to meet its international obligations and at the same time conform with the Paris Convention. These were the factors considered by the Appellate Division in interpreting the concept of "well known".

The Appellate Court, as a result, ruled in favour of McDonald's. This final judgement removed the international stigma that was already placed on South Africa for not respecting Article 17 of the Universal Declaration of Human Rights in terms of the right of an individual to own property. In addition to this, this judgement of the Appellate Division finally put to rest the other international criticism, that South Africa does not fulfil its obligations under Article 6 bis of the Paris Convention by not protecting "well known" international trademarks.

This judgement of the Appellate Division confirms that South African courts have achieved some level of success in the implementation of human rights principles in terms of international standards which is based on Article 17 of the Universal Declaration of Human Rights in 1948.

From the above discussion, it can be argued that the principal aim of this section 25 in terms of the property clause is to protect both individual and community properties and, in the same vein, to compensate those who were deprived of their property with the hope that this will help restore the disturbed equilibrium. This compensation and protection of an individual's property is what Aristotle refers to as retributive justice.

In the case of infringement on one's properties as unjust action, this can be considered in terms of justice associated with its inner nature as involving choice. In book V of the Nicomachean Ethics of Aristotle, it is argued that a man acts unjustly or justly whenever he does such acts voluntarily, when involuntarily, he acts neither unjustly nor justly except in an incidental way, for he does things which happen to be just or unjust.

In summary, the argument by Aristotle is that if a man harms another by choice, he acts unjustly, and these are the acts of injustice which imply that the doer is an unjust man, provided that the act affects the other person or his property and at the same time violates equality because of the losses suffered by one party. The above analysis influenced the entrenchment of Chapter Two Section 25 of the property clause of the South African Constitution.

The third type of justice according to Aristotle is the commutative justice which is also entrenched in the new South African Constitution. Commutative justice finds its application in what we refer to as the law of contract and the law of delicts. Commutative justice is governed by arithmetic equality, which differs from geometric equality by the fact that it does not consider all subjective inequalities between the persons involved. It therefore requires strict equality between performance and counter-

performance in the law of contracts and between harm and damages or between injury and reward in the law of delicts, irrespective of any subjective attributes of the contracting parties or of the person who has suffered harm or injury and of the transgressor in a delictual action.

This commutative justice in terms of contract can be illustrated with the case of *Baloro vs University of Bophuthatswana* which I earlier discussed. In this particular case, there was a contract between the foreign lecturer and the University. The terms of contract did not stipulate that when it is time to promote him (the lecturer), he will not be promoted based on the factor of his social origin. There was no clause in terms of the contract depriving him of promotion. It was on this ground that the Supreme Court held that in light of the new constitution the University has no *locus standi* to deprive the foreign lecturer his promotion and that the action of the University in that regard amounted to racial discrimination which is no longer allowed in the new constitution. In light of the new constitution of 1996, everybody should be treated equally in view of the Bill of Rights and this puts aliens in the same position as South African citizens. In other delictual actions, individuals are now considered equal and all the past elements of discrimination are now eliminated.

In our daily monetary transactions, money is an instrument that is used by both buyers and sellers. It is used as a means of exchange in relation to what an individual has received from another person. This relationship between the buyer and the seller is governed by arithmetic equality since it does not consider all subjective inequalities between the persons involved.

As a matter of fact, money is an integral part of our daily lives and no economy can function without money. We can still recall that during the days of barter economy, goods can only be exchanged for other goods. For example, a wheat farmer who needs clothing for his family first has to find a tailor who needs wheat. Then the exchange can take place. If no tailor who happens to want wheat can be found, the farmer will be obliged to exchange the wheat for something else that the tailor does require.

In other words before the exchange of two goods can take place, there has to be a double coincidence of wants between the parties concerned. A barter economy is therefore characterized by numerous unnecessary exchange transactions which are cumbersome and inefficient.

However, with invention of money as a means of exchange, individuals have been able to purchase whatever they want without necessarily working for someone else to exchange something with them. With the monetization of the present economy, money is now used as a medium of exchange. The other functions of money include:-

- a) unit of accounts
- b) as a store of value
- c) as a means of deferred payment.

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