CICERONIAN VIRTUES AND VALUES IN CONTEXTUAL PERSPECTIVE

Deon van Zyl*

I have known Philip Thomas since the early seventies of the previous century and have held him in the highest regard since he was first “imported” from the Netherlands by Professor Paul van Warmelo, my predecessor in the Department of Roman Law and Legal History at the University of Pretoria. From the outset he impressed me as a sincere, hard-working and dedicated legal historian and academic. I am still indebted to him for the trouble he took, quite unsolicited, in drawing my attention to a number of errors in the Afrikaans version of my text book on Roman private law, hence enabling me to avoid such errors in later printings and in the English version.

Although the present contribution may be taken as constituting a long-overdue token of gratitude to Philip for his assistance in this regard, it is primarily intended as a mark of appreciation for his wide-ranging efforts over many years of unconditional commitment to academic research and teaching. In addition I have chosen the topic of Ciceronian virtues and values not only in recognition of his regular references to Ciceronian sources in his own work on Roman law and legal history, but also because we shared a love for and deep-seated interest in Cicero’s major contribution to the reception of ancient Greek legal thought and philosophy into that of Rome and the West. It goes without saying that I am particularly privileged to have the opportunity to honour his name in this way.

My own interest in Cicero must, I believe, be attributed to the passion I developed for his life and works during my secondary school Latin studies under the guidance of Mrs M J (Jean) Smart at Springs Boys’ High School. From our first greeting (salvete pueri – salve domina) in 1957, her inspiration served to guide me into law and languages, including an all too brief academic career in Roman law and legal history. Much of this inspiration was derived from Cicero’s orations, such as the Pro Sexto Roscio Amerino, In Verrem, In Catilinam and Philippicae, and his philosophical treatises, such as the De amicitia and De senectute to which, amongst other Ciceronian sources, I have occasionally referred in

1 DH van Zyl Geskiedenis en Beginsels van die Romeinse Privaatre (1977).

* Judge, Western Cape High Court.
publications and judgments handed down over a long period of time. Needless to say I had no difficulty in dedicating my first contribution on Cicero\(^3\) to Mrs Smart.

### 1 Introduction

In order to understand Cicero’s concept of virtues and values, one must of necessity have insight into his career as an orator, politician, writer and, of course, as a philosopher of life, politics and law. His foray into philosophical writing included profound works on the state (De re publica), laws (De legibus), the ends of good and evil (De finibus honorum et malorum), moral duties (De officiis), the Tusculan disputations (Tusculanae disputationes), the nature of the gods (De natura deorum), the academics (Academica) and divination (De divinatione). It also incorporated his famous monographs on old age (De senectute) and friendship (De amicitia), both of which were dedicated to his great friend Titus Pomponius Atticus, who was born in Rome in 109 BC, some three years before Cicero’s birth in Arpinum in 106 BC. His last name (cognomen) “Atticus” undoubtedly derives from the fact that he spent some twenty-three years in Athens (88-65 BC), where he became a devotee of Greek literature and philosophy. He and Cicero exchanged in excess of four hundred letters and it may be accepted that he provided a strong stimulus and encouragement for Cicero to embark on the production of a number of outstanding philosophical treatises in which he was able to develop his views on virtues and values.

Cicero’s respect for Atticus appears early on in the De senectute,\(^4\) when he refers to his virtues of self-restraint and fairness (moderationem animi tui et aequitatem) alongside his humanity and prudence or, as it was also described, “practical wisdom” (humanitatem et prudentiam). In this regard\(^5\) he ascribed the fact that old age was never burdensome to the famous statesman, Cato the Elder (Marcus Porcius Cato), to what he regarded as his virtue of “outstanding and perfect wisdom” (excellentem perfectamque sapientiam). This was the same Cato who had directed much of his time and energy at fighting the lax morals of his day and ended all his speeches by intoning that Carthage, the seat of immorality, should be destroyed (censeo delendam esse Carthaginem).\(^6\) This was in fact achieved in 146 BC by Publius Scipio Africanus Minor, who was described by the historian Polybius\(^7\) as one of the purest and noblest men of all time. It is no wonder then that Cato and Scipio both featured in the De senectute as participants in the discussion of old age. It may also be assumed that they were, in many respects, role models for Cicero as a staunch proponent of all that was virtuous and morally correct.

---

3 DH van Zyl Cicero’s Legal Philosophy (1986).

4 De sen 1.1.

5 De sen 2.4.

6 This dictum has been attributed to the Roman historian Florus in his Epitome de T Livio bellorum omnium annorum DCC libri duo 1.31.4.

7 Historiae 32.9-16. On Publius Scipio Africanus Minor and the fall of Carthage, see M Carey & HH Scullard A History of Rome 3 ed (1975) 149.
In assessing Cicero’s views on virtues and values it should not be lost from sight that he was not in any strict sense an original philosopher. In this regard it is generally accepted that he was an eclectic in the sense that he selected or borrowed what he regarded as the best material produced by various schools of Greek thought. Although he was greatly influenced by the works emanating from Plato’s Academy and Aristotle’s Peripatetic school, he also found much that interested him in the Stoicism of Diodotus and Zeno and in the Epicurean school of Epicurus and Zeno of Sidon. Despite the sometimes harsh criticism to which his eclecticism has been subjected, his vast contribution to Latin literature in the sphere of law, philosophy, rhetoric and politics may never be under-estimated. His influence on many generations of lawyers, politicians, writers and philosophers has continued unabated up to the present day.

Since my first introduction to Cicero, I have been fascinated by the facility with which he discusses and applies virtues and values which have existed since the time of Plato and Aristotle (if not long before them) and have continued until the present day. They feature prominently in the South African Constitution, from its preamble and founding provisions, throughout the various sections of the Bill of Rights contained in its chapter 2, and at random in the remainder of its provisions. In the concluding section of this contribution, I touch on the relationship between Ciceronian virtues and values on the one hand, and the virtue- and value-based provisions of the Constitution on the other hand, as part of the contextual perspective underlying such contribution. In dealing with this topic I do not attempt to analyse the historical development of Ciceronian virtues and values from his time to the present day. Nor do I propose to deal with such virtues and values in any form of comparative perspective. The aim of this contribution is rather to establish the extent to which popular concepts of human rights in the modern world and in South Africa in particular may be understood in the context of virtues and values which go back to Cicero and the sources on which he relied.

2 VIRTUES AND VALUES IN CICERO

At an early stage of his career as an orator and lawyer Cicero fully realised how important an understanding of philosophy was to develop and hone his rhetorical skills. As he put it, “without philosophy it is not possible to acquire the eloquence we strive for”. Central to this was wisdom, without which eloquence was a hindrance rather than a benefit. Wisdom, again, was the first of the cardinal virtues propounded by

---


9 See idem 203-234 regarding his impact on peers and contemporaries and on lawyers from the time of Ulpian and Paul to the time of the glossators, commentators, humanists, historians and theologians, with special reference to Augustine, Aquinas, Calvin, Grotius, Voet, Kant and modern authors. See also the brief appraisal in Van Zyl op cit (n 3 above) 86-89.


11 De or 4.14: ... sine philosophia non posse effici quem quaerimus eloquentem.

12 De inv 1.1.1: ... eloquentiam vero sine sapientia nium obses plerumque, prosede nunquam.
Socrates and Plato and which, in Cicero’s view, constituted the foundation of moral goodness (*honestum*), virtue (*virtus*), honour (*honor*) and glory (*gloria*). It was this moral goodness that enabled a person to achieve true virtue in accordance with the cardinal virtues of wisdom (*sophia*), justice (*dikaiosyne*), courage (*andreia*) and temperance or self-restraint (*sophrosyne*), which Cicero rendered in Latin as *sapientia*, *iustitia*, *fortitudo* and *temperantia* respectively. Of some interest is that wisdom was not merely an accumulation of (theoretical) knowledge (Greek: *episteme* or *gnosis*; Latin: *scientia*), but that it necessarily included “practical wisdom”, prudence or, simply, “common sense”. This was rendered in Greek as *phronesis* and in Latin as *prudentia*. True wisdom (*sophia* or *sapientia*) hence included practical wisdom or common sense (*phronesis* or *prudentia*).

By the application of these cardinal virtues, Cicero opined, one could achieve the “greatest good” (*summum bonum*) which would be reflected by the leading of a virtuous, moral and ethically correct life. This was consonant with one’s true nature (*natura*) and substantially accorded with Aristotle’s fundamental proposition that the most common goal of mankind was to achieve happiness (*eudaimonia*) in the sense of attaining well-being (*eupraxia*) and virtue (*arete*). Virtue, again, was honourable (*kalon*), desirable (*haireton*), praiseworthy (*epaineton*) and good (*agathon*). This, Aristotle said, applied in equal measure to the cardinal virtues and, in the process, nurtured magnificence (*megaloprepeia*), magnanimity (*megalopsychia*), liberality (*eleutheriotes*) and gentleness (*praotes*). These were qualities that applied both in war (*en polemo*) and in peace (*en eirene*).

Cicero was clearly influenced by this approach, believing that nothing was more divine or beautiful than virtue, which was perfected by nature and existed in God and man alike. Nature was inherent or innate in man and was accompanied by a spark of divinity that enabled him to develop his individuality and ability to recognise his rights and duties in an orderly society directed at achieving harmony, stability and peace. In this way the individual would inevitably achieve happiness and the *summum bonum*, while his social intercourse with other like-minded individuals would nurture friendship and reciprocal benefits.

This is well illustrated in a passage from the *De officiis* in which Cicero describes the fourfold source of moral goodness as: that which is concerned with the perception and development of truth; the preservation of human society by attributing to each his own and by adhering to the faith required in contractual relations; the greatness and strength of an exalted and indomitable spirit; and the moderation and temperance required in all orderly deeds and speech.

It is difficult to escape the inference, from this passage, that the values of moral goodness and faith, which may, in jurisprudential context, be rendered as “good morals”

---

13 *Leg* 1.8.25: *iam vero virtus eadem in homine ac deo est neque alio ullo in genere praeterea; est autem virtus nihil aliud nisi perfecta et ad summum perducta natura; est igitur homini cum deo simililitudo.*

14 *Off* 1.5.15: *Sed omne quod est honestum, id quattuor partium oritur ex aliqua aut enim in perspicientia veri sollicitaque versatur aut in hominum societate tuenda tribuendoque suam cuique et rerum contractarum fide aut in animi excelsi atque invicti magnitudine ac robore aut in omnium, quae sunt quaeque dicuntur, ordine et modo, in quo inest modestia et temperantia.*
(boni mores) and “good faith” (bona fides), are closely interlinked with the cardinal virtues and with the values contained in Cicero’s concepts of justice (iustitia), fairness or equity (aequitas) and (good) faith (fides). This is also strikingly illustrated in his treatise on the state (De re publica) when he states that the mere possession or knowledge of a virtue, as if it were an art, is of little or no value if it is not put into practice or used. Its most prominent use in this regard, he says, is in the governance of a state, for this is the source of piety (pietas) and religion (religio) and likewise that of the law of nations (ius gentium) and the civil law (ius civile) whence the concepts of justice (iustitia), (good) faith (fides) and equity (aequitas) derive.15

A particularly prominent virtue in Cicero’s philosophy is contained in the concept of humanitas, which may be rendered as humanity, humanism or humaneness. It is directed at human goodwill and fellowship in the sense of being humane, benevolent, considerate, kind, helpful, tolerant and unselfish towards others. It may even be contained in the concepts of altruism or philanthropy in general. People who practised this virtue were those “cultivated in the arts appropriate to humanity”.16 Significantly no exact equivalent of this concept appears in Greek philosophical sources. It approaches paideia in the sense of parental care towards a dependant, or it may reflect a refined and cultured philanthropy (philanthropia) in the sense of humanity (humaneness), benevolence or kindness. It does not, however, reflect the more serious, severe, stern, weighty or grave side of one’s personality contained in the concept of “gravity” (gravitas). According to Cicero in his De legibus, his dear friend Atticus was one of the few persons who, by virtue of his lifestyle and oratorical skills, had achieved that most difficult “partnership” of gravitas and humanitas in acquiring his incomparably worthy finesse or elegance (elegantia).17

It may be useful to point out that Cicero had a flexible approach to political philosophy, be it monarchy, oligarchy or democracy, which he saw as government by an individual, a chosen few or the whole multitude.18 He was in favour of a balanced and moderate combination of these three tested forms of government on the basis that the king or regal element of government should be the central and decisive authority, but that certain subordinate powers should be delegated to a number of selected leading citizens while other relevant matters of government should be left to the judgment and will of the people as a whole. This would provide a substantial measure of uniformity (aequabilitas) and create stability (firmitudo) among citizens.19

---

15 Rep 1.2.2: Nec vero habere virtutum satis est quasi artem aliquam, nisi utare; etsi ars quidem, cum ea non utare, scientia tamen ipsa teneri potest, virtus in usu sui tota posita est; usus autem eius maximus civitatis gubernatio ... Unde enim pietas aut a quibus religio? Unde ius aut gentium aut hoc ipsum civile quod dicitur? Unde iustitia, fides, aequitas?

16 Rep 1.17.28: [H]omines ... qui essent politi propriis humanitatis artibus.

17 Leg 3.1.1: Quid enim est elegantia tua dignitas, cuius et vita et oratio consecuta mihi videtur difficillimam illam societatem gravitatis cum humanitate.

18 Rep 1.26.42: Deinde aut uni tribuendum est aut delectis quibusdam aut suscipiendum est multitudine atque omnibus.

19 Rep 1.45.69: [H]aec constitutio primum habet aequabilitatem ... deinde firmitudinem.
In this regard Cicero pointed out that the reign of Numa Pompilius, the second king of Rome during the late eighth, early seventh, century BC, had been characterised by complete peace and harmony \textit{(summa in pace concordiaque regnavisset)}, largely as a result of the king’s life-long application and development of religion \textit{(religio)} and clemency \textit{(clementia)}. Only a reign based on enduring power, justice and all-encompassing wisdom would ensure the welfare \textit{(salus)}, equability \textit{(aequabilitas)} and leisure \textit{(otium)} of citizens. The state could not be governed without the highest level of justice \textit{(summa iustitia)}. Under these circumstances the ideal statesman and model leader would be a man of wisdom noted for virtue and exemplary character, familiarity with law and justice, a dedication to peace and stability and the urge to create welfare, equal opportunities and leisure for his fellow-citizens.

In developing his legal philosophy, Cicero fully realised that the aforesaid virtues and values were fundamental to an understanding and application of law, justice, equity, reasonableness and analogous concepts. In eclectic fashion he modified and transformed Greek legal philosophical concepts with a view to bringing them into line with a typically Roman approach. Although his main works in this regard, the \textit{De re publica} and \textit{De legibus} on the state and laws respectively, smack of Plato’s \textit{Politeia} and \textit{Nomoi} on roughly the same topics against the background of the cardinal virtues and true knowledge \textit{(gnosis or episteme)}, there were vast differences. Platonic justice, which was primarily directed at achieving goodness \textit{(agathon)} and happiness \textit{(eudaimonia)}, was subdivided into universal and individual justice. This accorded in general terms with the distinction between general and particular justice propounded by Aristotle, who expanded on this in his \textit{Nicomachean Ethics} by distinguishing between distributive, remedial (corrective) and compensatory (retributive) justice as forms of particular justice. Justice as such constituted a mean between doing and suffering injustice but, as he pointed out in his \textit{Politika}, it applied to all persons on an equal basis.

Cicero saw justice as a virtue underlying all human relationships on the basis of shared interests and the need to give to each his own \textit{(suum cuique tribuere)}. Although he apparently accorded it primacy of position among the cardinal and other virtues he mentioned, he presented it in the \textit{De finibus} as interacting vigorously with, and enuring to the benefit of, all such virtues in harmony with nature. He pointed out, however, that, despite the leading role played by justice, each of the cardinal virtues still performs its special function: thus fortitude \textit{(fortitudo)} comes to the fore in dealing with toil and trouble, temperance \textit{(temperantia)} in passing by (worldly) pleasures, prudence \textit{(prudentia)} in choosing between good and evil, and justice \textit{(iustitia)} in according to each

\begin{enumerate}
\item Rep 2.14.27.
\item Rep 2.23.43: \ldots is est autem status, ut unius perpetua potestate et iustititia omnique sapientia regatur salus et aequabilitas et otium civium.
\item Rep 2.44.70: \ldots sine summa iustitia rem publicam geri nullo modo posse.
\item Nic Eth 5.5.17.
\item Pol 3.5.8. On justice in Plato and Aristotle see Van Zyl \textit{op cit} (n 8 above) 47-70.
\item Fin 5.23.64-65.
\item Fin 5.23.67.
\end{enumerate}
his own. It is significant that, in this passage, Cicero singles out prudence, in the sense of “practical wisdom” or “common sense”, rather than the general concept of (theoretical) wisdom (sapientia).

The harmony with nature (natura) to which Cicero adverts is fundamental to his understanding of the general principles of law and legal relationships. In a famous passage\(^\text{27}\) he puts it that true law is “right reason” (ratio recta) in conformity with nature (vera lex recta ratio naturae congruens): it is in fact “a unified, eternal and immutable law” (una lex et sempiterna et immutabilis). Elsewhere\(^\text{28}\) he describes law as “supreme reason embedded in nature” (lex est ratio summa insita in natura).

This is the very nature from which justice originates as a state of mind (habitus animi) directed at preserving the common good (communis utilitas) by according to each his dignity (suum cuique tribuens dignitatem).\(^\text{29}\) It is indeed nature from which not only justice derives, but also equity and good faith: if this were not the case and if nature were referred to purely for the sake of expediency (utilitas), it would not, Cicero says, be possible to find a good man.\(^\text{30}\) Good faith, in turn, is the basis of justice inasmuch as it recognises the underlying truth and binding effect of agreements and undertakings.\(^\text{31}\) In the same way justice is closely linked with virtues such as kindness (beneficentia or benignitas), benevolence or goodwill (benevolentia) and generosity (liberalitas).\(^\text{32}\) This is what moves Cicero to describe justice as a virtue that serves as “the mistress and queen of all virtues”\(^\text{33}\) and “the faithful guardian of human society”.\(^\text{34}\)

It goes without saying that justice was central to the concept of law and legal rights or obligations as set forth in the classical Roman law of Cicero’s time and in post-classical legal development thereafter. In addition, it was linked indissolubly with equity or fairness (aequitas) on the one hand and good faith (bona fides) on the other. It was in fact a function of the praetor (urbanus), the Roman magistrate who administered law and justice within the city limits of Rome, to apply equity and good faith in tempering the formality, harshness and inflexibility of the strict civil law (strictum ius civile). He did this, \textit{inter alia}, by introducing a number of flexible legal remedies in the form of actions based on what was good and fair (actiones in bonum et aequum conceptae). Thus actions based on fairness or equity were known as “useful” or “expedient” actions (actiones utiles) and those based on the facts or circumstances of a particular case were “factual” actions (actiones in factum).

\(^{27}\) Rep 3.22.33.  
\(^{28}\) Leg 1.6.18.  
\(^{29}\) De inv 2.53.160.  
\(^{30}\) Fin 2.18.59: Perspicuum est enim, nisi aequitas, fides, iustitia proficiscantur a natura, et si omnia haec ad utilitatem referantur, virum bonum non posse reperiri . . . .  
\(^{31}\) Off 1.7.23: Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas.  
\(^{32}\) Off 1.14.42, where he also refers to dignity as the cornerstone of justice in so far as it is attributed to each person: . . . tum ut pro dignitate cuique tribuatur; id enim est iustitiae fundamentum . . . .  
\(^{33}\) Off 3.6.28: . . . iustitia, haec enim una virtus omnium est domina et regina virtutum.  
\(^{34}\) Fin 2.34.113: . . . ad humanam societatem iustitiae fida custodia.
The law emanating from this counterpart of the *ius civile* became known as “honorary law” or *ius honorarium*, with reference to the “office” (*honor*) of the *praetor*, or simply as “praetorian law” (*ius praetorium*). The post-classical jurist Papinian explained in this regard that the *praetores* introduced praetorian law in the public interest for purposes of rendering the *ius civile* more flexible, or to supplement or improve it.\(^{35}\)

In his approach to equity, Cicero took cognisance of the Greek philosophical approach of Plato and Aristotle, but perhaps not to the same extent as in his thought on justice. Plato, indeed, had no clear conception of equity in a legal-philosophical sense but entertained strong views on equality (*isotes*) which, according to him, gave rise to all good things (*pant'agatha*) by attributing to each his due in accordance with nature (*physis*). He did, however, refer to equity (*to epieikes*) in his discussion of universal justice and its relationship with equality. Aristotle had a far more clearly defined view of equity, to which he referred as *epieikeia*, than did Plato. Significantly, however, he used this concept not only in the sense of equity or fairness, but also as reasonableness or, simply, justice. Although this illustrates, to some extent, the close relationship between these concepts in Aristotelian thought, it does not purport to equate justice and equity. What Aristotle intended was to indicate that equitable considerations should be applied in establishing whether or not written law is truly just. This is illustrated by a famous passage from his *Nicomachean Ethics* in which he explains that equity is a means of rectifying injustice.\(^{36}\) Although he creates the impression that equity is superior to justice, he clarifies this by describing equity (*epieikeia*) as “a special kind of justice” (*dikaiosynes*).\(^{37}\)

Cicero must needs have been influenced by Aristotle when, in his *Topica*, he defined *ius civile* as “the equity constituted for members of the same state so that each may acquire his own”.\(^{38}\) The link between *ius* and *aequitas* was extended to (written) law (*lex*) when Cicero made the threefold classification of *ius* (*the genus*) into *lex*, *mos* (*customary law*) and *aequitas* as *species* of it.\(^{39}\) Elsewhere he described law as “the link with the dignity we enjoy in the state, the foundation of liberty and the fountainhead of equity (*fons aequitatis*)”.\(^{40}\) This concept likewise appears from his joiner of justice, equity and goodness (*bonitas*) in accordance with “the natural principles of human fellowship and social intercourse” (*naturae principia ... communitatis et societatis humanae*).\(^{41}\) The force of equity, he tells us, is twofold. On the one hand it rests on the direct principle of

---

35  *D* 1.1.7.1: *Ius praetorium est quod praetores introductae sunt adiuvandi vel suppleandi vel corrigenda iuris civilis gratia propter utilitatem publicam quod et honorarium dicitur ad honorem praetorum sic nominatum. See in general on the *ius honorarium*, the discussion in Van Zyl *op cit* (n 3 above) 30-34; and on Papinian, *idem* 44.

36  *Nic Eth* 5.10.1-8:1137a-1138a.

37  On Platonic and Aristotelian equity see Van Zyl *op cit* (n 8 above) 93-105.

38  *Top* 2.9: *Ius civile est aequitas constituta eis qui eiusdem civitatis sunt ad res suas obtinendas.*

39  *Top* 7.31: *Formae sunt igitur eae in quas genus sine ullius praetermersione dividitur; ut si quis ius in legem, morem, aequitatem dividat.

40  *Pro Clu* 53.146: *Hoc enim vinculum est huius dignitatis, qua fruimur in re publica, hoc fundamentum libertatis, hic fons aequitatis ... .

41  *Off* 1.16.50.
truth, justice and, as it is called, the fair and good while, on the other hand, it relates to reciprocal exchange, being kindness or gratitude in the case of a benefit and retaliation in the case of a wrong. In this way aequitas is linked not only to justice but also to any number of other virtues, such as the remaining cardinal virtues of wisdom (sapientia), courage or fortitude (fortitudo) and self-restraint or temperance (temperantia). In addition it is linked to virtues such as friendship (amicitia), goodness (bonitas), dignity (dignitas), trust or (good) faith (fides), humanity (humanitas), integrity (integritas), truthfulness (veritas), generosity (liberalitas) and many others.

If these thoughts were to be encapsulated, it may be stated that justice in Cicero went hand-in-hand with his concepts of equity or fairness, reasonableness, good faith and a spectrum of other virtues and moral considerations underlying a positive interpersonal relationship reflected by kindness, goodness, benevolence and generosity among men. It brings together his personal, political and legal philosophy as the source of what he considered to be the virtues and values underlying all human relationships.

3 Ciceronian virtues and values in contextual perspective

That Cicero made a lasting impression on the Roman law and legal thought of his time cannot be denied. Not only did he succeed in transposing Greek philosophy and thought to Rome and, from there, to the greater part of the Western World, but he also rendered it in the exquisite classical Latin of which he was so truly the master. He inevitably influenced Roman lawyers and jurists of his time in his formulation of justice and equity and in his application of the virtues and values discussed above. Such virtues and values were, indeed, basic not only to the classical Roman law and jurisprudence of his time, but also to the value systems underlying the law and jurisprudence pertaining in post-classical and later legal development. I speak here of the development of Roman law during the time of the post-classical lawyers such as Gaius, Papinian, Paul, Ulpian and Modestinus, all of whom feature prominently in the digest of juristic law (the Digesta), which was to become the most important component of the Corpus iuris civilis (the “body of civil law”), compiled in the sixth century AD at the instance of the Emperor Justinian.

Of great significance is the fact that Ciceronian virtues and values remained prevalent throughout the period of the revival of Roman law, commencing in the twelfth century AD, when the Italian glossators and commentators turned their attention to a renewed study of Roman law and its sources, and continuing in the sixteenth century and thereafter, when a large-scale reception of Roman law took place in Europe and elsewhere. In this regard it is probable that Cicero was kept alive by philosophers such as Augustine, Aquinas,

42 Part or 37.130: Aequitatis autem vis est duplex, cuius altera directa et veri et iusti et ut dicitur aequi et boni ratione defenditur, altera ad vicissitudinem referendae gratiae pertinet, quod in beneficio gratia, in iurisultio nominatur.
43 Off 1.19.62; 2.23.83; De or 1.13.56.
44 See the sources cited in Van Zyl op cit (n 3 above) 67-79, with reference also to moral and religious considerations.
45 On the influence of Cicero on Roman law see Van Zyl op cit (n 8 above) 208-209.
46 This development is discussed in Van Zyl op cit (n 2 above) 41-70.
Calvin and even Kant, while a great lawyer like Hugo Grotius gave him pride of position in his work on war and peace (*De jure belli ac pacis*) and in his thoughts on equity as expressed in his little-known monograph on “equity, indulgence and flexibility” (*De aequitate, indulgentia et facilitate*). 47

Reference may also be made to Johannes Voet’s concept of rationality or reasonableness in a passage in his commentary on the Pandects of Justinian, in which he states that law must be reasonable or rational (rationalis) to be just. 48 This has a decidedly Ciceroian ring in that it harks back to Cicero’s concept of true law being recta ratio (“right reason”) in agreement with nature49 and which, if ignored, may give rise to injustice. 50 In like vein Voet waxes Ciceroian when, in the same passage, he links justice and equity with equality (aequalitas) on the basis that the laws enjoin what is honourable (honesta) and forbid what is dishonourable (turpia). This is not far removed from Cicero’s view that, if friendship should be nurtured for its own sake, the fellowship of men, equality and justice should be sought for their own sake. 51

With this kind of background it is not surprising that Cicero’s virtues and values still feature in modern law and in the writings of contemporary philosophers, theologians, lawyers and thinkers. A good example is John Rawls, who speaks of justice as “the first virtue of social institutions, as truth is of systems of thought”. 52 This sounds remarkably like Cicero’s view of justice as the first of all virtues, while truth or truthfulness (veritas), as we have seen in a number of texts cited earlier, is one of the virtues with which he frequently links justice and equity. In addition the “social institutions” of Rawls may be linked with the community good (communis utilitas) of which Cicero took account when stating that justice requires that to each should be attributed what is forthcoming to him (suum cuique tribuere). 53

By the same token it may not be surprising that, in my personal approach to law and justice, I have almost inevitably been influenced by Ciceronian virtues and values and the principles emanating from them. In several of my judgments over the years, as well as in lectures to students, I have emphasised that justice does not simply mean applying the law and statutes to the letter. To be truly just the law or statutory provision in question must be fair or equitable and also reasonable. In addition the act or omission being assessed in the context of justice must be consonant with the requirements of good faith (bona fides) and good morals (boni mores) in the sense of the generally accepted morals of the community or, as it has developed in jurisprudence, in that of public policy. Similarly Cicero’s concept of “right reason” (ratio recta) is that which later generations of lawyers have rendered as “reasonableness”, which goes hand in hand with justice and

47    See the full discussion of this period of Ciceronian influence in Van Zyl *op cit* (n 8 above) 209-231.
48    Voet Commentarius ad pandectas 1.3.5.
49    Rep 3.22.33 cited in note 27 above.
50    Leg 1.15.42.
51    Leg 1.18.49: [Q]uodsi amicitia per se colenda est, societas quoque hominum et aequalitas et iustitia per se expetenda ... . In this context aequalitas approaches aequitas in the sense of equity or fairness.
53    See the text to notes 29, 33 and 34 above and the discussion of Cicero and modern law in Van Zyl *op cit* (n 8 above) 231-234.
equity and which constitutes an almost indispensable tool in considering whether or not a person is liable in accordance with the facts and circumstances of a particular case. Thus in delict a court must consider whether or not, on the basis of reasonable foreseeability, there has been a failure to comply with legal obligations or duties. Similarly in the case of criminal liability a court must be satisfied that the accused is guilty beyond reasonable doubt.

In a general South African context, the Roman-Dutch or, as I prefer to call it, the “Roman-European” common law, which found its way to South Africa when the Dutch East India Company first established itself at the Cape during the mid-seventeenth century, kept alive the cardinal virtues of ancient Greek philosophy while applying and developing the legal principles founded on virtues and values such as those propounded by Cicero and other lawyers, philosophers and thinkers. In this way Cicero has lived on and remained relevant up to the present day. It is hence no surprise that many of the virtues and values for which he stood have been preserved in the South African Constitution of 1996.54

In the preamble to the Constitution the concepts of justice, honour, freedom and respect come to the fore immediately when recognition is given to “the injustices of our past”, honour is bestowed on “those who suffered for justice and freedom in our land”, respect is shown to “those who have worked to build and develop our country” and the belief is expressed that “South Africa belongs to all who live in it, united in our diversity”. The aim of the Constitution is hence, firstly, to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”; secondly, to “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”; thirdly, to “improve the quality of life of all citizens and free the potential of each person”; and fourthly, to “build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”.

It may be assumed that Cicero was not a direct source of any part of this preamble, but the virtues and values expressed in it might have come from any number of texts in the De officiis, De re publica or De legibus. The same applies to the founding provisions contained in section 1(a) of the Constitution, where we are told that South Africa is a “sovereign, democratic state” founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms”. Even more so is it prevalent in chapter 2 of the Constitution, which contains the Bill of Rights, section 7(1) of which provides that the Bill of Rights is “the cornerstone of democracy in South Africa” which “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”.

The democratic value of human dignity is dealt with in section 10, where we are told that all persons have “inherent dignity” and the right to have such dignity “respected and protected”. The right to equality and freedom appears from section 9, which provides, in section 9(1), that all persons are “equal before the law” and have “the right to equal protection and benefit of the law”. In section 9(2), again, equality is said to include

“the full and equal protection of all rights and freedoms”, in which regard legislation and other measures are envisaged for the achievement of equality and the protection or advancement of persons prejudiced by “unfair discrimination”, a term which is considered in more detail in sections 9(3)-(5).

A good example of the link between justice, fairness and reasonableness appears from section 33(1) which provides that all persons have “the right to administrative action that is lawful, reasonable and procedurally fair”. Section 35(1)(f), in turn, provides that arrested, detained or accused persons have the right to be released from detention “if the interests of justice permit, subject to reasonable conditions”. As long as they are detained, however, they are entitled, in terms of section 35(2)(e), to “conditions of detention that are consistent with human dignity”. In addition they have the right to “a fair trial” which, in terms of section 35(3)(d), includes the right “to have their trial begin and conclude without unreasonable delay”. As for the evidence which may be adduced in such trial, section 35(5) excludes evidence “obtained in a manner that violates any right in the Bill of Rights”, if the admission thereof “would render the trial unfair or otherwise be detrimental to the administration of justice”. These rights may be limited in terms of section 36, but only “in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”, provided all relevant factors are taken into account.

Whether or not any right should be limited frequently involves a question of interpretation of the Bill of Rights in terms of section 36, section 36(1)(a) of which provides that such interpretation “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. This links up with section 1(a) of the founding provisions of the Constitution and the introductory section 7(1) of the Bill of Rights discussed above. It likewise links up, in terms of section 171(1)(b), with the power of courts dealing with constitutional matters to “make any order that is just and equitable”. This power is consonant, in accordance with the provisions of section 173, with the “inherent power” of superior courts to develop the South African common law while taking into account “the interests of justice”. Small wonder, then, that section 6 of Schedule 2 to the Constitution requires all judicial officers to swear an oath or solemnly affirm that they “will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law”.

4 Concluding observations

From the preceding discussion it must inevitably be concluded that the virtues and values propounded and promoted by Cicero have withstood the test of time and remained with

55 It likewise accords with the basic principles governing public administration which is required, in terms of s 195(1)(d), to provide services “impartially, fairly, equitably and without bias”. This is in line with the requirement that the Public Service Commission must, in terms of s 196(2), be independent and impartial and perform its functions “without fear, favour or prejudice” with a view to maintaining “effective and efficient public administration and a high standard of professional ethics in the public service”.

55
us up to the present time. This may, at least partially, be attributed to the fact that he relied strongly on Greek philosophical sources, most of which he was able to make available to the Western World by rendering them in the impeccable classical Latin for which he has justifiably been honoured by later generations of lawyers and philosophers. That he has indeed influenced such later generations, without attempting to impose his views on them, appears from an even superficial consideration of various legal and philosophical sources emanating from any number of countries, including South Africa with its recently promulgated Constitution directed at creating and serving the new democracy which came into existence as recently as 27 April 1994. It is a source of pride for all South Africans and, I believe, for the international community in that it was conceived as “one law for one nation” by a nation united in and strengthened by its diversity. Far be it from me to suggest that our law and Constitution should be described as “Ciceronian”, but that Cicero’s efforts played a material role in its development cannot, in my considered view, be denied.