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List of Contributors 2005 (2)

Prof. A. A. Okharedia: University of Limpopo, South Africa.

Mr J. Ranger: University of Ottawa, Canada.

Ms S. Boudouris: Greek Ministry of Interior, Greece.

Ms L. Mabille: University of Pretoria, South Africa.

Prof. A. Ladikos: University of South Africa, South Africa.

Dr. P. R. Bosman: University of South Africa, South Africa.

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

Akhabue A. Okharedia[*]
Post-graduate Research Student at the School of Law, University of Limpopo, South Africa

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

* *Prof. Akhabue A. Okharedia is an Advocate of the High Court of South Africa and a Social Science Research Fellow.*

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 Section9(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 trade-marks"). 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.

In the above discussion, it can be argued that Aristotle's ideas on commutative justice justifies the present monetary transactions which is based on contractual relationship and governed by arithmetic equality. The equality claus in the present South African Constitution protects the right of individuals and accepts the reality of present injustice, caused by past discrimination, with the result that those discriminated against in the past are entitled to preferential or advantageous treatment so that genuine equality for all will ultimately emerge in South African Society in the future. This is expressly provided for in section 9, which is an affirmative action provision. In addition to this, section 12 of the 1996 constitution stipulates that everyone has the right to freedom and security of person, which includes the right:

a) not to be deprived of liberty arbitrarily or without this cause
b) not to be detained without trial
c) to be free from all forms of violence from either public or private sources
d) not to be tortured in any way or punished in a cruel, inhuman or degrading way.

In the same vein, Section 13 of the 1996 Constitution stipulates clearly that no-one may be subjected to slavery, servitude or forced labour. Forced labour in this context refers to work done without consent and invariably without fair and just compensation. This fair and just compensation is fully supported by section 23 of the Constitution which stipulates that everyone has the right to fair labour practices in which workers should be compensated according to the work they perform and their qualifications. Fair and just compensation does not mean that everybody should be compensated equally. The nature of the job performed by individuals and the skills required for the performance of the jobs are different and in view of this, workers will be compensated according to their skills and the work performed.

The above paradigms agree with Aristotle`s view where he states clearly that equality in morals means this: those things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness! Equality and Justice are synonymous: to be just is to be equal, to be unjust is to be unequal. Although, Aristotle's ideas have influenced the South African Constitution, there are also some of his view points that are incompatible with the South African Constitution. For example, Aristotle is of the view that women should be excluded from citizenship in Athens. He strongly supported the idea that women should be excluded from the participation in the public life of democracy. This view is contrary to the South African Constitution that considers the status of men as equal to women. Women are no longer discriminated against in South Africa, in fact, much effort is being made to promote their status and this is

why they receive preferential treatment when ever they compete for a job with men. The principle of Affirmative Action and Employment Equity are all measures to advance the status of women in South Africa. Aristotle argued that slaves, which he also referred to as under achievers, do not qualify for equal treatment. This class of individuals are very much like those who have not made it in South Africa and whom we often refer to as those who are less well-off. The South African Constitution suggests such individuals should be given opportunity to improve themselves. The Constitution does not discriminate between individuals on sex, race, religion, social background or origin.

The above weaknesses in Aristotle notwithstanding, our submission in this article is that his early scholarly ideas influenced the present South African Constitution to some extent.

Conclusion

The above discussion shows that Aristotelian legal philosophy in terms of the concept of justice is still very relevant in our present society. His ideas on equality constitute the corner stone of the Bill of Rights which is now implemented in most civilized societies. The new South African Constitution has entrenched the Bill of Rights and this in turn has become the corner stone of the new democracy.

It is hoped that the implementation of democratic principles in the new South Africa will improve the lives of the majority of the people who were not only deprived of their rights but were also discriminated against under the past apartheid regime.

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Security and Happiness in Aristotle's *Polis*

Jean-Philippe Ranger
University of Ottawa, Canada

Abstract

This paper focuses on the telos *of Aristotle's* polis *and on the laws' effectiveness in achieving this end. The* polis *aims to make citizens happy. However, I argue that due to the means the* polis *possesses, it can only provide* security *through an imitation of virtue.*

Aristotle wants citizens to find happiness in a polis*, but emphasizes the good of the* polis *over the happiness of individual citizens. I show Aristotle does not oppose the individual and the common good since the latter is composed of individual goods. Yet at the same time, Aristotle's analysis of the acquisition of* aretè *in the* Nicomachean Ethics *reveals the laws' inability to make citizens happy. As guidelines for action and instruments for correcting deviant behaviour, laws provide means by which citizens habituate themselves to virtuous actions. However, there is a difference between virtuous actions and true virtuous* character*. Good laws* aim *to make citizens virtuous, thus happy, yet may only succeed in ensuring virtuous action. In reality, a law-abiding citizen more closely resembles a continent agent than a virtuous one. Therefore, Aristotle's* polis *may not necessarily make citizens truly virtuous and, therefore, not necessarily happy.*

The πόλις "comes to be for life (τοῦ ζῆν ἕνεκεν), but it exists for the good life (τοῦ εὖ ζῆν)" (*Pol.*, I, 1252 b 29-30). According to Aristotle, while the πόλις can provide the conditions for survival and security in a communal life, it possesses a higher τέλος: the happiness of its members.

Through an analysis of Aristotle's arguments, I propose to examine whether the πόλις can provide the means to the good life. To this aim, I must first determine if the common good is opposed to the individual good, that is, if the legal framework forces citizens to forego their individual happiness. Second, I evaluate the legal system's ability to make citizens happy by instilling virtue. Third, I approach the question from another angle, considering whether a law-abiding citizen is a truly virtuous agent.

I

In a well-known passage of the *Nicomachean Ethics*, Aristotle claims: "For if the good of the individual and of the πόλις are the same, the good of the πόλις seems precisely greater and more perfect to grasp and conserve; it is good when it is cherished by one, but nobler and more divine when cherished by the people and the πόλις (I, 1094 b 7-11). On the one hand, insofar as the individual good and the common good both aim for the supreme human good (*Eth. Nic.*, I, 1094 b 7), they are the same. In other words, all human beings, both as individuals and members of a πόλις, aim for this supreme good, both individually and as members of a πόλις. However, the good of the πόλις (the common good) is greater, more complete, nobler and more divine because it is shared by many. Presumably, this text and others, claiming for example that a citizen belongs to the πόλις and not to herself (*cf. Pol.*, VIII, 1337 a 27-30), justify a call on all citizens to lay aside individual ethical ends for political ones, i.e. for the greater good of the community. Furthermore, citizens are often coerced by the legal system to sacrifice their happiness for the sake of the common good. It may be true that working towards this common good is advantageous to each citizen insofar as they can live out their lives in a safe environment (*cf. Pol.*, III, 1279 b 27-31; 1282 b 17), however, this seems inconsistent with the opening pages of the *Politics*, where it is plainly stated that the τέλος of the πόλις is the good life (εὖ ζῆν) rather than survival (ζῆν: *cf. Pol.*, I, 1252 b 29-30).

It is possible to eliminate this apparent inconsistency by analysing the nature of the common good. Pierre Aubenque for example suggests a different interpretation of the relationship between ethics and politics in Aristotle, given that "the good of the πόλις is reduced (*se ramène à*) to the good of the individuals that compose it."[1] It would thus be possible that Aristotle, in claiming the good of the πόλις is greater than the good of the individual, does not imply the necessity to sacrifice the good of individuals to a greater common good, but rather, it would be nobler to attain the good of many citizens.[2] This interpretation is consistent with textual evidence, where Aristotle states that the very concept of "common good" is inconceivable without the happiness of each citizen.[3]

If, for Aristotle, "it is apparent that the best constitution is that arrangement where anyone could undertake the best actions and live in felicity" (ζῴη μακαρίως: *Pol.*, VII, 1324 a 23-25), the πόλις achieves its goal or attains its good if *all* citizens are happy. In other words, insofar as the common good is the good of *all* the individuals, there seems to be a certain *reversal (renversement)* in comparison to Aristotle's position in the first book of the *Nicomachean Ethics*. Rather than being opposed, the common good includes the goods of the citizens[4].

According to Aristotle,

> It is impossible for the whole to be happy, unless all, or most, or some have acquired happiness. For happiness is not of the things like evenness: it is possible on the one hand to predicate the latter of the whole and on the other hand not of either of its parts, but this is impossible in the case of happiness (*Pol.*, II, 1264 b 17-22).

Aristotle identifies two distinct types of collective concepts. On the one hand, if we take an even number (W) made up of two parts (P1 and P2): it is possible for W to be even independently of the evenness or oddness of its parts (P1 and P2). On the other hand, Aristotle refers to the good of the πόλις. If the parts of this kind of whole (in this case, the citizens) are not happy, it is impossible to declare that the πόλις itself is happy. This distributive conception of the common good is apparent in Aristotle's criticism of the platonic πόλις.

Aristotle's principal point of contention with Plato rests on the latter's claim: that which is best for the πόλις according to Plato (as Aristotle interprets it) is to be an absolute unity (*Pol.*, II, 1261 a 15-16). However, from an Aristotelian perspective, this τέλος is in no way desirable for the πόλις because it will inevitably prove to be the source of its downfall (1261 b 8-10; *cf.* 1263 b 31-35). The reason is, according to Aristotle, that Plato does not adequately understand the *nature* of a πόλις: "certainly it is apparent that making and transforming a community into more of a unit will make it so that it is no longer a πόλις; for the πόλις is by nature a kind of multiplicity" (*Pol.*, II, 1261 a 16-18). By nature, the πόλις is not uniform; at least not in the way Plato conceives it. To ensure its self-sufficiency, such a community must necessarily be made up of many different parts (*cf. Pol.*, II, 1261 b 10-15; III, 1275 b 20-21).[5] To desire absolute unity for the πόλις is to wish for it to be something it is not, in the same way that one would wish to transform "a harmony into a monotone or a rhythm into a unified beat" (*Pol.*, II, 1263 b 34-35).

If Plato's πόλις (as Aristotle interprets it) aims at reaching an absolute unity, then the good of the citizens need to be subordinated to this higher good.[6] Now if Aristotle recognizes that the πόλις is not a unity, but a community composed of many differing types of citizens, presumably he would not subordinate the good of individual citizens to the good of the whole.[7] Or if he does, it would not be for the same reasons nor in the same way as Plato. For Aristotle, in the case of the community, the whole is not a concept different from the sum of its parts.[8] It therefore seems Aristotle is aiming at a common good that is no different than the sum of individual goods. The τέλος of the πόλις is then no different than the happiness of each *part* of the political community (*Pol.*, III, 1278 b 20-24).[9] This claim is related to the purpose of what Aristotle calls the right constitution.

One of the elements differentiating the right constitution from a corrupt constitution is the interest at which it aims: "when one, or few, or many govern for the sake of the common interest, those constitutions are necessarily right, but those governing for the sake of individual interest, either of one, of a few, or of the multitude are corrupt" (*Pol.*, III, 1279 a 28-31). A constitution is right if and only if it aims for the interest of the whole community. But insofar as the community is a sum of parts, and due to the way it must "distribute" happiness among its members, the common interest is neither some abstract notion of general interest[10] nor mere survival or security of the community. This implies that the happiness Aristotle intends to offer citizens is not the happiness of some abstract entity called the "πόλις." Rather, this happiness cannot *exist* unless the citizens themselves are happy.[11] Insofar as the common good is the good of all (individually), it would seem most profitable for everyone to work towards it.

This type of demonstration, however is not entirely convincing, and it is difficult to imagine Aristotle presenting these arguments to convince citizens to act for the sake of the common good. Aristotle himself recognizes this insofar as he differentiates two means of attaining virtue: teaching and habituation (*cf. Eth. Nic.*, II, 1103 a 14-19). Teaching is a method of transmitting virtue using arguments and demonstrations. But since most people are not convinced by arguments alone, teaching can only be a second step, once a citizen is habituated to ethical virtue (*cf. Pol.*, VIII, 1334 b 6-28; *Eth. Nic.*, X, 1179 b 23-28).[12] This leads us to my second point: I will now examine the relationship between happiness and virtue, which will allow me to evaluate the means possessed by the πόλις to make its citizens happy.

II

Εὐδαιμονία is "an activity of the soul (ψυχῆς ἐνέργεια) in agreement with virtue (κατ' ἀρετήν)" (*Eth. Nic.*, I, 1098 a 16-18). In other words, the happy individual will possess virtue and act accordingly. If the πόλις is to achieve its end, it must possess the means to transform its citizens from non-virtuous to virtuous agents.[13] This is, according to Aristotle, the task of legislators: "For, by habituating (ἐθίζοντες) them, the legislators make the citizens good, and this is the intent of all legislators" (*Eth. Nic.*, II, 1103 b 3-5; *cf. Pol.*, V, 1310 a 12-19). It is the legislators, Aristotle suggests, by means of laws, who habituate the citizens and make them virtuous. Before developing this idea further, I will say a few words on the Aristotelian conception of ethical virtue.

In general terms, ethical virtue is "a disposition of deliberated choice (ἕξις προαιρετική)," an inclination to choose to act appropriately (*Eth. Nic.*, II,

1106 b 36). In other words, an agent is virtuous in that she possesses a specific character (ἦθος) that determines the way she acts. Ethical virtues are in no way innate (*cf. Eth. Nic.*, II, 1103 a 14-b 1). Rather, they are acquired by means of habituation (*cf. Eth. Nic.*, II, 1103 a 17; I, 1095 b 4-b 6, 1098 b 6). Aristotle argues for the connection between habituation (ἔθος) and character (ἦθος) by drawing an analogy between virtue and art (τέχνη):

> We acquire the virtues by first accomplishing actions in the same manner as with the arts. For those things requiring learning to do, we must do to learn. For example we become builders by building and harpists by playing the harp. In precisely a similar way, we become just through just actions, temperate through temperate actions, and courageous through courageous actions (*Eth. Nic.*, II, 1103 a 31-b 2).

Virtues resemble the arts insofar as one learns them through repetition: it is impossible to acquire either of them through teaching alone. It is as ludicrous to claim that someone can become courageous without behaving courageously, as to claim that someone can become a builder without building.[14] Therefore, the repetition of a given type of action is a necessary condition to acquiring the corresponding disposition. Presumably then, to instil virtue, the πόλις must encourage its citizens to act as virtuous agents.

When a citizen becomes an adult, the legal system is intended to habituate her to act in a certain way:

> The law commands (προστάττει) to accomplish the actions of the courageous (τὰ τοῦ ἀνδρείου ἔργα ποιεῖν), for example, not to abandon one's post, nor to flee, nor to throw down one's weapons, and the actions of the temperate, for example not to commit adultery, nor excess, and the actions of the mild, for example not to be violent, nor to revile another, and in the same manner for the other virtues or negative dispositions, urging toward some and forbidding others, in a correct manner if the law was correctly established, and incorrectly if it was improvised (*Eth. Nic.*, V, 1129 b 14-26).

Through a system of rewards and punishment, the laws encourage virtuous actions and punish reprehensible ones.[15] For Aristotle, this is presumably sufficient for the development of ethical virtue. The relationship he establishes between character and habit is such that if one were to perform certain virtuous actions over a long period of time, one will become virtuous. It may very well be necessary to repeat an action for it to become second nature, but Aristotle does not indicate *how* the law could be sufficient to acquire ethical virtue. Forcing citizens to act in a certain way may not affect their character *in the desired way*.[16] The nature of Aristotelian virtue makes it difficult to understand how early childhood moral education or the legal system could be sufficient means of ethical habituation.

In Aristotelian philosophy, there is a difference between an action and its principle. A fine action, i.e. one prescribed by good laws, may be caused by something other than virtue. In contrast, the virtuous agent possesses a certain disposition; her actions are shaped by a certain character (ἦθος).

We can understand the relationship between an action and its possible causes by looking closely at an example from Aristotle's text, in which he analyzes the causes of improper actions. Let us say, for instance, that an agent is virtuous, but at some point commits an action contrary to her virtue: a courageous citizen flees the battle scene, or a just citizen commits adultery. Aristotle is not saying that these citizens are, respectively, cowards or unjust, but that these actions may have been cowardly or unjust *by accident* (κατὰ συμβεβηκός: *Eth. Nic.*, V, 1137 a 23). To be a coward or unjust is not to act in a certain way "just as to treat and to cure is not a matter of cutting or not cutting, nor of treating with drugs or not treating with drugs, *but doing it in a certain way*" (*Eth. Nic.*, V, 1137 a 23-26; my emphasis). Someone could successfully go through the motions of cutting or administering drugs, but unless she possesses the art of medicine, she is not a doctor. Similarly, someone could act either virtuously or un-virtuously, but that does not mean she possesses the corresponding disposition: she may be only "going through the motions." Aristotle is aware of this problem. This is apparent in a further example:

> But someone may be puzzled if in any way we say it is necessary to do just actions to become just and to do temperate actions to become temperate. And if people do just actions and temperate actions, they are automatically just and temperate, similarly if they do grammar or play music, that they are automatically grammarians and musicians. But it may not be so in the case of the arts. For it is possible to do grammar and that it be the result of luck or of directions. To be a grammarian, then, is to do grammar and to do it in a grammatical way, that is, to do it according to the art of grammar in us (κατὰ τὴν ἐν αὐτῷ γραμματικήν: *Eth. Nic.*, II, 1105 a 17-26).

In this text, Aristotle anticipates an objection: he acknowledges it would be absurd to claim that as soon as someone engages in just or temperate actions, she automatically and therefore necessarily becomes just or temperate. This is as unfounded as the claim that someone will be a grammarian or a musician as soon as she performs the actions corresponding to these arts. There are three possible causes or principles that could make someone able to do grammar: luck, following directions, or the true possession of the art of grammar. Possession of the art of grammar is different form the two other possible causes in that it is *internal* to the agent. In this third case, the agent does grammar "in a grammatical way."[17] Just as there are certain conditions to be met to correctly state that an object is crafted by art, there are also certain necessary conditions to be met to

claim that virtue is the principle of an action. In the case of the virtues, an action must be accomplished (a) with an understanding of the reason for acting in a certain way, (b) as a result of a deliberated choice (προαίρεσις) and chosen for its own sake, and finally, (c) it must be done in a firm and unwavering state (*Eth. Nic.*, II, 1105 a 31-34; III, 1119 b 15-16). In other words, she must act knowingly, freely and her actions must correspond to her character. With this understanding of virtue, let us return to the case of a law-abiding citizen.

Insofar as laws are well constructed, they will lead to virtuous action on the part of a law-abiding citizen (*cf. Eth. Nic.*, V, 1129 b 14-26). However, it may not seem correct to claim that such an action is necessarily caused by virtue. A possible explanation might be that such an action is involuntary (ἀκουσία) and therefore not the result of a deliberated choice, for the law *coerces*, *forces* a citizen to act in a certain way under the threat of punishment (*Eth. Nic.*, X, 1180 a 8-9). In general terms, an involuntary (ἀκουσία) action is an action with an external principle. For example, if "the wind or those who control someone carry her somewhere" (*Eth. Nic.*, III, 1110 a 3-4), it cannot be said of such a person that she acted voluntarily. It seems that an action undertaken because it is prescribed by law may correspond to such a case.

However, an action undertaken under the threat of punishment is purely forced. Aristotle gives the following example: what if a tyrant has captured someone's family and under the threat of executing her family, forces that person to do something she would never do otherwise (in Aristotle's terms, she would not do it ἁπλῶς)? Is that particular action voluntary or involuntary? This otherwise undesirable action possesses elements of voluntary and involuntary actions; it is a mixed action, but more closely connected to voluntary action in that it is chosen in *that* particular circumstance (*Eth. Nic.*, III, 1110 a 4-26). Its motive is the "fear of a greater evil" (φόβον μειζόνων κακῶν: *Eth. Nic.*, III, 1110 a 4). If punishment is the means by which law is *imposed* on citizens, it is presumably the fear of punishment that will "force" the citizen to act according to law. An action that she would not have chosen otherwise (she would not have chosen ἁπλῶς), is nevertheless *chosen* for fear of a greater evil, i.e. punishment. Therefore, we can assume that lawful actions are the result of a deliberated choice. Nevertheless, the reason why lawful action does not necessarily lead to a virtuous character is *related to* the laws' necessity to contain a coercive element. The coercive nature of the law is a direct result of the moral psychology of a law-abiding citizen. This idea can be explained further in my third and final part, by comparing processes of practical reasoning that may result in virtuous action.

III

Without a coercive element, laws would be ineffective because citizens would not act appropriately of themselves. In fact, citizens' motivations are often contrary to what the legislators have identified as the good of the community. In terms of the conditions of virtue identified by Aristotle, whereas the virtuous agent chooses virtue for its own sake (προαιρούμενος δι' αὐτὰ: *Eth. Nic.*, II, 1105 a 32), a good citizen may act merely for the sake of avoiding punishment.

> We say that some who undertake just actions are not yet just, for example those who do what is deemed appropriate by the law, either unwillingly, in some ignorance or for the sake of some other reason and not for its own sake (yet they do what they must and as much as the good agent (τὸν σπουδαῖον) ought to) (*Eth. Nic.*, VI, 1144 a 13-17).

In this case justice (as a virtue) is not necessarily the cause of just action. If the agent conducts herself in agreement with the legal prescriptions, it may be for reasons other than justice: under constraint, in ignorance, or for *any* reason other than for the sake of the just action itself. A few lines above the text just cited, Aristotle claims that "on the one hand, ethical virtue makes the target correct, and on the other hand, practical wisdom chooses the means to it" (*Eth. Nic.*, VI, 1144 a 7-9). If the agent is virtuous, ethical virtue is the motivation for, or the final cause of the action. In such a case, there is no need of external motivation.

In contrast, praise or avoidance of punishment are rewards for lawful action. The legal system provides a *necessary* reward (μισθὸς: *cf. Eth. Nic.*, V, 1134 b 6) for those who do not act for the sake of virtue but for some other reason.[18] Therefore, if a citizen refrains from acting in a certain way out of a fear of punishment or for the sake of an honour, she is not virtuous in the Aristotelian sense, since she does not desire the proper thing. The final cause of her actions is reward or avoidance of punishment rather than virtue itself. However while the law-abiding citizen is not virtuous, it would be just as wrong to claim that she is immoral.

In Aristotelian ethics, there are multiple intermediary degrees between virtue and vice. For example, regarding bodily pleasures, the different human levels are the following: intemperance (ἀκολασία: *cf. Eth. Nic.*, VII, 1147 b 28; 1148 b 12), incontinence (ἀκρασία: *Eth. Nic.*, VII, 1145 a 16-17), continence (ἐγκράτεια: *Eth. Nic.*, VII, 1145 a 18), and temperance (σωφρόσυνη: *Eth. Nic.*, VII, 1147 b 28).[19] The positive human dispositions in relation to pleasure are temperance and continence. While they are related, they are not the same (*Eth. Nic.*, VII, 1146 a 10-11; 1148 a 14) insofar as the latter is not a virtue (*Eth. Nic.*, IV, 1128 b 34). They are different in that the continent "chooses but without desiring" (*Eth. Nic.*, III, 1111 b 14-15).

While the continent *chooses* the correct action – it is a deliberated choice (προαίρεσις) guided by reason and the knowledge of the appropriate action – it is in conflict with the desires (*cf. Eth. Nic.*, I, 1102 b 14; I, 1102 b 27, *Eth. Eud.*, II, 1224 b 27). In other words, the continent agent knows *how* she ought to act, but does not desire to act in that way, yet at the same time, she nonetheless forces herself to act appropriately, according to what her reason dictates (*Eth. Nic.*, VII, 1145 b 10; IX, 1168 b 34).

Outwardly the continent and the virtuous agent seem to be the same (*cf. Eth. Nic.*, VII, 1145 b 8), but the decisive difference is the way each *feels* with regards to virtuous action: the virtuous agent derives pleasure from the actions themselves (*Eth. Nic.*, II, 1104 b 3-1105 a 14) since she possesses a certain character that determines the way in which she acts and feels towards virtuous actions. Ethical virtue makes people *want* to act virtuously.[20] However, the continent must force herself to undertake fine actions. She is able to resist desires (βίαιον ἡ κάθεξις: *Eth. Eud.*, II, 1123 b 18; *cf.* II, 1224 a 32-34) and act in imitation of the virtuous agent, according to what her reason dictates (*Eth. Nic.*, VII, 1145 b 10; IX, 1168 b34).[21] The continent acts against her desire, but for the sake of possible future advantages (*Eth. Eud.*, II, 1224 b 16-19). This is how the law-abiding citizen is driven to virtuous action. She acts according to the dictates of law for the sake of rewards (or avoidance of punishment), not for the sake of the actions themselves (*Eth. Nic.*, V, 1134 b 6).

Her misguided wish (βουλὴσις: *Eth. Nic.*, III, 1111 b 26-29; 1113 a 15-b 2) does not regard just action as a good in itself, rather, it interprets it as being good for *others*, and in many cases a source of harm to herself.[22] Of course, as I have shown in my first section, the common good is not superior to the individual good, but insofar as the law-abiding citizen is not virtuous, she cannot understand this. This explains why an external reward is necessary. Of course, it *is* necessary for the πόλις to enforce its laws through a system of rewards and punishment since most people will only respond to fear of punishment (*Eth. Nic.*, X, 1179 b 11-13). As most members of the political community are not virtuous, their improper wishes and desires must be kept in check for all to be able to coexist within a community.

To conclude, it seems on the one hand that the πόλις aims at a common good that is inseparable from the good of each citizen. In this sense, the happiness sought by the πόλις cannot be interpreted as the happiness of a totality to which the good of individual citizens is sacrificed. Instead, Aristotle's political project is to make citizenship necessary and sufficient for the happiness of *each* member of the πόλις. On the other hand, while the laws may *aim* to make citizens love the fine and despise the bad (*cf. Eth. Nic.*, X, 1179 b 30-31), laws can only ensure an intermediate state

more akin to continence than to virtue: laws habituate the citizens to rewards and punishment, not to desire virtue in itself. Therefore, the legal system cannot make a citizen virtuous, no more than it can make her happy.[23] The πόλις can be, *at best*, an (or *the*) environment where citizens *may* become virtuous. The πόλις thus provides a safe environment where those few and rare citizens capable of crossing the threshold from imitation of virtuous action to virtue itself can do so without the fear of becoming victims of injustice.[24]

Said differently, there seems to be a tension between the τέλος of the πόλις and its ability to fulfill that τέλος, that is, its limited capability to make its citizens happy. This tension represents a tragic consequence: the πόλις gives itself a nearly impossible task due to the nature of virtue, for virtue is not only the result of actions for the sake of external motivations, but more importantly, it is founded on the internal disposition of each citizen.

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Endnotes

1. P. Aubenque. 1980. "Politique et éthique chez Aristote." Ktèma 5: 216. *Cf.* E. Lévy. 1980. "Cité et citoyen dans la *Politique* d'Aristote." Ktèma 5: 231.

2. *Cf.* R. Bodéus. 1996. Aristote, la justice et la cité. Paris: Presses Universitaires de France. 13, 114. *Cf.* E. Lévy. "Cité et citoyen." 231.

3. R. Bodéus. Aristote, la justice et la cité. 108.

4. R.-A. Gauthier and J.-Y. Jolif. 1970. L'Éthique à Nicomaque. Traduction et commentaire. Louvain: Publications Universitaires. Vol. II.1. 11-12.

5. *Pol.*, III, 1274 b 38-40, tells us a πόλις is made up of many parts (ἐκ πολλῶν μορίων) and *Pol.*, II, 1261 a 24, that it is not a group of ὁμοίοι, of resembling parts. In the Aristotelian vocabulary, a "multiplicity" is the opposite of a "unity" (*Metaph.*, Γ, 1004 a 10; I, 1054 a 20-22). *Cf.* R. Mayhew 1997. "Part and Whole in Aristotle's Political Philosophy." Journal of Ethics 1: 331.

6. I will not examine eventual limits of Aristotle's criticism of Plato's πόλις. The very fact that Aristotle condemns Plato's doctrine shows that for the former, the πόλις cannot be an absolutely unified whole. On this question, see M. Canto-Sperber. 1993. "L'unité de l'État et les conditions du bonheur public (Platon, *République*, V ; Aristote, *Politique*, II)." Aristote Politique: Études sur la *Politique* d'Aristote. (Eds, P. Aubenque and A. Tordesillas) Paris: Presses Universitaires de France. 49-71.

7. R. Mayhew. "Part and Whole." 333.

8. *Cf.* M. Canto-Sperber. "L'unité de l'État."

9. E. Lévy. "Cité et citoyen." 230, n. 291.

10. *Cf.* P. Rodrigo 1987. "D'une excellente constitution. Notes sur *Politeia* chez Aristote." Revue de philosophie ancienne 5(1): 79-80.

11. E. Lévy. "Cité et citoyen." 230, n. 291; F. Wolff. 1991. Aristote et la politique. Paris: Presses Universitaires de France. 66-67.

12. M. Burnyeat. 1980. "Aristotle on Learning to be good." Essays on Aristotle's Ethics. (Ed, A. O. Rorty) Berkeley: University of California Press. 69-92; J. Lombard. 1994. Aristote: politique et éducation. Paris: L'Harmattan. 86.

13. J. Lombard. Aristote: politique et éducation. 54.

14. Aristotle uses the examples of building and seeing when he explains the way in which logically, activity (ἐνέργεια) precedes potentiality (δυνατόν: *Metaph.*, Θ, 1094 b 12-17).

15. *Cf.* Ph. Betbeder: "Le facteur déterminant réside dans le rôle de la loi : seule, celle-ci a le pouvoir coercitif suffisant pour plier les enfants et les hommes sous le joug de la contrainte formatrice." P. Betbeder. 1970. "Éthique et politique selon Aristote." Revue des sciences philosophiques et théologiques 54: 478.

16. According to some commentators, this is somehow due to some inappropriate or "improvised" laws. In other words, in an ideal πόλις, laws would be sufficient to instil

ethical virtue. See S. Vergnières. 1995. Éthique et Politique chez Aristote: *phusis, êthos, nomos*. Paris: Presses Universitaires de France. 188; R. Bodéus. 1982. Le philosophe et la cité. Recherches sur les rapports entre morale et politique dans la pensée d'Aristote. Paris: Belles Lettres. 18; and, to a certain extent E. Lévy. "Cité et citoyen." 247-248. However, on this point, I follow J. Barnes' interpretation, for whom this aspect of Aristotle's political theory is fundamentally flawed for "you may, as the proverb has it, lead a horse to water; but if you do, it won't drink," J. Barnes. 1987. "Aristotle and Political Liberty." Aristoteles' "Politik". (Ed, G. Patzig) Göttingen: Vandehoeck & Ruprecht. 247-263.

17. Notice the use of the expression κατὰ τὴν ἐν αὐτῷ γραμματικήν, opposed to one of the passages I evoked earlier, where an action possessed a quality *by accident* (κατὰ συμβεβηκός: *Eth. Nic.*, V, 1137 a 23).

18. Compare this with Pl., *Resp.*, II, 358 a 4-6; *cf.* 357 c 5-10; 358 a 4-6.

19. The two extreme dispositions, bestiality (θηριότης: *Eth. Nic.*, VII, 1145 a 17) and a "heroic and god-like" temperance (ἡρωική τινα καὶ θείαν: *Eth. Nic.*, VII, 1145 a 20), are not human and therefore very rare (*Eth. Nic.*, VII, 1145 a 22-35).

20. *Cf.* L. Kosman: "The moral virtues are states of character that enable a person to exhibit *the right kinds of emotions* as well as the right kinds of actions," L. Kosman. 1980. "Being Properly Affected: Virtues and Feelings in Aristotle's Ethics." Essays on Aristotle's Ethics. (Ed, A. O. Rorty) Berkeley: University of California Press. 103-116.

21. This continent agent possesses incorrect desires but "knowing her desires are bad, does not obey them because of her reason (οὐκ ἀκολουθεῖ διὰ τὸν λόγον)" (*Eth. Nic.*, VII, 1145 b 13-14; *cf. Eth. Eud.*, II, 1223 b 11-12; *De An.*, III, 433 a 7.

22. *Cf.* P. Betbeder. "Éthique et politique selon Aristote." 458.

23. *Cf.* "Politics aim to ensure the reign of virtue, but this end remains exterior to the quality of the means put in motion (*cette fin reste étrangère à la qualité des moyens mis en oeuvre*): the moral end of politics being only an extrinsic end, in no way implies the political capacity," P. Aubenque. "Politique et éthique chez Aristote." 220. *Cf.* D. J. Allen. 1964. "Individual and State in the *Ethics* and *Politics*." Entretiens sur l'Antiquité Classique: La "Politique" d'Aristote. Vandoeuvres et Genève: Fondation Hardt. 55-95.

24. On this point, see P. Betbeder. "Éthique et politique selon Aristote." 466.

Environment as Common good and Ecological Crimes

Sophia K. Boudouris
Faculty of Philosophy and History of Science, University of Athens, Greece

Abstract

Certain human activities have a bad effect on the environment and result in a serious ecological imbalance, which can surely bring very dangerous consequences for the subsistence of human beings and risk the lives of other beings on the globe. In fact, there is a list of human activities that can be regarded as ecological crimes or crimes against nature. I will shortly mention the disposal of domestic or industrial waste in illegal landfill sites, direct disposal of wastewater in the sea or rivers, illegal trade in endangered species of wild fauna and flora or other pollution incidents. What we should care about more is not to try to prevent environmental crimes by prosecuting those committing them or dealing with environmental damages, but to define our basic view of nature and the place of human beings within it, as well as our stance towards the environment itself.

The integrity of the natural environment is of paramount importance, not only as a background of human activities but also due to the fact that the primary resources, such as air, water and soil, are the conditions human lives directly depend on. In this paper, I discuss the view that the environment is a universal common good for human beings, and in fact it may be a liberal common good. Seeing things from the liberal point of view, it is easier to present convincing arguments against the view that some disparity exists between the natural world and the human beings that live within it. The natural environment as universal common good to every person has a higher-order value, which requires respect and concern. The commonality and the universality of nature as a common good imposes enduringly certain obligations to the present and the future generations, to anyone who lives or may live on this planet. Within this Rawlsian liberal perspective of the common good, I will try to elucidate how I understand an adequate distribution of rights and obligations towards the nature. Evoking a sustained and widespread commitment to "the common good" does not imply

sacrificing personal freedom or individual rights. On the contrary, in a liberal community, where there is an equal distribution of rights and obligations, one is free to pursue one's own personal ends, as long as one does not cause harm to someone else and respect the other.

I

In this paper, I will attempt to define the environment as a common good and to establish the ways and the modes of the treatment appropriate to such status. In view of this, it seems also necessary to determine the meaning and the scope of the concept of ecological crime, which clarifies up to a point why the environment is considered as a common good. In this way, we would be able to correlate the two concepts and further to find effective ways of dealing with both individual and collective practices that lead to the deterioration, pollution or destruction of the natural world.

Starting with the meaning of ecological crime I would suggest that the following view is a quite good definition of what is an ecological crime. That is, any violation or infringement of a statute that is in place to protect the quality of our air, water, or any other kind of natural resources is considered a crime against the environment. Ecological crimes, i.e. crimes against Nature, refer to a list of illegal activities, such as waste and wastewater crimes (disposal of waste in illegal landfill sites, direct disposal of domestic or industrial wastewater in the sea or rivers without prior treatment), wildlife crimes (that can take many forms, such as illegal trade in endangered species of wild fauna and flora, crimes against protected native species, cruelty to wildlife and other fishing offences), and various pollution incidents.

Ecological crimes are and must be thought as a serious problem, even though the consequences of an offence may not be immediately obvious, or may have no direct victims that can be identified. What matters in the latter case is the accumulation of damages, since the cumulative costs of environmental damage and the long-range toll in illness, injury and possible death are not insignificant at all. Certain human activities have definite bad effects on the environment and result in a serious ecological imbalance, which can surely bring very dangerous consequences for the subsistence of human beings themselves and risk the lives of other beings on the globe. For instance, if the environment is transformed in such a way that exceeds the limit of its capacity of restoring its equilibrium, it may not be wholly recovered and ultimately human beings will most likely vanish from the face of the earth. Polluting the environment is our main problem, which we throw, so to speak, at the face of nature, and which we have to solve for ourselves.

In our effort to put an end to the incalculable damage and to establish

a meaningful relationship between human beings and the natural environment, we have to reconsider our approach to the whole issue of environmental pollution; so we have to discuss the following questions: 'what is the importance of the natural environment?' and 'what stance should we human beings take towards it?'

This means that we should not only care about the attempts to prevent immediate environmental crimes by prosecuting those committing them or dealing with environmental damages, but also define our basic view of nature and the place of human beings within it, as well as determine our stance towards the environment itself.

But, what is the importance of the natural environment? First of all, nature should be regarded as a background of human activities. We are living within and we are supported by it, utilising or consuming natural resources. It is important, because it provides us with the primary resources, such as air, water and soil, which are conditions human lives directly depend on. To explain this, we need to understand that, apart from several kinds of preconditions that are significant for what constitutes "the good life of human beings", such as the physiological health or know-how for ordinary activities, there are also some conditions that are collectively given and equally provided to every individual and formulate the baselines for human conduct. I will roughly distinguish three kinds of such conditions: the cultural, the social, and the natural. In the cultural field, language or life-forms are to be included; in the social field, norms or rules in the form of trust, relationship, community, laws or market are to be included; and in the natural field, the basic natural resources, such as air, water, or soil are to be included.

The value of these resources was early understood by humanity. Although in Ancient times the ecological crisis did not appear to have the extent and of course the intensity of that of our times, problems were still present; and this led the people to deal, among other things, with these problems at an institutional level. It is very instructive to refer to the following ancient Greek edict of 440-430 BC, which is an indication of the awareness of Ancient people towards environmental issues. The Decree says:

> "…and let the king provide. The present decree should be transcribed on blocks of stone and placed on both sides. It is forbidden to throw out leather to rot in the Ilyssus river near the temple of Hercules, also the practice of tanning and disposing of the wastes in the Ilyssus river…"

This Athenian edict is not simply a sacred decree, but is the first ecological edict that the world has known[1]. It was written in order to denigrate and to attack the lucrative business operations, such as tanning and leatherworks, intending to protect the environment. It is noteworthy that the sensitivity and a kind of awareness that nature is of paramount importance (and therefore should be protected whatever the cost) is depicted

in this decree. Similar elements of ecological consciousness can also be found in the Pre-Socratic thought (and even before that in the Greek myths).

Considering the importance and the vulnerability of these natural conditions, and the fact that the equilibrium of nature is connected with the well-being of human beings, the environment should be called "the common good" and be evaluated as more important than any other similar condition, such as the cultural or the social conditions. But what is the common good and why is the environment a common good?

I think that in order to clarify this question, it is very instructive and appropriate to refer to conceptions and views which have been expressed by thinkers in the Ancient Greek Antiquity.

In the ancient Greek thought the prevailing attitude may be thought as being a free and competitive society and culture that at the same time gives priority to *the common good* and *the public welfare* over the excessive demands of every individual to acquire even more goods. For example, Solon, the famous Athenian statesman and legislator, in his *Eunomia* refers in general to some civilians and rulers who behave unwisely (δήμου θ' ἡγεμόνων ἄδικος νόος[2]), caring only about money, while stealing the public property. Consequently, their intemperate greed drives the city to its own destruction (οὔθ' ἱερῶν κτεάνων οὔτε τι δημοσίων φειδόμενοι κλέπτουσιν ἐφ' ἁρπαγῇ ἄλλοθεν ἄλλος).[3] Solon certainly gives priority to the *common good* of the political community without however downplaying the role and the interest of every member. The common good of the *polis* is its *eudaimonia*. This can be accomplished only *within* the principles of *metron*, eunomia, the principle of fair play and justice; only wealth itself cannot lead people and the city to eudaimonia.[4]

II

According to Platonic political thought, there is a mutual relationship and balance between the notion of the *private* and the *public* and between what is considered to be the *private* and what is the *common good*. People should live and act within the political community (in the republic), which certainly has priority. One may pursue one's own goods (goods of the soul (virtues), goods of the body, and other public goods)[5] or choose one's way of life as long as this does not oppose *the common good of the community*.

In the Aristotelian conception of the common good, according to Professor Judith Swanson, it is acceptable for every individual to pursue goods that may be distinctive from the political community's good. Aristotle gives priority to the political community, considering it to be (i.e. its very existence) the common good, grounding his opinion on the view that it functions in such a way so as to promote the human good or what is

considered human good, that is, the individual well-being (eudaimonia). *The ultimate common good* is *the telos of every individual* and according to the political order of things one should freely enjoy one's private life and pursue one's own happiness (*Polit.* 1332a29-38 and *Nicom. Ethics* 1176b26-28) within the political community.[6]

From the above remarks, one can be led to understand that the concept of common good is traditionally confined to the bounds of moral and political community of human beings.[7] However, I think that it is the right time for us to extend the meaning of the common good to include the natural world. Natural environment, in this sense, is to be shared by every possible human being of every possible community on this planet. It is the basis for all possible activities of any human being and an essential element for human subsistence. Thus, it should be called "universal common good".

In explaining the notion of common good, we should further distinguish three types of the notion of common good: the organic, the nomological, and the liberal.

By the organic common good, I mean that common good is, so to speak, the "pole" of the organic structure of beings. In this organic structure of beings, the units of being are hierarchically related and function according to a principle (telos), which is their common good. According to the Aristotelian understanding of *the telos* of all living beings and human beings, as mentioned above, the common good is the virtue and truth-seeking, as well as the pursuit of *eudaimonia*, which is considered the most important state of affairs for a rational being. To this common good every part of the organic structure of human beings is converged and integrated. But we should, of course, make a distinction between the structure of the human political society and the structure of the community of other natural beings. The political community does not have in actual fact organic structure, but in some respects and only analogically the same laws may apply to both the political community and the nature. In addition, the human good is not the same with *the natural good* or what is considered to be good for every other being. However, in the general perspective of *the end* of all beings, that is, the development of all their capacities and the fulfilment of their existence, there are similarities between the common good of human beings and that of all other living creatures.

By the nomological common good, I mean that common good is the norm that dictates and specifies the convergent relationship of beings. According to this conception, all beings are placed within the rationally created and hierarchically conceived order of things. For example, for the Thomistic understanding of *the telos* of human beings, the common good is the decency of human living through the realisation of reason given by God. All human beings are related to this common good by the norm which represents the

dictates of reason. Furthermore, regarding the nomological common good, we should mention the Heraclitean understanding of the world. According to him, nature is viewed as a unity and as a whole that has its own internal measures and order, as "being governed" by one universal law, *Logos*. Heraclitus states that "… one must follow (the universal Law, namely) that which is common (to all)".[8] The good life of every being, including human beings, is essentially connected with *Logos* and "with the maintenance of this natural order".[9] Hence Heraclitus would never have accepted the balance of the world to be disturbed, or be overridden by human actions. In the Presocratic philosophical thought nature has priority, although it is not clearly stated that nature is a good, the first good or the common good. This is perhaps, because nature, regarded as a universal common good, was then something quite obvious, and so did not require further clarification or explication.

Before analysing the third type of the notion of common good, that is, the liberal common good, I will further refer to and analyse the views of Plato and Aristotle regarding nature, since their views, in my opinion, have important ecological connotations and support the view that nature is a valuable common good.

According to Plato' s *weak anthropocentric view*, nature as a whole has value in itself, that is, nature and all the beings that live in it have a value for themselves and all of us. To explain it further, Plato, in his dialogue *Timaeus*, refers to the structure of the natural world. He views the natural world as a work of *reason* and *balance*, as a work of art (according to the ingenious phrase coined by Professor T.M. Robinson[10]) from which we can learn to regulate our own vagaries:

> "…reason is hovering around the sensible world", (Tim., 37b)

> "…we, learning them [the courses of the intelligence] and partaking of the natural truth of reason, might imitate the absolutely unerring courses of God and regulate our own vagaries", (Tim., 47c)

Plato also sees the world as a living organic system that has a richly cohering living unity. The world is a Living Being (παντελῶς ζῷον); it is constructed in such a way so that it is good for every living creature, down to the smallest biological detail of the animal and plant kingdom:

> "God desired that all things should be good and nothing bad…[and the universe is] a living creature truly endowed with soul and intelligence by the providence of God"[11].

Furthermore, the world is inherently good, beautiful, and it can be characterised as "the fairest of creations and the best of causes" (Tim., 29a6). All beings operate in harmony.[12] Consequently, nature should be respected and valued as such by all human beings.

In his other dialogue, the *Critias*, one can also find important ecological thinking and the strong awareness of what human intervention can do to the environment. In this dialogue, Plato argues that human intervention can cause the destruction of the natural world. He refers to the case of the overharvesting of timber that had led to the erosion in the lands around Athens, to a general degradation and a decline in their ability to sustain life. This affected the ecological system and environment of Attica. Plato recognised that the welfare of the human community depends on that of other living beings and that this, in turn, depends on human *prudence* concerning the consequences of what is done to other living creatures and beings. These views are stated clearly in the *Critias* (Crit., 110c3-111d8, and especially in Crit., 111a-d), where Plato says the following:

> "Now since many huge cataclysmic floods have occurred in the last nine thousand years (for these events were that long ago), the earth that erodes during these times and events leaves no deposit worth mentioning, as it does in other places, and it is always carried away, spiralling into the depths of the sea. So, as in the case of small islands, the remaining lands (compared to those back then) are the bones of a body ravaged by disease, with all of the soft fat earth having wasted away, leaving behind only the earth's emaciated body. But then, when the land was still pristine, today's mountains supported high hills, and what we call the Stony Plains were full of rich earth, and in the mountains there was a good deal of timber, of which there are clear indications even now. Some of the mountains can sustain only bees these days, but it was not long ago that they were wooded, and even now the roofs of some of our largest buildings have rafters cut from these areas and these rafters are still sound. There were also many tall, cultivated trees, and the land offered a vast amount of pasture for animals. What is more, the land enjoyed the annual rain from Zeus, not lost, as now, when it flows off of the bare earth into the sea. Rather, much of it was retained, since the earth took it in within itself, storing it up in the earth's retentive clay, releasing water from the high country into the hollows, and supplying all regions with generous amounts of springs and flowing rivers. That what we are now saying about the land is true is indicated by the holy sanctuaries, which are situated where this water used to spring up".

Undoubtedly, if Plato was to live today, he would certainly have accepted the view that the natural world is and must be considered a global ecological good.

Aristotle in his biological studies shows great respect for every natural being in the world, even for the most trivial. According to Aristotle, nature does nothing in vain (ἡ φύσις μηθὲν μήτε ἀτελὲς ποιεῖ μήτε μάτην)[13] and all things embody something divine. In his work, *De Partibus Animalium*, he says to his students the following: "…. do not think foolishly regarding the most trivial and small animals; because within any kind of natural being exists something wonderful, good and divine" (PA., 645 a 15-23).[14]

A notion that can be regarded to have ecological connotation and does have a significant value in Aristotelian philosophy is the concept of *autarkeia* (self-sufficiency). For a species or an entire ecosystem to function properly and to continue to live it is essential that it should be self-reliant. The notion of *autarkeia* can be connected with the notion of *eudaimonia* (happiness, well being, flourishing), which for every being is an *end in itself*. In the *Nicomachean Ethics*, the Stagirite philosopher says that:

> "the self-sufficient we now define as that which when isolated makes life desirable and lacking in nothing; and such we think happiness to be" (Nic. Ethics, 1097b14-15).

Moreover, according to Professor Laura Westra, other basic concepts and notions of the Aristotelian philosophy, such as *ergon* (function), *excellence*, *potentiality*, *actuality*, *telos* and *eudaimonia* (happiness or well-being), can be interpreted in such a way as to support the notion of ecosystem integrity.[15] These notions can be related not only to the good of an *individual organism*, but also to the good of the whole population (or the community) of organisms of the given ecosystem in which they exist in and interrelate. Thus, the *ergon* (function) of not only an individual, but an ecosystem as well is to reach its *telos* (completion) starting from various evolutionary stages and transitions. In general, the concept of integrity implies unity. To say that something possesses integrity implies that we are viewing something as unitary, and this has been one of the major claims of the recently accepted ecosystem approach, of which the value of integrity is the integral part. Disturbing the balance of an ecosystem means destroying the way that it supports itself and thus disrupting its growth, or reducing its biological richness and diversity.

Somewhere in the *Politics* Aristotle seems to state that nature is created for designated human purposes and that human beings should use nature's goods for their own benefit and according to their purpose.[16] Many contemporary environmental philosophers attacked Aristotle for this view believing that the Stagirite philosopher is a strict anthropocentric (with the derogative contemporary meaning of the term). Nevertheless, in my opinion, Aristotle's admiration for nature is apparent and he would never have defended the unreasonable, extensive and excessive use of natural resources. On the contrary, nature is the necessary condition for the existence and health of human beings. Nature provides human beings with all necessary goods in order to accomplish all their goals and to fulfil their ends within the political community, that is, to be happy and live a virtuous life. This is the antidote to the strict and excessive utilitarian and individualistic welfare that is based only on how many goods one has obtained and not on the moral Good itself. Thus nature is a necessary

functional good for achieving happiness (eudaimonia), but its very necessity is regarded to be good in itself. The principle of *metron* (the famous Golden Rule), combined with *ratio* and respect that Aristotle proposed should be followed in our times and should govern every human action for safety, preservation, integrity and sustainability of natural environment.

III

Let me now refer to the notion of the liberal common good.

As liberal common good I understand that common good which as a meaningful principle embraces the particular pursuit of private good within a certain framework and limit of toleration. In this context, human beings co-exist and co-operate with each other. For example, diverse individuals in the political sphere can live in peace by accepting certain political principles, such as equality and liberty that exist to regulate the conduct of every individual member of the community.

It is common knowledge that within society there is no single "end-in-itself." There are many "ends." Ends projected by an individual may be in conflict or compatible with the ends of another individual. However, courses of action should be mutually reinforcing; we get more done when our energies work together. The projection of ends which work together increases the possibility of their fulfilment. This common good does not require that individuals suppress their individual interests and preferences, but only that they adjust their actions so as to be compatible with and to promote the development of the capacities of others. We try to make room for the concerns of others and to adjust our course so as, at the least, to bring no harm to others and, (optimally) if possible, to assist others in their progress. This common good includes two aspects, which are inseparable: the development of the capacities and powers of unique and irreplaceable human beings and the development of co-operative, fraternal, and mutually helpful ways of associating.

In other words, individual growth means the widening and expanding of one's horizons to include others and their concerns. Growth means deepening of character while extending and expanding the horizons of one's concern. The common good includes co-operation in promoting individual growth and enlargement and broadening of individual interests so that they include the interests of others. The big picture includes others. Interdependence is a fact. We are connected. Since co-operation works better than conflict of energies, individual courses of action are best achieved when modified flexibly in the face of the movement of the energies of others. The flexibility of unique individual striving adapted to work together with the unique striving of others, so that both are moved forward

rather than impeded and so that they are mutually reinforcing, is indeed the unity within diversity sought in the light of the democratic ideal.

The imaginative vision of the common good, which brings into view the possible development of many unique individuals together, is none other than democracy based on morality – which includes the development (liberty) of qualitatively unique (equality) individuals in mutually reinforcing association (fraternity) with one another. Unlike the narrow utilitarian ideal, it is objective rather than subjective. It looks to a future when human beings and their affairs will *be* rather than simply *feel* better. The satisfaction or pleasure taken in each success, though enjoyable in itself for the moment, is thereupon a means (not an end) or incentive for further striving.

In my view (and I am aware that this is a bold statement) the environment is and must be considered a universal common good for human beings, and in fact a liberal common good in the sense delineated above and with what follows. First of all, this means that the world and all things in the world are in such a way connected that they form a kind of community. Although the ends projected by the individual may be incompatible with the ends of another being, every being should adjust its actions in such way so as not to cause any great harm to the overall good of the other. Seeing things from the liberal point of view, it is easier to present convincing arguments against the view that some disparity exists between the natural world and the human beings that live within it. It is also easier in this way to find arguments against the view that there is no such thing as teleological and rationally created hierarchical order in nature or that the natural environment has no intrinsic value and is regarded merely as the fundamental resource to be exploited.

What does the recognition of the environment as a universal liberal common good imply for us?

Concerning this question, if nature is a universal liberal common good for human beings, then there is a presumption of shared responsibility for it by human beings, actual and possible. In the Part II of John Locke's *Two Treatises on Government*, where the legitimacy of private property is discussed, this so-called Lockean Proviso is very important, because the land (and I generalize it to include Nature *in itself)* is supposed to be shared by everyone in a certain universal way. If so, the natural environment as universal common good to every person (as the fundamental living condition, as the very baseline of every possible human life)[17] has a higher-order value, which requires our mutual respect and concern.

To explain it further, the commonality of the environment should be understood in such a way that equality of environment (fair distribution of natural resources and the possibility of equal share for each person of unspoiled, unpolluted natural environment) is the first and foremost

presumption of our environmental thinking. Hence, use of the natural environment is not to be prohibited or denied to any people, because we are all entitled to use it due to its commonality. The universality of the environment should be understood in such a way that all human beings have equal standing towards nature. Thus, exploitation of natural resources by certain people or nations without respecting the permitted limits violates the right of others and so it is not acceptable. The commonality and the universality of nature enduringly impose certain obligations to the present and the future generations, to anyone who lives or may live on this planet.

Furthermore, the human stance should be neither tyrannical nor dominant or hostile. Human beings should not destroy nature or use unreasonably its natural resources. According to Professor Keekok Lee, it is important to view nature not merely as a resource that can be industrially exploited in order to produce goods for the increasing needs of human beings, or as *matter in motion* for the scientific processes and use only. In her view this is, in some respect, what the modern capitalistic society tried to do by legalizing Locke's privatization of public property and of natural resources, and this has led to the ecological crisis. The relation between human beings and nature should not be based upon domination or simple utility. This shows that the relation between human beings and nature should take at least the form of stewardship.[18] So, there is no need for new ethics, as certain people believe. The weak anthropocentric view of stewardship is sufficient, according to Professor Robin Attfield, to protect nature, but he also believes that it is a necessity to expand our ethical view in order to include in our responsibility the care for the whole world, i.e. Nature; and so we are led to what he calls global Ethics.[19]

Within this liberal perspective of the common good, an adequate distribution of rights and obligations towards nature is required. According to Passmore, bacteria and humans have neither mutual obligations nor common interests;[20] however, this cannot exclude the case that the human beings are interested in the wellbeing of nature and all its beings. Thus, there is a need to formulate the well-balanced set of prerogatives and responsibilities among people that will result in the appropriate and harmless use of the natural environment. In order to do so, I follow, to some extent, the Rawlsian theory of Justice and the lexical ordering of his two principles of Justice.[21] The first principle of justice can be adjusted in such a way as to assign the space of prerogatives including certain rights for the environment, while the second principle of fair equality of opportunity and of income differentiation can assign the space of responsibility in terms of the permissible limit of prerogatives. The lexical ordering and the inner connection of the aforementioned principles will serve not only for the development of the wellbeing of people, but also will secure the sustainability and the integrity of the environment.

Concerning the universality of the common good, there seems to be a difference between what is defined as common good and as public goods. There are many intermediate cases of public goods, sometimes called quasi-public goods or non-pure public goods. For example, air, flowing water, wandering animals, fisheries, wetlands, aquifers, parks are considered to be common and in a broader sense public goods. In reality, all the above-mentioned are quasi-public goods and not ordinary public goods, like education and health. However, this difference seems to be of no great significance concerning the environment. Since, either from the common good perspective or from the ordinary public goods perspective, the environment should be recognised, expressis verbis, as *the common good* and should be respected and valued *as such*.

Regarding the dominant attitude to the commons in the world, Aristotle, as we said before, acutely observed that these *common goods*, our so-called "common property", due to the fact that it is common to the greatest number, has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest" says Aristotle (*Politics*, Book 11, Ch. 3, 1261b33-35). That is, what is common to most people is accorded the least care, since the people take thought for their own things above all.[22] This famous Aristotelian view that was termed later as "*the tragedy of the commons*",[23] has proven a useful concept for understanding how we have come to be at the brink of numerous environmental catastrophes created either by malicious and self-interested individuals or nations, or by innocent behaviours of many unreasonable and uneducated individuals. Apart from these, it advises us not to adopt towards the environment the attitude (of non care) described above by Aristotle but to awake in view of the impending ecological dangers.

IV

So, from now on all human beings as members of the global community should share responsibility and the common goal to support efforts to maintain its health and integrity of nature and preserve these commons not only for its own sake, but, of course, for our own sake. To paraphrase Aldo Leopold' s view: a human action is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.[24] The new goal of protecting the integrity of nature should become the global, common good. This ecological ethics imposes changes to be made concerning the structure of society and its economy that aims not only to the profit (individual or public), but promotes integrity, sustainable development and social justice in such a way so that it becomes ecological social justice.

Finally, evoking a sustained and widespread commitment to "the common good" as mentioned above does not imply sacrificing personal freedom or individual rights. It is wrong to assume – as some are inclined to argue – that by promoting "the common good" one loses one's personal freedom. On the contrary, in a liberal free community, where there is an equal distribution of rights and obligations, one is free to pursue one's own personal ends, as long as one does not cause any harm to someone else and as following the just rules instituted by that society. Thus, egocentric activities towards the environment are permitted to a great extent, since not necessarily all egocentric activities are considered to be bad *in* themselves and harmful to the environment.[25]

In conclusion, a universal ecological ethical theory should be formulated on the basis of the principle that the universal common good is the natural good (the necessary condition and the value for the proper function of every political community) that should, as a right of every human, be protected regardless of time and place. This also means that any kind of destruction of nature, in every possible form and with regard to any condition of life on earth, should be recognised by people and nations as a crime which must be punished according to the regulations of both civil and penal law.

Endnotes

1. See L. Rossetti, "The oldest known ecological Law in context" in T. M. Robinson and L. Westra (eds.), *Thinking about the Environment*, Lexington Books, Rowman and Littlefield, Lanham, M.D., 2002, pp. 43-57. The first reference to above-mentioned edict was in Karousos, "Ἀπό τὸ Ἡράκλειον τοῦ Κυνοσάργους" (Apo to Heraklion tou Kynosargous), *Archaiologicon Deltion* 8, 1923, pp. 96-98.

2. See West, Solon, fr. 4, line 7.

3. See West, ibid., line 12-13. I would like to thank Professor Pratibha J Mishra, Participant in the 4th SASGPH International Conference for her remarks and comments concerning greed as an element of human nature.

4. For Solon metron and justice play a very important role, even when he refers to the sea he characterises it as just (θάλασσα ἀκαιοτάτη). Regarding Solon's social and political conceptions see the following works: Simon Hornblower, "Creation and development of Democratic Institutions in Ancient Greece", in John Dunn (ed.) *Democracy. The Unfinished Journey, 508 BC to 1993 AD.*, Oxford University Press, 1993, pp. 1-16. See also V. Tejera, *The City-State Foundations of Western Political Thought. A Study in Intellectual Method and the History of Political Thought*, University Press of America, 1984, pp. 17-41; and Gregory Vlastos, "Solonian Justice", in Daniel W. Graham (ed.), *Studies in Greek Philosophy, Volume I: The Presocratics*, Princeton University Press, pp. 32-56.

5. See G. Santas, *Goodness and Justice*, B. Blackwell, Oxford, 2001, pp. 21-22.

6. See Judith Swanson, *The Public and the Private in Aristotle Political Philosophy*, Cornell University Press, 1992, p. 205.

7. Mainly in Plato's and Aristotle's political philosophy and later in the works of the thinkers influenced by the classical and Christian tradition, like St. Thomas Aquinas and St. Augustine. See John Finnis, *Aquinas*, Oxford University Press, 1998, Chapters III & VII.

8. See Diels-Kranz, Heraclitus B, Fr. 2.

9. See M. Oeslchaeger, *The Idea of Wilderness*, New Haven: Yale University Press, 1991, pp.55-60.

10. See T.M. Robinson, *Cosmos as Art Object*, Global Academic Publishing, New York 2004.

11. See Plato *Tim.,* 30a-b8, and especially 31b1.

12. "And harmony… to correct any discord which may have arisen…" (Plato, *Tim.*, 47c).

13. See Aristotle *Politics*, 1256b20.

14. See also the article of Professor Alex Antonites, "Do animals have moral worth? The contemporary debate with special reference to Aristotle", in A. Ladikos (ed.), *Phronimon*, Journal of the South African Society for Greek Philosophy and the Humanities, Volume 5 (2) 2004, Pretoria-South Africa, pp. 17-37.

15. See L. Westra, "Aristotelian Roots of Ecology: Causality, Complex Systems Theory, and Integrity", in L. Westra and T. M. Robinson (eds.), *The Greeks and the Environment*, Rowman and Littlefield Publishers, 1997, p. 85 and p. 89.

16. "The reference must be that she [nature] has made all animals for the sake of man" (Aristotle's *Polit.*, 1256b20).

17. See Ronald Dworkin, *Sovereign Virtue*, Harvard University Press, 2001, Chapter 2.

18. See R. Attfield, *Environmental Philosophy: Principles and Prospects*, Avebury Series in Philosophy, Avebury, Aldershot, 1994.

19. See Attfield, R., *The Ethics of Global Environment*, Edinburgh University Press 1999.

20. See John Passmore, *Man's Responsibility for Nature*, Scribner, New York 1974, pp. 116-118. See also M. Oeslchaeger, *The Idea of Wilderness*, New Haven: Yale University Press, 1991.

21. See John Rawls, *A Theory of Justice*, Harvard University Press, 1971, Chapter 2.

22. See Aristotle, *The Politics*, translated by Carnes Lord, University of Chicago Press, 1984, p. 57.

23. The famous economist and ecologist Garrett Hardin wrote an article about "the tragedy of the commons" and ecology (See G. Hardin, "The Tragedy of the Commons", in *Science*, 162:1243-48, 1968, reprinted in Robert N. Stavins (ed.), *Economics of the Environment* [selected readings], W. W. Norton & Company, New York, 2000, pp. 9-22).

24. See Aldo Leopold, *A Sand County Almanac*, Oxford University Press, 1948, p.165.

25. Although this liberal doctrine is considered sufficient to deal with environmental problems, it may need to be modified in a way to be consistent with the view of "the expanded self".

Nietzsche, Violence and Justice: Towards a Rehabilitation of *Dike*

Louise Mabille
University of Pretoria, South Africa

Abstract

At the risk of engaging in a gross generalization, it can be argued that post-WWII philosophy, and in particular post-structuralist thought, tends to adhere to a passive model of justice that emphasizes phenomena like the Other (in its various forms), forgiveness, and the undermining of traditional metaphysics. In employing themes like 'undecidability', thinkers like Jacques Derrida often refer to a certain Nietzsche: the Nietzsche who set himself against the metaphysical tradition. There is, however, another Nietzsche, a Nietzsche that prized the human capacity for judging. I argue that the position of this Nietzsche seems to have drawn his inspiration from the ancient concept of dike*, rather than the gentler notion of* epiekia*.*

If ethics is, according to Levinas and Derrida, the domain of the infinite, justice is the domain of the limit. For although the word 'justice' appears frequently in so many contemporary texts on the topic, what seems to understood by it corresponds more closely to the ethical domain. And justice understood as ethics, does violence to both concepts. For this reason, I refer to two major classical 'definitions' of justice, namely *epiekia* and *dike*. The latter is, of course, the better known, and yet in our times, the most neglected. *Epiekia*, by contrast, is seldom mentioned by name, but it appears to be the dimension of justice that has dominated discussion on the topic since WWII and especially so in the post-structuralist revolution. This concept can be defined in general as merciful and caring judgement, or in particular according to Aristotle: 'It is *epieikeia* to pardon human feelings and look to the lawgiver, not to the law, to the spirit and not to the letter, to the intention and not to the action, to the whole and not to the part, to remember good rather than evil'[1] This definition seems to find a modern counterpart in concepts such as 'hospitality' 'the Other/other' in its various forms, mercy, cosmopolitanism and forgiveness that keep resurfacing in contemporary texts that purport to deal with justice.

As important as these terms are, justice cannot be limited to what amounts to an embracing of what has been excluded by a particular

configuration - metaphysical or otherwise. The emphasis on *epiekia* comes at the expense of the older concept of *dike*, which could be defined along the lines of the Latin tag *suum cuique tribure* or simply - to each his own according to merit.

For *epiekia* without *dike* is ethics. The excessive emphasis on the 'positive' dimension of justice completes (or continues) what may (after Odo Marquard) be called the 'advance of Inclusive Reason'. This refers to the change from the classical distinction between the 'more' and the 'lesser' realities, to the gradual allowance of the latter, following Leibnitz's *Essais de théodicée* of 1710. These 'negative' ('evil') aspects became gradually positive: be it evil in the epistemological sense (the false, the fictional), the aesthetic (ugliness), the ethical (the immoral) and importantly for our purpose, in the judicial sense, the 'Other' - whatever any prevailing order excludes. And in our times, justice is very often, far too simply, taken as the removal of *any* barrier, be it metaphysical or political.

By doing this, the negativity of exclusivity is exchanged for the negativity of the amorphous. For all his usage of the tragic, Derrida ignores the most fundamental tragic lesson: that excess requires at least a degree of a temporary but essential stability. Derrida's use of tragedy appears to be very one-sided: the vulnerability of the subject in the face of the events is emphasised at the expense of a richer understanding of tragedy, an understanding which I hope to demonstrate, has important implications for how we define justice. For tragedy is also about judgement and finality. Letting this dimension fall into oblivion is the danger of the postmetaphysical ethics of Derrida and Levinas. Bearing in mind that their philosophy arose in response to some of the most horrific events of the twentieth century, I will turn to Nietzsche and the role of the limit in his thought in order to question the tendency to equate the establishment of limits, distinctions and hierarchies with violence and injustice. According to Henry Staten 'Deconstruction is not a defence of formlessness, but a regulated overflowing of established boundaries'.[2] All the same, I believe that, with the theme of excess dominating much of post-structuralist thought - excess presents itself not only in Derrida, but also in Banchot, Irigiray, Cixous, and even Foucault, the limit is called for.

In his now famous text on the question of justice, 'Force of Law: The Mystical Foundations of Authority', Derrida makes the following provocative statement: 'Justice in itself, if such a thing exists, outside or beyond the law, is not deconstructible. No more than deconstruction itself, if such a thing exists. Deconstruction is justice'.[3] This enigmatic statement proceeds from the distinction between the law, which Derrida not only holds to be deconstructible, but essential to be deconstructed if any claim towards progress is to be made, and justice, which cannot be deconstructed, but in

the name of which all deconstruction is undertaken. Employing a quasi-transcendental register, Derrida maintains that justice is the undeconstructible condition for the possibility of deconstruction, for 'nothing is more just than what I today call deconstruction'[4]. Justice is defined in customary paradoxical fashion as the experience of that which cannot be experienced, that which is 'mystical', 'the impossible', or 'aporia'. In other words, justice is an 'experience' of the undecidable. This experience however, does not merely pertain to some theoretical terrain but always arises in relation to a particular entity, to the singularity of the Other. This is the moment when Levinas becomes relevant - on p. 22 of 'Force of Law' Derrida cites Levinas's famous definition of justice as defining and being refined by the ethical relation to the Other, 'la relation avec autrui – c'est la justice'.[5] In other words, justice, according to this definition, arises in the particular and irreducible relationship to the Other, as a response to suffering that demands an infinite responsibility.

What is often forgotten, is that Levinas *does* distinguish between justice and ethics. In the 1987 preface to the German translation of *Totalité et Infini* Levinas points out that in this particular work, justice functions as a synonym for the ethical. However, in later publications like *Autrement qu'être ou au-delà de l'essence* justice is distinguished from the ethical relation, where Levinas argues that the question of justice arises when a third party arrives on the scene, obliging one to choose between competing ethical claims. The arrival of a third party acts as a reminder that the ethical relation is always already situated in a specific social and political context. But even this distinction does not go far enough in my opinion, to separate the specificity of justice from ethics. For philosophy to take refuge in the realm of ethics, albeit through a phenomenological rather than a transcendental register, and then to proceed to equate it with justice brings about dangers and possibilities of further injustice of its own.

The particular injustice that I have in mind is one feared by the Greeks from the earliest days of their tragic thought, and that is the injustice rendered by a lack of measure, or *sōphrōsyne*. This virtue plays a primary part in many of the Greek tragedies, and the absence of this quality ranks with *hubris* as one of the prime tragic flaws. Throughout Aeschylus and Sophocles, excess manifest itself either in the form of sublime horror (the *miasma* or pollution that requires the hand of justice to reset order, or as vice, for example the excessive rage of Ajax when he is denied Achilles's armour in the eponymous play by Sophocles. In this play in particular, we see one passion tempered by another: rage tempered by madness sent by Athena. For there is something terrible and inhuman about excess.

The idea of the limit, which appears to be anathema to Derrida's conception of justice, was certainly essential to the Hellenic ideal of what

justice should be. I would go as far as to suggest that a necessary counterpoint to the deconstructive/ Levinasian idea of 'justice' as something infinite, sublime, the domain of the unceasing appeal of the Other, would be to associate justice with the classical notion of measure, especially as this theme operates in Nietzsche.

There can be no question that Nietzsche stands as one of the central figures to whom Derrida traces his intellectual genealogy. He credits Nietzsche in whose work one finds 'the systematic distrust as concerns the entirety of metaphysics, the formal vision of philosophical discourse, the concept of the philosopher-artist, the rhetorical and philological questions put to the history of philosophy, the suspiciousness concerning the value of truth, of meaning, and of Being, of the 'meaning of Being', the attention to the economic phenomena of force and of difference of forces, etc'.[6] Throughout his *oeuvre*, especially up to *La Carte Postale*, Derrida makes frequent use of Nietzsche in his attempt to deconstruct the logocentric tendencies of Western metaphysical thinking. Nietzsche often appears as an alternative to the nostalgic longing for full presence that Derrida detects at the heart of Western philosophy. 'Nietzsche' has become shorthand for the very possibility of thinking otherwise, and often serves as an alternative to Heidegger in Derrida's texts. One of the most important options that Nietzsche provides is an alternative to the more traditional Rousseauian myth of a 'fall' from a state of nature'. At first it appears that the Nietzschean plea for a morality based not on revenge but on expenditure demands everything *but* limits. Take George Bataille's reading of the *Genealogy of Morals* in his *The Accursed Share:*

> Nietzsche is on the side of those who give, and his thought cannot be isolated from the movement that tried to promote a resumption of life in the moment, in opposition to the bourgeoisie, which accumulates…Nietzsche's gift is the one that nothing limits, it is the sovereign gift, that of subjectivity.

In the second essay of the *Genealogy* Nietzsche turns towards the economic origins of guilt and bad conscience in 'the oldest and most personal relationship, that of buyer and seller, creditor and debtor' (*GM* II, 8). The moral concept guilt, conceived as a debt that is essentially unredeemable, is shown to have its origins in the economic-legal notion of a debt as something that can, and should be repaid, this, for Nietzsche explains the earliest account of punishment, which as retribution emerges from the inability to repay the debt. Because 'everything has its price and *all* things can be paid for' (*GM* II, 8), the debtors, having made a promise to pay - a promise they cannot keep, are obliged to offer something else instead, such as their body, their freedom or even their life. The concept *Schuld* that translates as both debt and guilt, is thus revealed to operate within the logic of compensation that establish equivalence between creditor and debtor.

Like guilt, Nietzsche sees the origin of what is commonly understood as justice in the relationship between debtor and creditor. The contractual relationship makes comparative evaluations of relative worth possible and it allowed primitive society to arrive at the oldest and most naive moral canon of *justice* [*Gerechtigkeit*] the beginning of all fairness on earth the *lex talionis* an eye for an eye. In the early *Origins of Justice* Nietzsche gives a neat summary of the egoistic and economic origin of justice:

> Justice (fairness) originates between parties of approximately equal power where there is no clearly recognizable superiority of force and a contest would result in mutual injury producing no decisive outcome the idea rises of coming to an understanding and negotiating over another's demands: the characteristic of exchange is the original characteristic of justice. each satisfies the other, inasmuch as each acquires what he values more than the other does. One gives to the other what he wants to have, to be henceforth his own, and in return receives what one oneself desires. Justice is thus requital and exchange under the presupposition of an approximately equal power position: revenge therefore belongs originally within the domain of justice it is an exchange. Gratitude likewise.

But I wish to suggest that the 'thinkers of excess' like Blanchot and Derrida is far too often, far too literally taken as an 'heir' to Nietzsche, and that this happens at the expense of a certain 'negative' Nietzsche. This is the Nietzsche of the limit, in whose thought limit and the virtue of *sōphrōsyne* play a vital role. Contemporary texts on virtue ethics tend to ignore the role of elements like judgement and censure in the establishment of codes of honour and criteria for achievement. This is where questions of violence become relevant. For there can be no virtue without contempt.

Furthermore, it is important to note that although Nietzsche asks how many parasites a body can bear, he nevertheless does not refrain from *calling* them parasites, deeming them inferior.

After Foucault it is hardly necessary to labour the point that all political systems are systems of authority and discipline. The important point is rather the qualitative objective of the political system. Why does society exist? And what type of human being does it seek to cultivate? What quality does it seek to captivate. The teaching of the one tradition that preaches the dignity and value of every individual and the equality of all beings - Christianity - is a religion that is based on an organizational structure that is deeply hierarchical, fraught with division and conflict - its greatest redeeming feature.

Nietzsche's anti-humanism assess the value of human life in terms of whether it represents an ascending or descending mode of life. The individual gains value by placing himself in the service of creation of culture. This is the basis of Nietzsche's aristocraticism, as well as the principle upon which he bases his unorthodox, illiberal and anti-Christian notion of justice.

'Justice', Nietzsche declares from the *Nachlass*, 'is the function of a panoramic power (*Macht*) which looks beyond the narrow perspectives of good and evil in order to *preserve something that is more than this or that person'*. (*KSA* 11, p. 188).

Nihilism chiefly signals a crisis in authority. In the wake of the death of God, Zarathustra holds, man vainly seeks idols that will provide a new metaphysical foundation for morals. In *Zarathustra* Nietzsche dramatises the predicament in which modern humanity finds itself and shows both the necessity and virtual impossibility of instigating a new legislation. How can new values be fashioned and legislated when the transcendental basis that would support them has been undermined? In an age of nihilism, it is of cardinal importance to rethink the value of truth, but equally of the value of morality, justice and the law. Throughout the book Nietzsche has Zarathustra constantly call into question the legitimacy of his own authority, thus keeping the question of his identity open. In *Ecce Homo* Nietzsche describes Zarathustra as a 'type' - he is the ideal of a spirit' who plays naively and impulsively with everything that has so far been called holy, good, divine and untouchable. Such a type will appear inhuman when it comes into touch with the 'earthly seriousness' that has presented itself so far in conventional morality. It was the Persian philosopher Zoroaster who has first introduced the struggle between good and evil into the workings of the cosmos and who first translated morality into metaphysics. As it was he who created the most fateful of errors, morality, it is he who must be first to recognise and overcome it. (*EH* Why I Am a Destiny).

On the many occasions in the notes from the period of composition of Zarathustra, Nietzsche portrays Zarathustra as a 'lawgiver' (*Gesetzgeber*) ranking him alongside figures like Jesus, Moses, Buddha and Muhammad. (*KSA* 9: p. 642). In Greek thought the lawgiver or legislator is the archetype of the political hero and the symbol of what uninhibited, if self-controlled greatness might achieve. He is the figure who suddenly appears to save the polis from disintegration and decay and to re-establish it on fresh foundation.

One of the best ways to illustrate how themes of judgement and violence operate in Nietzsche, and how he deals with problems like excess, is to look at the question of style. In a section from *the Gay Science* entitled 'One Thing is Necessary' Nietzsche begins: "To 'give style' to one's character - a great and rare art' (*GS* 290). In this particular context, style is not merely an aesthetic category, and to give 'style' to one's character is more than a question of aestheticism. In *The Case of Wagner* Nietzsche refers to style as a 'higher lawfulness' (*höhre Gesetzlichkeit, CW* 8). Although Nietzsche makes it clear that there is no 'right' style, no 'style in itself' (*EH,* III), the mere imposition of an ordering principle on one's chaos

of contradictory drives it not sufficient to regard it as the attribution of value. Instead, a 'higher lawfulness', and 'order of rank' is imposed from a certain perspective, which according to Nietzsche can be either life-enhancing or life-denying. The imposition of a decadent style ultimately leads to the dissolution of the whole and the impoverishment of life. By contrast, the grand stylist, the *master of self-legislation*, is able to control a 'multiplicity of drives' (*WP* 966) through the imposition of a life-enhancing order of rank upon these drives. It is still conceivable that punishment plays a role in this process, but not as part of the system of restorative justice, but in a role hitherto hardly acknowledged: as the manifestation of contempt. For is the refusal to be acknowledged, to be dismissed, that insult, not the ultimate punishment? Even if it is a 'punishment' beyond the logic of the free autonomous subject and his petty talk of good and evil? Consider the following fable by Aesop:

> A gnat alighted on a bull's horn. And it stayed for a long time. After a while it felt like moving on, and he asked the bull whether he would like it to go now. 'I did not notice when you came,' answered the bull, 'and I shall not notice if you go'.

I agree with Derrida that no political form can or should attempt to embody justice, justice should not be relegated as an abstract ideal on the outside of the public realm, but as the guiding principle, a meaning giving standard - albeit preliminary and up for revision - within it.

With this should come the acceptance that no concept of justice can, by definition, all-encompassing, and that some form of exclusion will always be the tragic price to pay to have a concept of justice as point of reference in the first place.

Endnotes

1. MacIntyre, A. *A Short History of Ethics*. London 1966, p.27.

2. Staten, H. *Wittgenstein and Derrida*. Lincoln: The University of Nebraska Press, 1984, p.34.

3. Derrida, J. 'Force of Law: The Mystical Foundations of Authority'. in Cornell, Rosenfeld and Carlson (eds.) *Deconstruction and the Possibility of Justice*. London and New York: Routledge, 1992.

4. Derrida, J. *ibid*, p.21.

5. Derrida, J. *ibid*, p.22.

6. Derrida, J. *Margins of Philosophy*, translated by A. Bass. Chicago: Chicago University Press, 1982.

Plato's Views on Capital Punishment

Anastasios Ladikos
University of South Africa

Abstract

Plato's theory of punishment distinguishes scientifically administered measures, which may or may not take the form of actual punishment designed to cure a criminal of his offence which is a disease of the soul, not something which is an inseparable part of the concrete criminal act. He is aversive to retributive punishment which is designed merely to make the criminal suffer as a kind of primitive compensation for his crime. Plato does not commit himself to the view that all forms of punishment benefits the criminal as he reasons that only just punishment has this effect. Capital punishment in Plato's penology is reserved for the incurable and the bad men themselves would seem better candidates for this penalty than those who in spite of propensities to vice yet succeed in avoiding the greatest judgement. The mere infliction of suffering (timoria) makes people worse than they already were; they will not be cured or deterred as they will go from bad to worse, ultimately become incorrigible and bound to be executed as an example to others. Curing or rehabilitating the criminal in practice will mean the reshaping of his character to a pattern approved by the authorities. The death penalty is imposed for the worst offenders but in Plato's opinion it is not considered to be an extreme penalty. This paradox can only be understood when pondered through Platonic assumptions about morality, happiness and existence after death.

I

The earliest discussion of the subject of capital punishment in Greek literature is found in the speech of Diodotus given in reply to Cleon's proposal that the Mitylenians be put to death. Diodotus' main argument was that death is an ineffective penalty. *"Though I prove them ever so guilty, I shall not, therefore advise their death, unless it be expedient... I consider that we are deliberating for the future more than for the present... All, states and individuals, are alike prone to err, and there is no law that will prevent them; or why should men have exhausted the list of punishments in search*

of enactments to protect them from evildoers? It is probable that in early times the penalties for the greatest offences were less severe, and that, as these were disregarded, the penalty of death has been by degrees in most cases arrived at, which is itself disregarded in like manner. Either then some means of terror more terrible than this must be discovered, or it must be owned that this restraint is useless" (Thucydides, 1968:152). This passage indicates that human nature cannot effectively be deterred by fear of death. When men venture on a precarious endeavour they are not inspired by fear of fatal consequences but by hope of successful achievement. Thus crime can be reduced, not by the severity of punishment but by careful administration and certainty of detection. In Plato capital punishment is of a purgatory nature and in his view death is a civic purging. It clears out the most heinous criminals when they are incurable and causes serious damage to the state. But Plato's word in the *Laws* and in various other passages come to mind that death is not the most severe punishment and in fact, it is the least of evils.

In Athens the social disruption that arose from wrongdoing and that necessitated punishment was viewed as a disease that had to be cured. The various periods that passed between the moments when a disease was recognised and cured were spent in a long process of negotiation and argument about desert and justice that led eventually to a judgement about how to reorder relationships within the city. The judgement itself, however, was not the final moment of the process of punishing, nor did it complete the cure and cleansing. Cure was achieved by the execution of a punishment that finalised a judgement and proved that social relations had been brought back to normal.

Plato addresses the subject of capital punishment in a number of his dialogues and quite extensively in the *Laws.* This dialogue is Plato's longest and also his most intensely practical work and contains his ripest comments on ethics, education and jurisprudence, as well as his one entirely non-mythical exposition of theology. This work is exceptionally rich in political and juristic wisdom and appears, indirectly, through its influence on the law of the Hellenistic age, to have exerted profound influence on the great system of Roman jurisprudence. It is obvious, even on a superficial reading, that the *Laws* has a more practical and less distinctive philosophical orientation than most other dialogues. Apart from anything else, we may refer to the amount of space devoted to detailed legislative proposals, something the Socrates of the *Republic* thought it unnecessary to deliberate (425C-E). There are other indications that the *Laws* may be intended for a different kind of audience. Of the three old men who take part in the conversation, the first one is the Athenian Stranger, the second one is Clinias a Cretan and the third one is Megillus a Spartan. The protagonist is the

Athenian Stranger and nearly all the talking is done by him. Although his companions are not as qualified to add anything original to the discussion the choice of their nationality is significant, since the main body of the *Laws* prepared for the model city of Magnesia is derived from the codes actually in force in Athens, Crete and Sparta. It is common ground that the *Laws* is a more practically oriented work than the *Republic* and that this practical orientation affects the treatment of almost all its topics. The difficulty is that of determining in what respects Plato believes that his earlier position was mistaken and in what respects he is merely suppressing earlier doctrines as irrelevant to his immediate purposes. Since Plato himself provides no explicit indications, one cannot expect to answer such questions by considering the *Laws* in isolation. (Stalley, 1983: 9-10).

II

The objectives of punishment held by Plato and his contemporaries are the following:

a) An orator will occasionally request that a penalty be imposed as an lesson to hold back the criminal from replicating his crimes and deter others from copying them.
b) Sometimes courts were asked to penalize criminals to restrain them or bring them to their senses. While this may sound like the modern concept of reform or rehabilitation, it probably refers to more primitive notions - something like the demand that criminals be given a 'short, sharp shock'.
c) The orators make frequent use of the concept of punishment "timoria" (τιμωρία). This has certain analogies with the concept of retribution, although it is evident that the orators were not supporting a retributive theory of punishment as propagated in modern times. Modern theorists view retribution as something neutral or impersonal advocating that it is right for those who have done wrong to suffer. The Greek orators, contrary to that, asserted that they are bringing prosecutions out due to personal vendettas and they appealed on juries to share their anger. (Stalley, 1983: 139-143).

Saunders (1991:351) alleges that Plato in the latter stage of his life redefined the aims of punishment to serve the following purposes:

d) Appropriate compensation for the injured party.
e) Satisfaction for the injured party, viewed as the pleasure of prevailing over an opponent.
f) The improvement of the offender by deterrence.
g) The improvement of society by deterrence and if necessary through the elimination of the offender by exile or death.

Plato in his *Laws* prescribes capital punishment for a wide range of offences including deliberate murder (871D), wounding a parent, brother or sister with intent to kill (877B-C), persistent atheism (909A), serious acts of impiety (910C-D), theft from temples (854E), theft of public property (942A), harbouring exiles (955B), waging private war (955C), taking bribes (955D) and obstructing the judgment of a court (958C). It looks as though these proposals would extend the use of capital punishment beyond what was existing in Athens.(Stalley, 1983: 137).

The discussion between irrational retribution and rational reform is central to Plato's analysis of punishment throughout his dialogues. In the *Protagoras* dialogue the sophist argues with Socrates pertaining to reformative punishment as follows: "*If you will think, Socrates, of the nature of punishment, (κολάζειν) you will see at once that in the opinion of mankind virtue (αρετήν) may be acquired; no one punishes the evil-doer under the notion, or for the reason, that he has done wrong, only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational (μετά λόγου) punishment (κολάζειν) does not punish (τιμωρείται) for a past wrong (παρεληλυθότος αδικήματος) which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention, (apotropes) thereby clearly implying that virtue is capable of being taught. (323D-324B).* Protagoras differentiates two kinds of punishment namely punishment that aims to reform and punishment that endeavours to remedy the past. He uses the word "*kolazein*" *(κολάζειν)* to refer to reformative punishment and "*timoresthai*" (*τιμωρείσθαι*) to denote retributive punishment. Furthermore it is evident that Protagoras disregards simple "*timorid*" and in doing so he rejects punishment as personal vengeance and also the types of supposedly impersonal retribution advocated my modern supporters of retribution. Socrates argues with Protagoras's analysis of why virtue is teachable, but never dismisses the dichotomy drawn between retributive and reformative punishment. Whereas as most people think that to be punished is to suffer something bad, Socrates contends that to suffer justice or to have something "just" done to one is to have something "beautiful" done to one. Hence the experience of "suffering justice" cannot be considered as unpleasant or evil but rather refers to having one's life enhanced by justice.

In his speech Protagoras also lays down penalties of death or exile for those evil characters who are incapable of acquiring justice. (322D, 325A-B). *"And he who rebels against instruction and punishment is either exiled or condemned to death under the idea that he is incurable-if what I am saying be true, good men have their sons taught other things and not this, do consider how extraordinary their conduct would appear to be".* In general, Protagoras's attitude is that punishment ensures that people will conform to

social rules and it therefore secures the good of the community as a whole. In the *Gorgias* and the *Republic* the emphasis is laid on the fact that injustice is bad, not only for society, but also for the unjust man himself. The unjust man is therefore like the sick man and punishment benefits him by curing his sickness. The emphasis here is on individual, rather than social, good. In Stalley's (1983: 140-141) view the two approaches are compatible in that punishment does good both to the individual, by curing him of injustice, and also to society by enforcing social rules.

An important aspect of punishment is expounded in the *Laws* when the Athenian Stranger pronounces the greatest judgement "*dike*" (*δίκη*) on those who behave badly. This judgement consists in their becoming like the wicked and so cutting themselves off from the company of the good (728B). *"Hardly anyone takes account of the greatest judgement, as it is called, on wrongdoing; "δίκην τῆς κακουργίας τήν μεγίστην" that greatest judgement is this, - this is to grow to resemble men who are wicked, and, in so growing, to shun good men and good counsels and cut oneself off from them, while seeking to attach oneself to the company of the wicked and follow after them".* The Athenian Stranger continues by identifying firstly a genuine judgement that does good and the mere infliction of suffering which may do no good at all: "Consequently, this condition is not really a 'judgement' at all, because judgement and justice are fine things. It is mere punishment, (τιμωρία) suffering that follows a wrongdoing. Now whether a man is made to suffer or not, he is equally wretched. In the former case he is not cured, in the latter he will ultimately be killed to ensure the safety of many others" (*Laws* V 728C). According to Saunders (1988: 191) the absence of punishment (*τιμωρία*) will signify that a person is not deterred from crime and will go from bad to worse until he has to be executed as incorrigible, and as an example to deter others from inviting the same fate. But if is to suffer, he will become resentful and turn to crime again. "Judgement" is a scientifically designed measure to cure vice while retributive punishment is only the infliction of suffering.

III

Stalley (1995: 484) holds the view that the versions of punishment in Plato's *Laws* seem to run together ideas of deterrence, education and cure which to a current criminologist might seem separate. The crux of the matter is that Plato has credible reasons for advocating that punishment can play a vital role in a system devised not simply to modify the conduct of wrongdoers but also to improve their characters. There are other signs that the Athenian Stranger does not hold fast to his curative theory. This is apparent, for example, in his use of the death penalty which is supposed to be confined to the incurable or unreformed offenders. The Athenian Stranger takes this restriction in his

treatment of thefts from temples and public property (854D-E, 941E-942A). Citizens who commit these offences after the education they have received should be executed as beyond cure, but slaves and foreigners may be allowed to live. The rationale of this distinction is obvious and it is also reasonable to assume that those who remained impenitent after three convictions for perjury are beyond cure and liable to face the death sentence as stated in 937C of the *Laws*. The Athenian Stranger prescribes also the death penalty for offences such as harbouring an exile, waging private war, taking bribes (955B-D) and obstructing the course of justice (958C), without any attempt to show that those who do these things must be incurable. The fact that the Athenian Stranger is so frequently in favour of the death penalty may be an indication of deterrent tendencies built into his conception of the law as implied in passages such as 721E, 722B, 784C and 853B-C of the *Laws*. He also expects punishment to have an educational function as the task of the lawgiver should teach the citizens virtue by dispensing the appropriate portion of praise and blame, rewards and penalties (*Laws*, 631B-632D). The Athenian Stranger also views punishment as a mechanism for enforcing social conformity by reshaping the criminal's character to a pattern approved by the state.

Mackenzie (1981: 208-214) distinguishes two types of deterrence in Plato's philosophy namely humanitarian deterrence and utilitarian deterrence. His early version of the deterrence theory, the execution of the incurables, seems to go hand in hand with reform, and one may attempt to clarify it in two ways:

Firstly the criminal is either no longer in a position to gain from life and by implication he is harmed by continuous existence as stated in the *Gorgias* (525B-C): *"Those who are improved when they are punished by gods and men, are those whose sins are curable; and they are improved, as in this world so also in another, by pain and suffering; for there is no other way in which they can be delivered from their evil. But they who have been guilty of the worst crimes, and are incurable by reason of their crimes, are made examples; for, as they are incurable, the time has passed at which they can receive any benefit. They get no good themselves, but others get good when they behold them enduring for ever the most terrible and painful and fearful sufferings as the penalty of their sins-there they are, hanging up as examples, in the prison-house of the world below, a spectacle and a warning to all unrighteous men who come to that place".* This passage in the *Gorgias* alleges that those who are justly punished benefit themselves by undergoing improvement or should serve as an example so that others who see them subjected to suffering may become better through fear. The implication is that those who refrain from crime through fear not only avoid doing evil deeds but may also become better people. Considering Socrates' views in the *Republic* that we become just by doing just deeds, it should eventually lead to people acquiring just characters. It would appear to be implicit in this doctrine that

the indirect effect of punishment will be to make people virtuous. Thus an offender's character would genuinely have been improved and one might comment on him as having been cured of his wickedness.

Secondly the criminal by his suffering he may benefit others, mainly by deterring them from following his example, and moreover by removing his own evil influence from them. This is argued as follows: *"But if the legislator has to establish a new society and new laws without dictatorial powers, and succeeds in administering no more than the mildest purge, he will be well content even with this limited achievement. Like drastic medicines, the best purge is a painful business: it involves chastisement by a combination of 'judgement' and 'punishment', and takes the latter, ultimately, to the point of death and exile. That usually gets rid of the major criminals who are incurable and do the state enormous harm"* (*Laws* V 735D-E). Thus, an offender's punishment either benefits both himself and others, or it is no harm to him and a benefit to others. According to Plato, only when the criminal is deemed incurable and not any more in a position to profit from reform, may he be used for deterrent purposes. In book IX of the *Laws* he states it as follows: "*When anyone commits an act of injustice, serious or trivial, the law will combine instruction and constraint, so that in the future either the criminal will never again dare to commit such a crime voluntarily, or he will do it a very great deal less often; and in addition, he will pay compensation for the damage he has done. This something we can achieve only by laws of the highest quality. We may take action, or simply talk to the criminal; we may grant him pleasures, or make him suffer; we may honour him, we may disgrace him; we can fine him or give him gifts. We may use absolutely any means to make him hate injustice and embrace true justice - or at any rate not hate it. But suppose the lawgiver finds a man who is beyond cure - what legal penalty will he provide for this case? He will recognize that the best thing for all such people is to cease to live - best even for themselves. By passing on they will help others, too: first they will constitute a warning against injustice, and secondly they will leave the state free of scoundrels. That is why the lawgiver should prescribe the death penalty in such cases, by way of punishment for their crimes (ἁμαρτημάτων) - but in no other case whatever"* (*Laws* IX 862C-863A). It is noteworthy that the Greek word *ἁμαρτημάτων* "hamartematon" is rendered as "crimes" or "sins" in various translations. In the quoted passage the death penalty is reckoned to be the most severe penalty of all, and is imposed retributively for serious crimes and for purposes of deterrence. But Plato rules out retribution, and sees the crucial issue as not the seriousness of the crime, but what the seriousness tells one about the criminal's state of mind. A very serious crime is proof that the criminal is beyond cure and that the normal policy of attempting to cure it is inappropriate. When this is so the death

penalty should be imposed and in no other case. This type of punishment will also serve to deter others and cleanse the state from evil persons.

In Calvert's (1997: 246) opinion Plato's reference to the purging of injustice from the soul of the criminal suggests that the aim is to bring about genuine reform in the offender when he intends making the criminal to "hate injustice and embrace true justice". At other times he seems to be more realistic or less enterprising when he says that "the criminal will never again dare to commit such a crime or do it less often" and resigns himself to the fact that with some people the maximum one can achieve is a change in behaviour. In the second part of the passage (*Laws* IX 862C – 863A) Plato contends that not all offenders will be obliging to treatment as some will prove to be unrehabilitable (incurable) and the best thing for such people is that they be executed. Their execution will not only be for their own benefit but in these circumstances, and only in these circumstances, the death penalty will deter others from acting likewise and will also protect society by the elimination of such wicked persons together with the assurance that they never repeat their deeds.

According to MacKenzie (1981: 214) the deterrent arm of Plato's penology reveals both humanitarian and utilitarian characteristics. It is justified either by benevolence extended to the individual offender, or by benevolence extended to the society. The objections raised by MacKenzie are directed on both humanitarian and utilitarian fronts. On the humanitarian front the question asked is whether paternalism (ie. the alternative defence for the humanitarian against the charge that he infringes upon the criminal's rights) is justified. On the utilitarian front the question posed is whether victimisation or gross exploitation is possible and if this is the case, is that justified.

The institution of reform, however, is the core of Plato's penology. Reform is the primary consideration, which may be ignored only when it cannot be effective and it is to be justified on individualistic, humanitarian grounds. In Plato's *Protagoras* (324A-324C) it becomes evident that punishment is relevant to those qualities over which a man has control as Protagoras endeavours to prove that virtue (ἀρετή) is teachable. Punishment is considered an incentive which will improve human behaviour in the future and can be utilised as an instrument in the teaching of virtue, as well as a form of social hygiene. But included in the previous passage is a notable claim that punishment ought not to be inflicted with an eye to the past implying that the ordinary man is in fact committed to the rational policy of ignoring the past. This is an incorrect assumption due to the fact that the ordinary man clearly believed that punishment should be imposed with due consideration to the past as the people sanctioned compensation and satisfaction. In Platonic language, retribution is punishment whose

justification is sought retrospectively, in the loss or damage caused. It is based on the assumption that people deserve punishment if and only if they have intentionally done wrong. The penal code of the *Laws* on the other hand, makes no distinction between the question whether the agent committed an offence intentionally and the issue is raised as to how he should be punished. This is what one would have expected in view of Plato's theory of punishment. He rejects any element of retributivism and looks on punishment as a devise for doing social good, mainly by curing the criminal. (Stalley, 1983: 162-164). Within the *Laws* there is no explicit account of how punishment cures, though we might construct an account out of some remarks made during the discussion of drinking parties. The Athenian Stranger there argues that the fear of disgrace or punishment may stop us fleeing from danger. This "good" or beneficial fear may thus help to train us in the habit of fearlessness (646e-648c). This idea could be generalized pointing to a process whereby people initially desist from committing crime due to fear of punishment and thus become used to just behaviour. The problem which is also viewed by Stalley (1983:146) as a major weakness in Plato's theory of punishment with this proposition is that it makes the reformative effect of punishment dependent on deterrence and in doing so renders his curative perspective unacceptable.

In the *Laws*, Plato proposed that the Nocturnal Council (*nukterinos sullogos)* - composed of men with the highest knowledge - visit those found guilty of heresy. The heretics believed that the gods were indifferent to humans or subject to bribes. While they served time in the House of Corrections the Nocturnal Council would reason with the heretics about the error of their thinking. This suggests that Plato identified a critical role for moral education in punishment - however he recommended the death penalty after a second conviction. Jean Hampton, a contemporary political theorist, justifies punishment "as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for choosing not to perform an offence" (Simmons et al., 1995: 117) Unlike most versions of the rehabilitation theory, moral education does not regard the offender as sick. The moral approach does not socially condition wrongdoers, but rather it teaches them about the moral boundaries they have transgressed. Perhaps, as restitution advocates claim, rehabilitation theorists have focussed wrongly on the perpetrator and the time has arrived for penologists to begin addressing the victim.

IV

In trying to justify the death penalty in terms of his curative penology, Plato resorts to a number of paradoxes and it is worth revisiting them in order to

grasp their significance. In 854E of the *Laws*, Plato states that no penalty imposed by law has an evil purpose but generally achieves one of two results, namely, it either makes the person who suffers the penalty either more virtuous or less wicked. He continues by saying that if a citizen is ever convicted of some great and infamous offence against the gods or his parents or the state, the penalty is death and the judge should consider him as already beyond cure bearing in mind the kind of education and upbringing the man has enjoyed from his earliest years and how after all this he has still not abstained from acts of the greatest evil. The offender will thus suffer the penalty of death which is the least of evils and moreover by serving as an example, he will benefit others when he is disgracefully banished from sight beyond the borders of the state. The paradox consists in that the incurable wrongdoer by not desisting from committing the greatest evils, is punished by the penalty of death which is the least of evils. What is more, it becomes a double paradox when the penalty is death, as it is hard to see how death can make the person more virtuous or less wicked and because according to the aforesaid, death is an evil albeit a small one.

In 862E of the *Laws*, Plato alleges that it is in the interests of incurable offenders themselves to live no longer. The imposition of the death sentence on them will serve firstly as a warning against injustice and secondly this action will leave the state free of scoundrels. That is why the lawgiver should prescribe the death penalty in such cases, by way of punishment for their crimes. The curable/incurable antithesis is also elucidated in 957E-958A of the *Laws* by the following statements: On the one hand a good judge will confirm and strengthen the virtuous in the paths of righteousness, and do his best to cast out ignorance, incontinence and cowardice and indeed every sort of injustice from the hearts of those criminals whose outlook can be cured. On the other hand when a man's soul is unchangeably fixed in that condition by decree of fate, good judges and their advisers will deserve the approval of the whole state if they can cure him by imposing the penalty of death. Therefore for incurable offenders death is a cure in the sense that they are cured of their bad moral condition. Plato's point is that it takes a certain amount of sophistication and learning to appreciate the paradox that the best cure for the incurable is death, which enables the criminal to cut his losses because a longer life lived would lead to greater depravity and therefore greater punishment for him eventually in the next world. What is more, he is a danger to the state and the state should get rid of him.

The most extreme deterrent is the prospect of suffering in Hades as declared by Plato in 880E-881A. of the *Laws*: *"Consider a man who will dare to lay hands on his father or mother or their ancestors by using outrageous violence. He will fear neither the wrath of the gods above nor the punishments said to await him in the grave; he will hold the ancient and*

universal tradition in contempt, on the strength of his 'knowledge' in a field where he is in fact a total ignoramus. He will therefore turn criminal, and will stand in need of some extreme deterrent. Death, however, is not an extreme penalty: the sufferings said to be in store for these people in the world to come are much more extreme than that. But although the threat of these sufferings is no idle one, it has no deterrent affect at all on souls like these. If it did, we should never have to deal with assaults on mothers, and wicked and presumptuous attacks on other ancestors. I conclude, therefore, that the punishments men suffer for these crimes here on earth while they are alive should as far as possible equal the penalties beyond the grave". It is evident that death is not extreme as a penalty and thus not as severe as the deterrent needed to have a therapeutic effect on the monstrous offenders. In Saunders's view Plato differentiates between death as a quick transition from life to a bare state of being dead and the dead person's post-mortem punishments. If the passing on is an evil, with reference to the incurable offender suffering some pain during his execution and to a certain extent also being deprived of the joy of living, it is still a minor and not an extreme evil when compared with the punishments which should be a greater deterrent than the passing on. This paradox has been highlighted earlier on, in the 854D-E passage where death is the least of all evils apart from the post mortem punishments.

According to Saunders (1991: 182) the aim of the various paradoxes expounding punishment is to help clarify a dilemma generated by this new penology. In line with the Platonic principles one must never harm anyone, therefore in Plato's language punishment which causes pain, is justified by its therapeutic effect and thus no harm is caused. But death which is harm, rules out cure and the obvious question is how it can be justified. Saunders (1991: 183) questions Plato's insistence in resorting to paradoxes in order to justify the death penalty but then reasons that by presenting death for incurables as a necessary evil or even as a benefit, Plato implies that even incurables are in some way under the philanthropic momentum of Socratic penology. An alternative view could be that Plato wishes to persuade legislators to get over their natural repulsion against imposing the death penalty as often as he prescribes.

V

In Plato's view, punishment and also capital punishment comes into the category of institutions which are undesirable but inevitable and his ideal state of Magnesia would be one in which all the inhabitants either had full moral knowledge, so that on Socratic principles they would never commit injustice, or were so thoroughly conditioned by training and education, on

the level of 'right opinion', that the same result would be achieved. Thus on the one hand, the legislator considers punishment in a state as unnecessary but on the other hand punishment is demanded by ordinary men, who will not tolerate a society in which no provision is made for wrongdoers to suffer for the pain they inflict. In both the *Republic* and the *Laws* texts, Plato treats punishment as being a social practice that reveals the fundamental conceptual structure and system of value according to which the members of community understand their world and organize their behaviours within that world. Plato depicts Socrates not only as a figure who wishes to revise social orders and practices across the board but also as one who attempts to do so by focussing on the topic of punishment and the topic of how a given society responds to social disruption (Allen, 2000: 281). Moreover the analysis of Plato's theory of punishment shows that the implications would be pushed to the limit in the sense that if a man's existence proves inimical to the happiness (*eudaimonia*) of the state, for whatever reason, he must be removed. Adkins (1960:311) interprets it as "nothing may take precedence over civic *eudaimonia*".

If capital punishment is pronounced, the evidence should be beyond a shadow of doubt. Can an innocent person be put to death, is an important question that needs to be asked. Voltaire raises the concern, that it is better to risk saving a guilty man than to condemn an innocent one. One cannot say with certainty that Plato would have been supportive of this view. Confident that his lawcode will hold good at all times, Plato is unrelenting in his belief that the laws be "immovable" (ακίνητοι) or "unchanged"; as the Athenian Stranger puts it at 798A-B. *"If the laws under which people are brought up have by some heaven-sent good fortune remained unchanged over a very long period, so that no one remembers or has heard of things ever being any different, the soul is filled with such respect for tradition that it shrinks from meddling with it in any way. By hook or by crook, then, the lawgiver must devise a means whereby this shall be true of his state".* However there is a great margin of misinterpretation when reading Plato's works in isolation from the rest of his works on a particular important theme such as capital punishment. What also needs to be borne in mind is that the main aim of Plato's penology is to enhance the authorities' influence over the behaviour of the citizens of his projected state. This goes hand in hand with his political theory in all his relevant works but especially in the *Republic* and in the *Laws*.

Many philosophers ponder as to what Plato's position would have been, if he had lived now and had read Hume, Kant, Wittgenstein, Popper, abolitionists, retentionists and others in respect of various issues as regards punishment, including the abolition or the retention of the death penalty. In addition imagine that we could teach him modern philosophical English and speculate as to what answers he would then give; but it will be speculation

and could not in any case pose as an interpretation of his views expressed in the dialogues. Plato's aim is an ideal society as he envisioned a world more real and more substantial and perfect that lies outside our experience. I venture to suggest that by pointing to this perfect world Plato would have assented that capital punishment would not be needed, while in the here and now its imposition with the utmost caution, albeit as an exception to the rule, could be necessary for the benefit of the incurable offenders and also for the protection of the virtuous who would then be able to fulfill their full potential.

But I wish to let the great philosopher have the last say from his masterpiece of art ie. the Symposium 207D-E: *"Yet though man is called the same he does not at any time possess the same properties; he is continually becoming a new person, and there are things also which he loses, as appears by his hair, his flesh, his bones, and his blood and body altogether. Which is true not only of the body, but also of the soul, whose habits, tempers, opinions, desires, pleasures, pains, fears, never remain the same in his particular self, as some things grow in him, while others perish; and equally true of knowledge, and what is still more surprising to us mortals, not only do the sciences in general spring up and decay, so that in respect of them we are never the same; but each of them individually experiences a like change".*

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Did the cynics condone theft? Possession and dispossession in the Diogenes tradition

Phlip Bosman
University of South Africa

Abstract

In this paper, I explore the evidence in the Diogenes tradition on the issue of theft. A line in Diogenes Laertius suggests that the Cynic approved of temple theft. However, before that can be taken as proof, various other factors need to be taken into account: Cynic philosophical principles, their view of the gods, and their adherence to begging and voluntary poverty. Finally, the Diogenic anecdotes dealing with theft should be considered. It appears that the Cynics could have constructed a case for legitimising theft, but that they probably neither drew the conclusion, nor put it into practice themselves. The claim that Diogenes condoned temple theft may have found its way into his Life *from a hostile source, but it more probably goes back to Bion of Borysthenes.*

1. Introduction

When ancient Greek philosophy is approached on issues such as politics and criminality, it is worthwhile not to remain restricted to the canonical voices of Plato, Aristotle, and the Hellenistic schools. Various other, 'smaller' voices should also be given the opportunity to be heard, especially for the unusual, often controversial angles with which they approach the issues, in the process opening up fresh insights into humankind and its relationship with society. One such smaller voice belongs to the ancient Cynics, since antiquity known for their original, non-conformist, and even provocative methods and views.

The topic I would like to explore in this paper is the Cynic stance towards theft. In the final section on the life of Diogenes of Sinope, his biographer relates the following information:

> (He saw) nothing improper in taking something from a temple...[1]

The sentence's context belies its potentially explosive significance. It is

tucked away, almost escaping notice before the more controversial and interesting issue of eating all kinds of flesh - including that of humans! The latter argument is derived from the (Anaxagorean) view that everything shares essentially the same substance.[2] But while the justification of cannibalism might be more provocative, condoning temple theft in ancient times would have been equally sensational, entailing much more than the breaking of a religious taboo. Temples in ancient times served as treasuries and general repositories of valuable dedications, which were of great social and political significance. Such a statement had the potential of having wide social and political repercussions. The whole system was rather precariously kept in place by the fear of the gods. The occasional looter of temple precincts had to bear the stigma of being a *hierosylos*, (temple-robber), and was expected to be visited by the wrath of the gods sooner or later for the committed sacrilege.[3]

How should this statement attributed to Diogenes be taken? The line's vocabulary is rather unspecific. Terms like *sylao* (to pillage) and *thesauros* (treasury) are absent; the infinitive *labein* (to take) is very general, and even more so the 'something' the taking of which is not *atopon* (out of place). Does it mean that the Cynic philosopher condoned temple theft, or - worse still - the plundering of sanctuaries? Or does it rather intend to be a statement about the existence of the gods or their involvement in human affairs? Can it be applied more widely to mean that the Cynic saw nothing wrong in stealing altogether? Is the claim compatible with what we know about Cynic philosophy and its basic tenets? Finally - in the light of the problematic sources for Cynic philosophy - the following question should be asked: may it perhaps be attributed to a misunderstanding, or an attempt at misrepresenting the ancient Cynics? Answers to these questions are not clear-cut; indeed, a good case can be constructed in favour of, as well as against the condoning of theft among the early Cynics. The remainder of this paper will present the available evidence.

2. Cynic principles: Life according to nature, and communal property

As said, the Cynics were known for their radical anti-social position, and it is not impossible - on the basis of the movement's philosophical principles - to derive a defence of stealing. Two such principles coming to mind are their particular definition of property, and their radical understanding of 'life according to nature'.[4]

To begin with the latter: Diogenes was known to have advocated life *kata physin* (according to nature) as the road to happiness. The distinction between *physis* (nature) and *nomos* (custom, convention) was a feature of fifth

century intellectual life, especially among the sophists.[5] Various positions were advocated, ranging from correspondence between *physis* and *nomos*, to radical opposition between the two concepts. Diogenes adhered to the school of thought that saw *physis* to be opposed to the follies of culture and society. The wise man - that is, the Cynic - is able to see through all forms of conventionality that obscures the simple truth of nature. A similar view is found in a fragment transmitted of the fifth century sophist Antiphon, in which he argues that the edicts of *nomos* are impositions, while those of *physis* are compulsions. If one transgresses against the *nomoi* but escapes the notice of one's fellows, one remains free from disgrace and damage. But when you transgress against *physis*, damage is inevitable, even if no one notices. For in the latter case you are up against the truth and not mere opinion.[6] Diogenes clearly reasons along similar lines to conclude that cannibalism cannot be against nature when other cultures do it without natural damage.[7] For the same reason, theft can be placed in the category of transgressions against *nomos*: if a thief does not get caught, his stealing is actually to his benefit. It is not wrong by nature, but only by convention and public opinion. Therefore, calling on the radical adherence to life according to nature, the Cynic could arrive at a philosophical justification of theft.

A second argument the Cynics may have employed, entails the deconstruction of the category of theft by reference to collective property. Diogenes and his successors were proponents of communal possession, an idea that seems to have found wide acclaim in philosophical circles of the era.[8] One can easily conclude from such a premise that theft is not a crime. In a society without private property, there can be no such thing as taking something that does not belong to you. The category of criminal dispossession falls away.

3. The Cynic view of the gods

As the line in D.L. 6.73 specifically concerns taking things from temples, the Cynic view of the gods should be factored into arguments for or against its authenticity and significance. Does Diogenes perhaps defend temple theft on the basis of atheism, or on the non-involvement of the gods in human affairs? That is, can things be taken from temples because the gods do not exist anyway, or that they will or could not take revenge on humans who commit sacrilege?

Cynic religion has been treated variously in scholarship, and the theology attributed to them ranges from outright atheism, to deism, to colourless abstract monotheism and pantheism. In a balanced discussion, Goulet-Cazé concludes that the early Cynics remained faithful to the position of Diogenes, who can be described as an 'outright agnostic, who

had rid himself, once and for all, of the basic problem of religion and succeeded in extricating himself from embarrassing questions with a display of intellectual alacrity'.[9] Two anecdotes transmitted in Tertullian illustrate the Cynic's agnosticism: 'When Diogenes was asked what went on in heaven, he said: "I have never been up there". When he was asked if the gods exist, he replied: "Do the gods exist? I don't know, but I know it is expedient that they should"'.[10] In Cynic epistemology, we cannot know anything about the gods, but that does not preclude their influential role in human affairs.[11] It follows, one may assume, that Diogenes would have been reluctant to justify temple theft flatly on the basis of the non-existence or the non-involvement of the gods.

A third argument that needs consideration, is that the Cynics - like other philosophical schools such as the Epicureans - transposed their philosophical ideals to the divine sphere, so that the gods were viewed as wanting nothing and, in effect, without possessions. From such a premise, it follows that the content of temples does not belong to the gods, and may therefore be removed without fear of committing sacrilege. The argument fits well with the critical attitude of the Cynics towards conventional religious practices and superstition.[12]

4. A Cynic syllogism: 'All things belong to the wise'

Yet another way exists in which the gods can be brought to bear on the issue at hand: by linking them to the Cynic notion of communal possession. Such an argument can be found in a syllogism attributed to Diogenes, and attested twice in Laertius' *Life*.[13] It reads as follows:

> All things belong to the gods
> The wise are the friends of the gods
> The goods of friends are held in common
> Therefore all things belong to the wise.[14]

What could the intent have been behind this little display of sophistry? Scholars who argue for the authenticity of the Cynic syllogisms are mostly inclined to accept the possibility of extracting analysable philosophy from them.[15] On what that might be in this case, opinions diverge. Moles sees a truly fundamental issue involved, namely that Diogenes wants to subvert the notion of 'sacred space'.[16] Goulet-Cazé regards it as a justification of Cynic begging, and Branham as providing a defense for Cynic theft.[17]

Although Branham's proposal seems most enticing because of the close vicinity of the two traditions in Laertius, serious objections may be raised against it. As Branham himself argues, one should be careful not to take the syllogism too seriously. It appears to be deliberately contrived to suit the purposes of the Cynic, so that one is struck more by its ingenuous

stringing together of statements, than by its claim to truth.[18] Cynic agnosticism further undercuts its validity as serious argument. Branham is therefore correct to regard it as a parody. The Cynic syllogisms aim at mocking the kind of reasoning that other philosophers take seriously. They are not meant to convince anyone not already inclined to accept their conclusions. 'The point of the parody', says Branham, 'lies rather in the jarring contrast between the formal protocols of reason and the paradoxical Cynic conclusions they serve to produce...The butt of the joke is the form...Cynic conclusions are asserted while the rationality of the philosophers is caricatured as logic chopping and verbal sleight of hand'.[19]

Even so, the syllogism is more than simply a joke. The Cynics fathered the genre of the *spoudaiogeloion*, in which they presented serious matters in comic packaging. Likewise, they probably made use of the form of the syllogism to poke fun at formal logic, at the same time communicating something of their own views, in the typical oblique way which makes them so fascinating and frustrating at the same time.

What should be taken into account is the fact that the syllogism explicitly deals with the unique status of the wise. Greek philosophy seems to have granted privileges to her wise men ever since the legendary Seven Wise men of the archaic age. The ideal became embodied in Socrates himself, who claimed that the betterment of society was the responsibility of the few, and that *arete* (excellence) could only be taught by those who had the wisdom to impart the proper knowledge. Many of the antics in the Diogenes tradition become more comprehensible when regarded as applying only to the Cynic sage. As Diogenes once put it himself, like the leader of the tragic chorus, he sets in the note a little higher than it should be, in order for the rest to pick up the proper pitch.[20] The Stoics, in later eras, made much of the notion of the 'wise man' as the idealised embodiment of philosophical truth, unattainable by the masses. Especially Epictetus, in his 22nd discourse, gave the Cynic the extraordinary status of the 'scout of God'; anyone thinking of taking on the role, must first consider, long and deeply, 'the magnitude of the enterprise'.[21]

Therefore, when Diogenes employs the form of the syllogism to show everything is the property of the wise, it might indeed contain some parody and an element of playful cleverness. But it also contains a kernel of serious intent, in this case pertaining to the wise. It forges a privileged position in society for the Cynic sage with regard to property. At the same time, the syllogism provides the basis for drawing the conclusion that the Cynic wise cannot be guilty of theft, since everything belongs to him anyway.

From the above, it is evident that the Cynics could easily subvert the notion of private property and criminal dispossession from their own principles, even if this may only apply to the Cynic sage. However, the fact

that a justification of theft can be derived from Cynic principles, does not mean that they drew these conclusions themselves, even less that they put them into practice.[22] These principles were offset by others, namely the Cynic emphasis on poverty and the simple life. Furthermore, Cynicism from the start emphasised example rather than prescription, practical application rather than doctrinal exposition, criticism rather than viable alternatives.[23] Consequently, one should not remain restricted to their theory. Rather, one must try to establish what they actually put to practice.

5. Anecdotes on theft

A number of Diogenic anecdotes revolve around the issue of stealing. Some of them offer little in terms of illuminating the Cynic view. These tend to serve as vehicles for putting on display the famous wit of the Sinopean. D.L. 6.57 contains an instance of Diogenes' knack for applying literary quotes out of context. Seeing someone who stole and got caught, he quotes the Homeric line: 'Fast gripped by purple death and forceful fate', which in its original context refers to the death of one of the minor Trojan warriors.[24] The double reference to 'purple death' and 'forceful fate' insinuates that the thief was caught as much by the lure of the purple than by the enforcers of the law. But apart from the allusion that desire for material things poses a threat to one's freedom, it tells us little about the Cynic attitude towards stealing. Equally scant light is cast by the anecdote in D.L. 6.52, where the context of theft gives occasion to a homophonic pun. Diogenes asks a thief at the baths what exactly he was looking for on the day: 'Seeing a clothes-thief at the baths, he said: "Is it for a little unguent (*ep' all' himation*), or for another cloak (*ep' aleimmation*)?"'. The question might be interpreted as implying censure on the planned deed, but the implication is obscured by the clever play on same-sounding words. Somewhat more illuminating is the anecdote where Diogenes sees two lawyers quarrelling with each other, and observes: 'The one has stolen something, but the other has not lost anything'.[25] Between the lines here, implied by the criticism of the profession, is a moral rejection of both dishonesty and theft.

More pertinent to the present argument, are two anecdotes involving a temple setting in the one case, and the gods as maintainers of the moral order, in the other. In D.L. 6.45, Diogenes sees temple officials leading away someone caught stealing a vessel belonging to the treasurers. He comments: 'The big thieves leading away the small one'. The witticism alludes to two levels of temple theft: on the small scale, the occasional utensil or ornament; and on the large scale: stealing from the temple treasury by its supposed custodians. The story gives testimony to the fact that the treasures kept in the temple precinct, loomed largely in the minds of the

general populace. Diogenes plays on the suspicion - probably widespread - that those in charge of the treasury helped themselves to what they were entrusted to keep safely. The general drift is not, as one might have assumed, that Diogenes approves of either the small scale thieves or the large ones. While he aims at exposing the greater of the two evils, neither in fact meets his approval.[26]

Finally, in a story transmitted by Cicero, Diogenes comments on the longevity, prosperity and happiness of a certain Harpalus, known by all to be a thief. This, according to Diogenes, must certainly be held as evidence against the gods.[27] Goulet-Cazé correctly notes that such commonsensical conclusions may not be used as proof of Diogenes' atheism, but that they rather intend to expose the folly of expecting the gods to uphold the moral order.[28] But one cannot detect any approval of the life of Harpalus in the saying either; on the contrary, it seems to comment on the unjustness of the thief getting away with it, thereby implying moral censure.

On the whole, the anecdotes on theft are not outright condemning, but neither do they support theft. They simply presuppose adherence to a moral order where thieving is viewed in a bad light.[29] We may next look at two aspects of the Cynic way, which make it unlikely for Diogenes to have resorted to stealing, either for personal gain or for obtaining a livelihood: Cynic begging, and the poverty ideal.

6. The mendicant philosopher

The begging Diogenes is a theme widely attested in the Cynic tradition.[30] Begging was considered by contemporaries a prime example of Cynic *anaideia* (shamelessness), and practised especially by the Cynics of the Roman era. Again, some stories have little more than amusement value.[31] Others depict Diogenes as the beggar who manages to retain his dignity and freedom towards those who give.[32] They seem to support Goulet-Cazé's contention that the Cynic views begging as a way of getting his due.[33] But they may also be intended to cover the blatant discrepancy between the begging philosopher and the central Cynic tenet of *autarkeia* (self-sufficiency).

It is not clear whether Diogenes' begging was an integral part of his philosophical act, or merely - as his biographer suggests - referring to a passing period in his life.[34] The latter may be a Stoic attempt at covering Cynic shamelessness. More probable is that his begging was a combination of Cynic provocation, of real need, and of putting to practice the ideal of the extreme simple life. Philosophers in ancient times were left to themselves to obtain a livelihood, and many were dependent on benefactors. This the Cynic notion of independence and freedom could not tolerate. One

anecdote tells of Diogenes being rebuked for begging while Plato does not. "O, but he does," replied Diogenes, "he only 'holds his head down low, so that no-one may hear'".[35] The final line, a quote from the *Odyssey* 1.157, contrasts the Cynic's open begging to the idealist's less transparent way of obtaining a livelihood, which threatened to make him a lackey of the rich and powerful.

If we conclude that begging was part and parcel of the Cynic performance, it seems less likely that Diogenes would have advocated stealing to obtain a living. By itself, the argument is not convincing: beggars may not be choosers, but little prevents them from resorting to theft. The argument is bolstered when viewed together with the Cynic notion of the simple life, and the accompanying poverty ideal.

7. The simple life

Cynic poverty has been integral to the movement throughout antiquity. Nothing communicated the Cynic status more effectively than their usual uniform of bare feet, folded cloak, a stick, and a wallet.[36] It stood for living by the bare minimum, the simple life according to what *physis* prescribes as absolutely necessary. A famous anecdote has Diogenes seeing a boy drinking water from his hands. Immediately he throws away the cup in his wallet, with the words: "A child has beaten me in plainness of living".[37] Subsequent Cynics also took to the poverty ideal: Crates, a wealthy landowner from Thebes, did the extraordinary thing of selling all his possessions and distributing the proceeds among his fellows, in order to take up the true Cynic style.[38] Another pupil of Diogenes who accompanied Alexander on his Asian campaign, reported in detail on the Indian *gymnosophistai*, the 'naked philosophers', who he thought resembled the life of Diogenes.[39]

As with the related topic of begging, it is difficult to establish whether poverty was an ideal from the start for Diogenes. According to tradition, he came to Athens from Sinope after being exiled for 'defacing the currency', indicating a problematic relationship with money that lasted a life-time. One tradition would have it that he came with an already established ascetic life-style; when a cottage he tried to procure for himself did not materialise, he took abode in a large wine-jar in the Metroön. Another tradition, probably closer to authenticity, tells that he became a convert when one day he watched a mouse running about, "not looking for a place to sleep, not afraid of the dark, not yearning for luxuries".[40] The first principle (no abode) he applied to himself by means of a quote from tragedy:

> without a city, without a home, deprived of fatherland
> a beggar, a wanderer, having life but for the day.[41]

The second principle (no fear) was the objective of Cynic training in hardiness of both mind and body, and the third (no excess) was realised by considering material things as of no concern to happiness. The Cynics went even further - possessions were considered a positive burden to the expression of freedom. Love of money he called 'the mother-city of all evils'.[42] The gods gave to humankind the means to live easily, he claimed, but that has been made impossible by our demand for superfluous luxuries.[43]

Pertinent to our argument is that Diogenes was poor by choice. To the Cynic, true happiness comes from being self-sufficient, from surviving on the barest necessities, from living the life of the dog. He was not interested in personal enrichment. While upsetting the economy of the state may have been convenient to his pre-cultural politics, the aim would not have been the redistribution of wealth. Neither revolutionary economics, nor theft for personal gain, seems to fit the profile.

8. Erroneous attribution?

The considered evidence leans towards the improbability of Cynic being in favour of theft. This raises the question what to do with the opening line of D.L. 6.73: is it simply an inconsistency in the Cynic tradition deriving from Diogenes' opportunism, or can something else be surmised behind its occurrence? As for the former, scholars have in the past been quick to blame the poor quality of thought of the early Cynics. Such evaluations are of course strengthened by their unwillingness to compromise on their subversive shock tactics against society. Going back to antiquity, they tended to elicit vehement attacks from people repulsed by their provocative shamelessness, and had to bear the accusation of moral degradation.[44] Currently, however, the tide has turned in favour of the Cynics, and scholars are far more willing to accept their criticisms as earnest attempts to search for the truth and to better the human condition. The easy way out of apparent contradictions, namely to simply blame it on the Cynics themselves, is nowadays less preferred. Scholars tend to try and solve these by means of source criticism, that is, by postulating repeated reworking, from various angles, of the Cynic tradition.

The line indeed gives the appearance of having been inserted into its current context. On the surface at least, the idea of commonality in D.L. 6.72 is not carried over into the next paragraph. Furthermore, the major part of D.L. 6.73 deals with a justification of cannibalism and is said to stem from the *Thyestes*; it is not clear how the topic of temple theft could relate to the theme of a tragedy called *Thyestes*, nor does the argument that all matter in essence share the same substances pertain to stealing from temples. It is clear, therefore, that either Diogenes Laertius drew from

various sources, or that he used a pre-compiled source for this part of the doxography, with the first line of D.L. 6.73 having a different origin than the remainder of the paragraph.

How could such a claim have entered the doxography? At least three possibilities present themselves. The first is the possibility of malicious distortion. As argued above, the notion is not completely irreconcilable with Cynic principles. Furthermore, I am inclined with Branham and Moles to see some connection between the line in D.L. 6.73 and the syllogism on the gods. D.L. 6.73 does not follow strictly from the syllogism, where the claim is made that all things, not just things in temples, are the common property of the gods and the wise. Furthermore, the syllogism restricts possession of 'all things' to the sage, whereas the claim in 6.73 has become unspecific, implying that nobody would do wrong by taking something from a temple. The perversion of what originally was a jocular display of mock sophistry, may point in the direction of deliberate misrepresentation of authentic Cynic material. In the hands of the polemicist, it could be a handy piece of inflammatory and damaging evidence, with which to tarnish philosophical opponents. Not wholly true, but not fully untrue either, this little piece of anti-Cynic propaganda could have got attached to the equally controversial defence of cannibalism, and so found its way into Laertius' *Life of Diogenes*.

A second possibility, proposed by Brown, is that the line goes back to the Cyrenaic philosopher known as Theodorus the Atheist: in D.L. 2.99, this near-contemporary of Diogenes is said to have claimed that theft, adultery and sacrilege are permissible under certain circumstances.[45] It would have been impossible to argue such an erroneous attribution beyond the point of conjecture, if it was not for an illuminating reference to Bion of Borysthenes in Seneca's *De beneficiis* 7.7.1, which suggests a route from Theodorus to Diogenes. Bion studied with both the early Cynics and with the above-mentioned Cyrenaic.[46] In the *De beneficiis*, we find Bion using arguments that closely resemble those attributed to Diogenes and Theodorus. Seneca devotes the seventh book to an elaboration on various levels of ownership, in the process making use of virtually all the premises of Diogenes' syllogism. Also significant is the favourable reference to the imperial Cynic Demetrius. Whereas Demetrius' thoughts are not disputed, Seneca quotes Bion in order to refute his arguments. Bion launches a double attack on the notion of sacrilege. Since everything belongs to the gods, everybody who appropriates anything should be considered guilty of sacrilege (i.e. not only taking from temples). Furthermore, since the whole world is the domain of the gods, removing something from a temple simply means moving the property of the gods from one part of their domain to another. In both cases, arguing from the commonly accepted premise that everything belongs to the gods, the notion of sacrilege is eroded.

The similarity in thinking to the line attributed to Diogenes is obvious. Bion, who was not in antiquity called a Cynic but was closely associated with Cynic thinking, could have got this kind of syllogistic parody from either the Cynics or the Cyrenaics.[47] The fact that Seneca adopts Cynic arguments, but criticises Bion, suggests that he used different sources when dealing with the issue of property in *De beneficiis* 7. It is not difficult to imagine how Bion's thoughts might have come to be attributed to Diogenes. Bion could have used him as his spokesperson when developing these arguments, or they could simply have become attributed to Diogenes by way of association, as apparently happened quite frequently with paradoxical and shocking ideas.

9. Conclusion

The early Cynics would not have welcomed any form of apology for their own radicality. One should therefore be careful not to suppress their shamelessness if the evidence suggests otherwise. Indeed, the aspects of ancient Cynicism considered in this paper do not point conclusively in one direction only. The early Cynics could integrate a justification of theft into their basic principles and their view of the gods. It is not clear, however, that they in fact drew such conclusions themselves. Any subversion of the notions of private property and criminal dispossession is offset by the Cynic ideals of poverty and the simple life. Cynic practice suggests an adherence to a code that regarded theft and temple robbery as among the immoral actions.

As the line in D.L. 6.73 appears isolated from its immediate context, the possibility should be seriously considered that it does not share the same degree of authenticity as the rest of the doxography. Especially the argument of Bion, that the whole world belongs to the gods, so that removing something from a temple cannot be regarded as sacrilege, looks suspiciously similar to the line in the Diogenes *Life.* But even if it does go back to Diogenes himself, its lack of context renders impossible any final decision as to whether it should be considered serious philosophy, or a parody of philosophical logic.

Endnotes

1. D.L. 6.73. Although not a doxography in the proper sense, most scholars consider D.L. 6.70–73 of greater historical value than the anecdotes; cf. R. Hoïstad, *Cynic Hero and Cynic King* (Lund, 1948), 17. K. von Fritz, *Quellenuntersuchungen zu Leben und Philosophie des Diogenes von Sinope* (Leipzig, 1926), 1–60 suggests that 6.70–73 comes from the same source as the biography of 6.20–24; M.-O. Goulet-Cazé, 'Le livre VI de Diogène Laërce: analyse de sa structure et réflexions méthodologiques'. *ANRW* 2.36.6. Berlin: Walter de Gruyter 1992, 3897 claims the whole 6.73 to be from the

Diogenic tragedy *Thyestes,* which, however, applies more to the section on cannibalism than to the first statement.
2. D.L. 6.73; 79; cf. D.R. Dudley, *A History of Cynicism from Diogenes to the Sixth Century AD* (London, [1937] 2003), 30; J.L. Moles, 'Cynic cosmopolitanism', in R.B. Branham and M.-O. Goulet-Cazé (edd.), *The Cynics: The Cynic Movement in Antiquity and its Legacy* (Berkeley 1996), 112.
3. Cf. Xen. *Hell.* 1.7.22; Diod. Sic. 16.30, 58; K. Kindstrand, *Bion of Borysthenes* (Uppsala, 1976), 239.
4. For brief characterizations of the Cynic movement, cf. R. B. Branham and M.-O. Goulet-Cazé, 'Introduction', in Branham and Goulet-Cazé (n. 2), 21–27; A.A. Long, 'The Socratic tradition: Diogenes, Crates, and Hellenistic ethics', in Branham and Goulet-Cazé (n. 2), 28–46.
5. Cf. W.K.C. Guthrie, *A History of Greek Philosophy Vol. 3: The Fifth Century Enlightenment*, (Cambridge, 1969), 55–134.
6. Antiphon Soph. fr. 4.1–14.
7. D.L. 6.73.
8. Plato advocated communal possession in his ideal state, as did the Stoic founder Zeno.
9. M.-O. Goulet-Cazé, 'Religion and the early Cynics', in Branham and Goulet-Cazé (n. 2), 47, 73, 80.
10. Tert. *Ad Nat.* 2.2. For Cynic reluctance to get involved in metaphysical speculation, cf. D.L. 6.24, 26, 38–9, 40, 53.
11. Cf. Goulet-Cazé (n. 9), 73.
12. Kindstrand (n. 3), 240.
13. D.L. 6.37 and 6.72; on the doxography, see above, n. 1. M.-O. Goulet-Cazé, 'Un syllogisme stoïcien sur la loi dans la doxographie de Diogène le Cynique. A propos de Diogène Laërce VI 72'. *RM* 125 (1982), regards the second syllogism as Stoic, while J. Moles, 'The Cynics and politics', in A. Laks and M. Schofield (edd.), *Justice and generosity: Studies in Hellenistic Social and Political Philosophy* (Cambridge, 1995), 129–158 argues for its authenticity. The first syllogism seems to be widely regarded as reflecting the authentic voice of Diogenes; cf., however, T.S. Brown, *Onesicritus. A Study in Hellenistic Historiography*, (Berkeley, 1949), 37. From Sen. *Ben.* 7 it is clear that the premises were employed within a Cynic-Stoic tradition.
14. The categorical syllogism's four elements can be broken up into two separate Aristotelian syllogisms: Syllogism A: Friends have everything in common ; but the gods are friends to the wise; therefore, what belongs to the gods also belongs to the wise. Syllogism B: All belongs to the gods; but that which belongs to the gods, belongs to the wise as well; therefore all belongs to the wise; cf. Goulet-Cazé (n. 13), 220–221 n. 18.
15. M. Schofield, *The Stoic Idea of the City*, (Cambridge, 1991), 141–145; Moles (n. 13).
16. Moles (n. 13), 140. Moles' view is better supported by Bion's argument in Sen. *Ben.* 7.7.2; cf. below.
17. Goulet-Cazé (n. 9), 72; R.B. Branham, 'Defaing the currency: Diogenes' rhetoric and the invention of Cynicism' in Branham and Goulet-Cazé (n. 2), 93–94.
18. The truth value of the three premises is less scientific than proverbial, according to Goulet-Cazé (n. 9), 72, 'with a vaguely Pythagorean or Platonic flavoring'; cf. D.L. 8.10.
19. Branham (n. 17), 94.
20. D.L. 6.35.
21. Epict. 22.12.

22. Branham (n. 17), 95 n. 45.
23. M. Billerbeck, 'Greek Cynicism in imperial Rome', in M. Billerbeck (Hrsg.), *Die Kyniker in der modernen Forschung*: *Aufsätze mit Einführung und Bibliographie* (Amsterdam, 1991), 150.
24. Hom. *Il.* 5.83, translation by R.D. Hicks, *Diogenes Laertius Lives of Eminent Philosophers* Vol. 11 (Harvard, 1979), 57.
25. D.L. 6.54.
26. I cannot agree with Kindstrand (n. 3), 240 that Diogenes defends the 'small thief'; Brown (n. 13), 32: 'Diogenes felt no indignation towards the lawbreaker, because he regarded all laws as "unnatural," but he could not have approved of the reasoning which led the criminal to think the goblet worth stealing'.
27. Cic. De natura deorum 3.34.83; cf. also 3.35.88.
28. Goulet-Cazé (n. 9), 71.
29. The Cynic criticism in Cic. *Off.* 1.35.128, that some immoral acts are not shameful to mention, while some moral acts are, is primarily directed against discrepancies between morality and decency, but tacitly accepts theft as among the immoral actions.
30. Cf. G. Giannantoni, *Socratis et Socraticorum Reliquiae,* Vol. 2 (Naples, 1990), 328–333.
31. A popular anecdote was of Diogenes begging from a statue. When asked why, he answered: 'To get practice in being refused'; D.L. 6.49; Plut. *de vitios. pud.* 7. A standard sentence constituted his line of approach: 'If you have given already, give to me as well; if not, start with me'; D.L. 6.49.
32. D.L. 6.56; 59.
33. D.L. 6.46; 62; Goulet-Cazé (n. 9), 72.
34. D.L. 6.49 mentions that Diogenes was forced to beg when initially he came to Athens as a penniless exile.
35. D.L. 6.67.
36. Cf. Epict. 3.22.50; 4.8.5; Dio Chrys. *Or.* 32,9; 34.2; Kindstrand (n. 3), 161–3; Giannantoni (n. 30), 301–14.
37. D.L. 6.37.
38. D.L. 6.87.
39. Cf. Brown (n. 13), 38–51.
40. D.L. 6.22.
41. D.L. 6.38; Ael. *VH* 3.29; Jul. *Orat.* 9.14; Epict. 3.22.45–50.
42. D.L. 6.50.
43. D.L. 6.44. According to Epict. 3.24.67, Diogenes thanked Antisthenes for setting him free, by teaching him to distinguish between what is his and what is not; property is listed among the things not his.
44. The Epicurean Philodemus' invectives come to mind; cf. Philod. *de Stoicis.* Ancient critics found a modern counterpart in the tireless devaluations of Ferdinand Sayre cf. *Diogenes of Sinope: A Study of Greek Cynicism* (Baltimore, 1938), 100, 104–5; *The Greek Cynics* (Baltimore, 1948); 'Antisthenes the Socratic', in Billerbeck (n. 23), 73–85.
45. Brown (n. 13), 32.
46. On Theodorus, cf. Kindstrand (n. 3), 10-11.
47. Seneca *Ben.* 7.6.7 quotes another example of obvious mock logic which he puts in the mouth of an unidentified opponent of Stoicism, and goes as follows: "The owner of prostitutes is a pimp. All things belong to the wise. Prostitutes also belong to the wise. Therefore the wise man is a pimp".