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THE TRIAL OF SOCRATES: RECENT REFLECTIONS

By FREDERICK VAUGHAN*

Miscarriage of justice has been the constant fear of all civilized societies. This is why the great trials of history continue to hold a fascination for succeeding generations. Such great and controversial modern trials as the Dreyfus affair, the Ethel and Julian Rosenberg trial, the Sacco and Vanzetti trial are still recalled and re-examined.¹ Occasionally, one's attention is directed back many centuries to 399 B.C. and the trial of Socrates as the *cause célèbre par excellence* of all cases where an innocent man was condemned to death by a judicial body administering the laws of a community which deemed itself civilized. In every modern account of that famous trial we are led to believe — at least by implication — that we in the present century would not have been as unjust as the Athenian court centuries ago. I should like in this article to explore how sound that belief is by responding to a recent article on the trial of Socrates by Professor Reginald Allen.²

In one of a collection of papers designed to bring a multi-disciplinary focus to bear upon the Canadian judicial system, Reginald Allen reviews Plato's *Apology of Socrates*³ in an attempt to understand why the Athenian dicasts could conceivably have found Socrates guilty of the indictment brought against him. The indictment read as follows:

Socrates is guilty of not acknowledging the gods acknowledged by the City and of introducing other new divinities. He is also guilty of corrupting the youth.⁴

After observing that "no irregularity in the proceedings was remarked either at the time or afterward,"⁵ Allen proceeds to inquire into the procedures leading up to the actual defence of Socrates in response to the indictment. He notes correctly that Socrates appeared before the king archon (a magistrate) in a preliminary hearing and that the king forwarded the case to trial. The

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¹ See, e.g., Guy Chapman, *The Dreyfus Trials* (New York: Stein and Day, 1972); Louis Nizer, *The Implosian Conspiracy* (New York: Doubleday and Co., 1973).

² Reginald Allen, "The Trial of Socrates: A study in the morality of the criminal process", M. L. Freidland, ed., *Courts and Trials: A Multidisciplinary Approach* (Toronto and Buffalo: University of Toronto Press, 1975).

³ *Apology, Crito, Phaedo, Phaedrus*, H. N. Fowler, ed., Loeb Classical Lib. (London: Wm. Heinemann, Cambridge, Mass.: Harvard Press, 1973). All references to classical text will be to this edition. I have re-translated some portions of the material cited in the interest of greater literalness.

⁴ Allen cites the version recorded by Diogenes Laertius. It is virtually identical to version recorded by Xenophon in the *Memorabilia*, I. 1.

⁵ *Supra*, note 2 at 5.

king was apparently convinced that the charges levelled against Socrates were serious and, if true, could lead to the subversion of that piety required by the city. This particular aspect of the case occupies only a small part of Allen's analysis. It leads Allen to conclude that the legal system of Athens was defective because it did not specify in sufficient detail the ingredients of impiety: "In a legal system in which rules of criminal law are so loosely defined that it is difficult to say in given cases what specific acts, if any, constitute a breach of them, innocence and guilt lose precise meaning, as does proof."⁶

In specific terms, Allen argues that for some reason Socrates failed to answer the specific charges levelled against him by the chief accusers, Anytos and Meletos. He calls Socrates' defence "a highly peculiar statement,"⁷ for this reason. Allen is correct on this point; Socrates did not directly deny the charges brought against him. Indeed, Socrates' speech of defence appears as a monumental failure in forensic rhetoric. The fact is, Socrates did not employ forensic rhetoric at all. But Allen fails to ask why Socrates did not do so at his trial before the five hundred dicasts; he merely concludes that Socrates failed to defend himself, *i.e.*, that he failed in his only attempt to use forensic rhetoric. However, Allen fails to understand the kind of speech Socrates employed. And despite his implied claim that Socrates was to blame in part for his conviction (because of his failure to argue before the court), he nevertheless places the major blame on Athenian law. Allen claims that Socrates was found guilty:

. . . by no standards at all, except the formal standard of having been voted guilty. Socrates died, not because of what he did, but because he was the sort of man he was. His trial was in effect a political trial, and the fact that it could have taken place as it did constitutes a severe indictment of the legal quality of Athenian law.⁸

This conclusion is based on the mistaken understanding of the trial of Socrates as a normal trial. It was much more than that: it was a trial in which philosophy was called before the bar of the city, a city which philosophy had been chastizing vigorously. Furthermore, Socrates died for what he did.

On the testimony of what Socrates says throughout the *Phaedo* and *Crito*, I would be inclined to say that Socrates would not have indicted "the legal quality of Athenian Law"; rather would he have been inclined to praise it. *Apology* does not give a single reason for casting aspersions on the quality of Athenian law. Not even in the *Crito*, where the justice of Socrates' sentence is discussed, does Plato hint at an indictment of Athenian law. As well, Plato could never have said that "Socrates died, not because of what he did, but because he was the sort of man he was."⁹ Plato could never have said this because he knew that "the sort of man" Socrates was prompted him to do "what he did." A knowledge of the character of the man is indispensable to a knowledge of his deeds.

⁶ *Id.* at 19.

⁷ *Id.* at 11.

⁸ *Id.* at 10.

⁹ *Id.*

The major part of Allen's argument is, however, that Socrates failed in the use of forensic rhetoric. Allen says in this regard that "in circumstances that called for appearing as an ordinary domesticated, farm-yard fowl, Socrates gave himself the character of the fox."¹⁰

Before questioning Allen's contention further, we must give a more detailed account of his claim that Socrates failed in his use of rhetoric. The first thing we note is that Allen is critical of Socrates' failure in this matter. After observing on several occasions that Socrates "does not deny the charges against him"¹¹ and observing that "his speech is rhetorical,"¹² Allen concludes:

Had he [Socrates] chosen to conduct his defence in plain speech, he would have done much to allay the prejudice against him. Instead, he disclaims ability to speak in the course of a masterful speech before an audience thoroughly familiar with the uses of political and forensic oratory.¹³

In sum, Socrates' "use of rhetoric suggested sophistry, and the very skill of his use confirmed the suggestion."¹⁴ In other words, Socrates walked openly into the trap set by the old accusers led by Aristophanes, and thereby gave credence to the charges brought against him by the new accusers led by Meletos.

Allen's account of Socrates' defence in the *Apology* leads him to conclude — albeit reluctantly and sadly — that the wisest old man of all times failed to defend himself successfully. But the failure of Socrates to defend himself before the Athenian dicasts has saddened and perplexed students of both philosophy and the law for many centuries. I believe that considerable light can be thrown on this matter by consulting another Platonic dialogue which treats explicitly the kinds and uses of rhetoric. That dialogue is the *Gorgias*.¹⁵ Since Professor Allen did not appeal to the *Gorgias* in his interpretation of the *Apology*, I shall attempt to correct the oversight in the remainder of this article.

The Gorgias

Allen is undoubtedly correct when he says that it is difficult to understand the kind of rhetoric used by Socrates in this dialogue. And he is correct when he implies that the circumstances, a trial before judges and jury, demanded forensic rhetoric. Yet Socrates did not employ even the minimum of forensic rhetoric, *i.e.*, he did not even deny the charges as made against him. But could Socrates have avoided forensic rhetoric knowingly? Could it be that he used another kind of rhetoric than forensic rhetoric? Allen correctly observes that the five hundred dicasts were "thoroughly familiar with the uses

¹⁰ *Id.* at 14.

¹¹ *Id.* at 11, 12, and 13.

¹² *Id.* at 13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Lysis, Symposium, Gorgias*, W. R. M. Lamb, ed., Loeb Classical Lib. (London: Heinemann, Cambridge, Mass.: Harvard Press, 1926).

of political and forensic oratory."¹⁶ Is it possible that there is another kind of rhetoric which Socrates used and which the dicasts were incapable of understanding? If Socrates used a special kind of rhetoric, then he must surely have done so knowingly. The answers to these questions can be found in the *Gorgias*.

Gorgias is a fighting dialogue which consists of three discussions among Socrates, Gorgias, a famous rhetorician, Polus, a star pupil of Gorgias, and Callicles, an aspiring Athenian politician. The first thing Plato does in this dialogue is to show that rhetoric is not a true art but a sham art, a form of flattery aimed at pleasing but not knowing.¹⁷ But Socrates makes it clear throughout both the *Gorgias* and *Polus* sections that a certain kind of rhetoric is not a sham art.¹⁸ It is that kind which Socrates says he will employ. He even promises Callicles that the kind of rhetoric which he will use "is a rhetoric you never yet saw."¹⁹ Much later in the dialogue Socrates expounds further on this kind of rhetoric. He says: "I was speaking in earnest when I said that a man must accuse himself or his son or his comrade if he do any wrong, and that this is what rhetoric must be used for."²⁰

A major part of the longest section of the dialogue, the Callicles sections, consists of an effort on the part of Callicles to convince Socrates to learn forensic rhetoric. But Socrates says that he shall have no need for forensic rhetoric because he has never done an injustice. As he says: "If ever I am brought before the court and stand in any such danger as you [Callicles] mention, it will be some villain who brings me there, for no honest man would prosecute a person who had done no injustice."²¹ Furthermore, he says that if he is ever brought before the court, "I shall be like a doctor tried by a jury of children on a charge brought by a cook."²²

In an exchange towards the end of the *Gorgias*, Callicles explicitly claims that Socrates will not be able to defend himself if he is ever called before the bar. Socrates replies that it will, in fact, be impossible for him to defend himself as it will be impossible for the doctor to defend himself before a court of children. He would be utterly at a loss what to say:

Such I am sure would be my own fate if I were brought before the court. For I am unable to claim that I have provided them with pleasurable benefits and services — indeed, I envy neither those who provide such benefits and services nor those who accept them. Furthermore, if anyone alleges that I either corrupt the youth by reducing them to perplexity, or revile the older with bitter expres-

¹⁶ *Supra*, note 2 at 13.

¹⁷ See, *Phaedrus*, *supra*, note 3 at 260A, where Phaedrus says:

I have heard that one who is to be a rhetorician does not need to know what is really just, but what would seem just to the multitude who are to pass judgment and not what is really good or noble, but what will seem to be so.

¹⁸ The *Gorgias* points beyond itself to the *Republic*. The missing peak of the *Gorgias* relates to the nature of the just regime in speech which Plato pursues at length in the *Republic*.

¹⁹ *Gorgias*, *supra*, note 15 at 503B.

²⁰ *Id.* at 508B-C.

²¹ *Id.* at 521D.

²² *Id.* at 521E.

sions whether in private or in public, I shall be unable to tell the truth and say: 'It is on just grounds that I say all this, and it is your interest that I serve thereby, gentlemen, the jury' — or to say anything else, and so I daresay any sort of thing, as luck may have it, will befall me.²³

For Socrates, forensic rhetoric is that kind of persuasive and deceptive speech which is employed in court not with a view to the truth but with a view to making something appear to be true. One can do this by a parade of witnesses or a parade of words. Thus, for Socrates, forensic rhetoric involves a degree of deception or concealment. If rhetoric has any use for Socrates, it is for self-correction or the correction of other wrongdoers.²⁴

This key passage in the *Gorgias* explains a great deal not only about how Socrates will be unable to defend himself before a jury of unknowing but it also reveals how he will reprove them if ever called before the court. This is precisely what he does in the *Apology*. Furthermore, we now begin to see that this trial is not like any normal trial and cannot be judged by the criteria of a normal or ordinary trial. This trial is a contest in which a philosopher is called before the bar to defend his activities which the city judges to be subversive.

If there is one thing that becomes clear in this dialogue it is that it points beyond itself to the *Apology* because the fate of Socrates at the hands of the city of Athens constantly emerges throughout.

Socrates says both in the *Gorgias* and in the *Apology* that he cannot cease questioning the religious myths of the city, and by implication one is led to understand that he cannot be an unqualified citizen. The trial of Socrates shows not just an ordinary citizen, but a philosopher of the highest order called to task for questioning the accounts of the gods acknowledged by the city, as well as for teaching the young to question the myths by which that piety prescribed by the city is transmitted. The philosopher is a qualified citizen: his patriotism is tempered by his commitment to natural justice and not to that justice prescribed by a specific regime. His efforts, furthermore, are directed at making the justice of the specific regime (Athens) identical with natural justice. This is why the *Apology of Socrates* is not the only or best apology of Socrates. The *Apology* points to the *Republic* in which the conception of natural justice is fully discussed.²⁵ This dialogue takes place in a friendly setting and explores in thought the conceptions of justice and the character of the just regime in speech (*i.e.*, not an actual existing regime). In the *Republic*, we find Socrates defending in the highest sense the claim that the philosopher or the man of wisdom ought by nature to rule. This is why Socrates says in the *Gorgias* that he is the only one in Athens who practices the true political art.²⁶

All this leads us to understand that that kind of rhetoric which Socrates employs in the *Apology* is and must be accusatory and not forensic. He is a

²³ *Id.* at 522B-C.

²⁴ See, *id.*, Callicles section, esp. 505B-E.

²⁵ See, Allan Bloom, *The Republic: An Interpretive Essay* (New York: Basic Books, 1968).

²⁶ *Supra*, note 15 at 521D.

philosopher with knowledge of the just regime and his efforts, even at his trial, must be to lead his fellow citizens to virtue. Furthermore, this is why Socrates addresses the jury as "Athenian men", or occasionally as "men". Only once does he use the term "judges" and on that single occasion it is addressed to that portion of the jury which voted for acquittal. Socrates was not being petulant here; Plato is saying that since that portion perceived the truth and judged truthfully, it alone was entitled to be called judges. But contrary to Allen, the purpose of a trial is not to establish the truth;²⁷ the truth is pursued in dialectic or philosophic discourse. The normal trial is an adversary setting where one attempts to persuade that a specific charge or set of charges is or are justified. As Socrates says in the *Phaedrus*, "For in the courts nobody cares for truth about these matters [*i.e.*, good or just men] but for that which is convincing."²⁸ And conviction or persuasion is a pursuit of rhetoric (and especially forensic rhetoric), whereas the discovery of the truth is the proper pursuit of philosophy. Socrates did not use rhetoric as an effort to persuade; rather did he use that form of philosophic rhetoric in which the truth is sought by way of reproving the Athenians. But since the quest for the truth means that the philosopher must question the opinions of the city in the interests of rising from opinion to knowledge, he is by nature a subversive. As Allen correctly states on several occasions, Socrates wounds his audience by questioning the opinion which a majority holds as truth.

In short, we must conclude that the reason why Socrates does not deny the charges brought against him is because he was guilty *as charged*. He did indeed question the myths of the city of Athens and teach that the unexamined life is not worth living; the young were indeed instructed to pursue justice simply and to attempt to bring the justice of the regime in line with natural justice; *i.e.*, Socrates was truly subversive.

We must not view the trial of Socrates, therefore, merely as the trial of a specific Athenian citizen by an Athenian court. Plato makes it clear in all the dialogues relating directly or indirectly to the trial and death of Socrates that the most important lesson to be garnered is the dangerous nature of the relationship of the philosopher and the city. (The fact that philosophers are no longer viewed as a danger to the political order is an implicit commentary on the nature of philosophy today more than anything else.) The Socratic or Platonic view of the relationship of the philosopher to the city prevailed as late as Dr. Bonham's case²⁹ (albeit in the context of Christian natural law as opposed to Socratic natural right), but with the rise of positivism and the Hobbesean conception of absolute civil sovereignty,³⁰ the "philosopher" is no longer a threat because legal philosophy (in particular) has become an instrument by which the "philosopher" aids and abets the civil power by his positivism.

²⁷ *Supra*, note 2 at 9.

²⁸ *Supra*, note 3 at 272D-E.

²⁹ (1610), 8 Co. Rep. 114a; 38 Digest (Repl) 85, 596. Coke argues in this case that natural law is a standard by which a Judge must judge even acts of Parliament and declare them "utterly void" when found to be inconsistent with the natural law.

³⁰ See, John Austin, *The Limits of Jurisprudence Determined*, Lecture VI (London: Weidenfeld and Nicholson, 1965). Introduction by H. L. A. Hart.

This leads us back to the question posed at the opening of this article: would we today condemn Socrates if he were brought before our courts of law dominated by legal positivism? Legal positivism — under the influence of Hobbes, Austin and Bentham — has repudiated the Socratic conception of natural justice and teaches that the sovereign power of the state determines what justice is. As Austin says explicitly upon the authority of Thomas Hobbes, “positive law is the measure or test of legal justice and injustice.”³¹ Furthermore, he claims that “justice is nearly equivalent to general utility.”³² A reading of the *Republic* and the *Gorgias*, especially the Callicles section, makes it clear that Socrates confronted and repudiated this conception of justice. In other words, were he in our midst today he would be actively and openly questioning and repudiating the very foundation of our legal and political order.³³ One can only guess as to whether he would be condemned to death for such activity. Two things are certain: Socrates would be even more uncomfortable in our midst than he was in Athens, and there can be no doubt that Socrates would appear as a threat to the state in our day.

³¹ *Id.* at 261.

³² *Id.* at 263.

³³ “The dominant legal philosophy of the Canadian judiciary is English positivism”: J. C. E. Wood, *Statutory Interpretation: Tupper and The Queen* (1968), 6 O.H.L.J. 92 at 92.

