COMMENTS ON FREDERICK SCHUAER'S "MUST VIRTUE BE PARTICULAR?" IN AMAYA AMALYA, HOCK LAI HO (EDS.), *LAW, VIRTUE AND JUSTICE*, HART PUBLISHING, OXFORD AND PORTLAND (OREGON), 2013

1. Frederick Schauer's comments on Ho Hock Lai's "Virtuous Deliberation on the Criminal Verdict" raise a few interesting issues along which the 'particularism of virtue' seems most relevant. He discusses Ho's views in the context of judicial decision in which some other worth-considering points concerning the structure and operation of the law are raised: judicial discretion, the indeterminacy of law, generalisations. Of course these points are not discussed *per se* but raised in a perspective that is critical of virtue ethics (EV). In my quick review of Schauer's paper I do not mean to take issue with his critique of Ho's discussion of virtuous deliberation in the criminal law, although most of my discussion here is obviously originated from Ho's points. By contrast, I mean only to suggest some different directions of inquiry from an EV perspective.

In starting this inquiry the first puzzle that comes to my mind is "what kind of EV are they dealing with?". It is well-known that the recent revival of EV in the last decades is far from being of one mind. Some authors distinguish at least an utilitarian from a deontological and an aretaic EV (Trianovsky 1990), while others confront Aristotelian, deontological and perfectionist EV (Sher 1992, 92-93). Depending on the EV approach you choose, you have a certain view of the general principles and, in turn, particularism. Schauer says explicitly that "my goal in this chapter is not to engage in Aristotelian exegesis." (Schauer 2013, 266) However, he quotes Aristotle a few more times through his chapter and seems to consider him the founding father of EV, the author who is responsible, more than others, for the contemporary particularism of EV. Further, given my previous observations about the variety of EV approaches and the unlikeliness that utilitarian or deontological approaches can be charged with particularism, it seems plausible to locate Schauer's (and Ho's) discussion on the background of an Aristotelian ethical framework. Thus, in putting forward my observations on Schauer's paper I will assume that he (and Ho) erroneously take Aristotle as just a particularist. From a correct Aristotelian perspective I believe that most of Schauer's critiques to Aristotelian EV seem misplaced.

2. I do not believe that being charged with 'particularism' is a serious weakness in ethics, given the nature of the ethical judgements with which we are daily confronted. However, general principles cannot be ignored entirely in ethical judgements even from the EV point of view. Schauer, being specially concerned with judicial decisions, is rightly worried that particularism erases those general principles that constitute the "beating heart" of the law. In my view Aristotle can still give us a few useful hints on the ethical/legal divide between particularism and generalism.

In Aristotle's theory ethical virtues (virtues of character) can be applied only through the employment of one intellectual virtues, *phronesis* or practical wisdom. It is not the place for exegesis on Aristotelian concepts but, given the central importance of *phronesis* in all contexts of judgement, as in judicial decision, it is noteworthy to consider some parts of *phronesis* which are relevant to our discussion. I want only to recall that, on the one hand, *sunesis,* 'comprehension', is about what to do in general but it is also a discriminatory ability to 'read' a situation and recognise what is salient; while *gnome*, 'sense', entails sympathetic response and the ability to see things from another's point of view. While these two aspects of *phronesis* seem to speak partially in favour of particularism, on the other hand, *nous* is a practical virtue shared with the theoretical virtue of 'intelligence'. Intelligence grasps "what is last" in demonstrations, those principles of which demonstration is not possible. It is not an intuition but it is similar to a problem-solving ability that results from a grasp of first principles of science deriving from induction. *Phronesis* in this sense works in a way quite close to skills such as carpentry or medicine which require complex reasoning and deliberation. (Cf. D.Russell 2009, 21-3) These aspects of *phronesis* make clear in my view how particularist and generalist features of deliberation cannot often be divorced.

A second point regarding Aristotle's ethics that deserves our attention – but can be tackled only in passing, given the complexity of the issue – is the problem of the "right action". Contemporary moral philosophers tend to say that the EV does not have much to add on the central problem of moral philosophy, "the right action" (deciding how to act, assessing what to do, thinking about outcomes, etc.).

Although Schauer does not tackle the EV on this issue, I believe it is relevant to his position insofar as the law is basically concerned with assessing right and wrong actions. I would just suggest on this point that the EV theorist Daniel Russell gives us useful hints by focusing on the idea of "serious practical concerns". This is a variable category that includes also intentions and motives of people who act, those reasons that differentiate actions apparently similar. These inner states contribute to the evaluation of the rightness or wrongness of an action, enlarging and sharpening the way in which we think about the right action. This focus on "serious practical concerns" allows to give pride of place also to character evaluation within legal inquiry. It should be considered carefully by legal theorists who, especially in the criminal law, are concerned also with the inner states that brought someone to produce a certain outcome and not only with a generalist evaluation of legal categories.

3. My third point in commenting Schauer's paper is connected to another aspect of Aristotle's EV which seems to me misinterpreted. A part of the dispute between Schauer and Ho regards the "inevitability of judicial discretion". (Schauer 2013, 268 ff.) This descends from the undeniable indeterminacy of the law and, according to Ho, makes particularised discretion inevitable in the criminal law. Schauer wants to maintain that clear applications of clear rules cannot be rendered defeasible in the service of equity or justice. (ibid., 270) I want to side with Schauer on the importance of general rules in the law but from within the Aristotelian ethical framework that is not merely in the service of "particularistic virtue".

Aristotle says explicitly that "equity" comes in as a rectification of what is legally just. "The reason is that all law is universal but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the universal rule that is usually correct, well aware of the error being made. And the law is no less correct on this account; for the source of the error is not the law or the legislator but the nature of the object itself." (Aristotle NE 1137 b 14-18) Aristotle is well aware that the role of the law is that of making universal rules but that what happens in particular cases may violate the intended scope of the universal rule. The judge who has to apply the rule may rectify the error in the legislation because the legislator himself would have prescribed that way if he had known. (NE 1137 b 22-23)

Aristotle is well aware of the importance of universal (general) laws that should leave as few as possible decisions to the judge's discretion because, as he explains, it is easier to find a few wise and sensible persons capable of legislating and judging them to find a large number. Another reason to prefer laws to judge's decisions depends on time: laws are made after long consideration, whereas decisions in the courts are given at short notice. (In our times somewhat less short than what Aristotle thought…) The final and weightiest reason of all is that laws are prospective and general, whereas members of the assembly or a jury decide on definite cases brought before them and can be influenced by feelings of friendship, hatred or self-interest with regard to the parties of the law-suit. (Aristotle *Rhetoric* 1354 a 34- b 10)

It seems clear to me that in the field of justice Aristotle is far from being a supporter of particularism but, on the contrary, recognises the importance of general laws. Of course this does not cut off the possibility of a *phronetic* judgement in difficult cases but only suggests, in my view, a balance between the general rules and a particularistic understanding of the facts of the case.

4. My final comments on Schauer's position concern the underlying reasons that drive his views about the particularism of virtues. Since the first stages of his theoretical work (Schauer 1988) he has shown sympathy for formalism in the positive sense of a doctrine that gives importance to observing the letter of the law, what the legislator established, before searching for the law's purposes or 'spirit'. Observing the letter of the law should be at least the "presumptive" duty of the judge who, however, should be left with some "escape route" in certain circumstances. Supporters of formalism hold that in cases of conflict the values of certainty and stability of the law should be carefully preserved, sometimes even at some cost for justice, efficiency or the political consequences of a decision. An obvious outcome of formalism is that the rules are generalisations that should be observed even at the cost of neglecting some particular features of a case.

The debate about formalism and anti-formalism has animated more than one century of legal history and its review would take us away from our purposes here. I would only point out that Schauer's

balanced understanding of formalism and its limits about 30 years ago can be brought to meet Aristotle's introduction of equity about 2500 years ago. As already noticed, Schauer's formalism is "presumptive" and not absolute and allows "escape routes". In *Thinking Like a Lawyer* (2009) he discusses some cases with regard to formalism: not criticising the court's decision when the literal meaning of the law is not respected in order to respect the purpose of the law (*Church of Holy Trinity* 143 US. 457 (1892)) or when it is not respected in order to respect an underlying principle of the law as a whole (*Riggs v. Palmer* 22 N.E. 188 (N.Y. 1889)); or sharing criticism in cases in which the literal application of the law brought about an unfair decision as in *Lochner v. New York* (198 U.S. 45 (1905); or recognising the reasons – but not the fairness of the outcome – of the judges of the Supreme Court who in *United States v. Locke* (471 U.S. 84 (1985)) decided that it is not up to the judicial power to rewrite the laws emanated by the Congress.

In these cases – and others – Schauer maintains the formalistic character of the law and the values embedded in the expression "rule of law" but he does not take as mistakes those cases in which the courts have decided beyond the literal meaning of the law. In turn, Aristotle, one of the first supporters of the rule of law against "the rule of men", holds that sometimes what is just because dictated by universal laws has to be rectified in a particular case because of "the nature of the object". Fairness comes in to rectify the deficiency because it is "what the legislator would have said himself if he had been present there." (NE 1137 b 22-23) As already noticed, Aristotle is well aware of the importance of universal laws and to leave few decisions to the judge's discretion. If my points are correctly addressed, I believe that Schauer is less distant from Aristotle's position than what he believes.

However, there is a further aspect of Schauer's picture in the paper I am discussing that seems to mark a greater distance from Aristotle's general picture: it is Schauer's appeal to the virtue of *humility*. Against Ho he holds that a virtuous deliberator should recognise sceptically that not only his first impressions but also his second impressions on a certain issue might be mistaken and that others may know and decide better than he does. Thus, the deliberator who follows the rule might not be irrational if he sets aside his all-things-considered judgment. He would be modest or showing humility in respecting the legislator who has considered a large number of cases.

Schauer's view grounds an attitude of judicial self-restraint better than Justice Holmes's "cosmic scepticism" and "military observance" of the rules (Luban 1992) but the appeal to humility drives him far away from the Aristotelian pictures of the EV to which we have referred so far. Humility is a characteristically Christian virtue that cannot be hosted in the agent-centered picture of Aristotelian EV. I believe we find here another weakness in Schauer's critique of Aristotle's EV: his critique of Aristotle's particularism is incoherent with his appeal to un-Aristotelian virtues such as humility. Rather, we have already seen how to accept the judge's self-restraint from within Aristotle's theoretical resources, while leaving room to fairness for rectifications in some cases.

In conclusion, I would emphasise that Schauer's charge of 'over-particularism' addressed against certain EV – and Ho's proposal – is misplaced with regard to Aristotle's ethical theory. As I have noticed, not only the Greek philosopher was aware of the importance of universal laws but also in the exercise of *phronesis* there is a combination of theoretical intelligence that grasps the generalities of law and practical wisdom that centers on particular ends and means best suited to achieve those ends. It is true, then, that in the application of the law "the reasonable judge" cannot help being particularistic, at least in the area of fact-finding. (Schauer 2009, chapter 11) But it is also true that a reasonable judge knows both the importance of rule-following and the necessity of a judgement of equity when it is "the nature of the object itself" to require it. I assume that Schauer's escape route from presumptive formalism amounts to something quite similar.

REFERENCE

Aristotle, *Nicomachean Ethics* (translated by T.Irwin), Hackett, Indianapolis, 1985.

Aristotle, *Rhetorics*, (translated by W.Rhys Roberts), Oxford University Press, Oxford, 1954.

Luban D., “Justice Holmes and Judicial Virtue”, in J.W.Chapman-W.A.Galston (eds.) *Virtue. Nomos XXXIV*, New York University Press, New York and London, 1992, pp 235-64.

Russell D., *Practical Intelligence and the Virtues*, Clarendon Press, Oxford, 2009.

Schauer F., “Formalism” *Yale Law Journal*, vol. 97, n.4, 1988, pp 509-48.

Schauer F., *Thinking Like a Lawyer. A New Introduction to Legal Reasoning*, Harvard University Press, Cambridge (Mass.), 2009.

Schauer F., “Must Virtue Be Particular?” in Amaya A. and Hock Lai Ho (eds.), *Law, Virtue and Justice*, Hart Publishing, Oxford and Portland (Oregon), 2013.

Sher G., “Knowing About the Virtues”, in J.W.Chapman-W.A.Galston (eds.) *Virtue. Nomos XXXIV*, New York University Press, New York and London, 1992, pp 91-116.

Trianosky G., “What Is Virtue Ethics All About?”, *American Philosophical Quarterly*, Vol. 27, No. 4 (Oct., 1990), pp. 335-344.