

CLEMENCY AND JUSTICE IN THE *DE CLEMENTIA* OF SENECA*

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The present paper is intended to address some questions concerning the concept of clemency as it appears in the *De clementia* (*On clemency*), a treatise by Seneca the Younger. These questions are twofold. On the one hand, I would like to examine the conceptual relationship between clemency and justice, while on the other hand, I am going to deal with the place of clemency within the framework of Seneca's philosophy of law.

Before turning to these questions, I think it is in order here to mention some of the problems related to the text of the *De clementia*, a rather puzzling piece of the textual tradition of Roman literature. It seems that what we have at hand is only a part of the complete work. As Seneca himself tells in the introduction, the work is divided into three parts.¹ “The first will treat of the remission of punishment;² the second will aim to show the nature and aspect of mercy; [...] In the third place I shall inquire how the mind is led to adopt this virtue, and how it establishes it and by practice makes it its

* The present article is the slightly revised and annotated version of my paper presented at the 2nd UCD Legal Research Conference in December 2007 at the University College Dublin. It reflects a first encounter with the issues raised here, which I hope to discuss in details in a further study.

¹ The text of the *De clementia* is quoted in the English translation of J. W. BASORE, as published in The Loeb Classical Library: LUCIUS ANNAEUS SENECA: *Moral Essays*. London: Heinemann, 1928–1935. Vol. 1, 356ff.

² The manuscripts of the *De clementia* contain the—probably corrupt—reading *manumissionis* as the topic of the first part. Several conjectures were suggested since the earliest editions of the work: a great number is listed in the commentary of P. FAIDER—CH. FAVEZ—P. VAN DE WOESTIJNE (eds.): *Sénèque: De la clémence*. Bruges: De Tempel, 1950. Vol. 2, 48f and (with further references and yet another suggestion) G. MAZZOLI: Sulla divisio del *De clementia* di Seneca. *Athenaeum*, 1974/52. 289ff. Yet one has to agree with the comment of F. Giancotti (quoted by B. MORTUREUX: *Recherches sur le “De clementia” de Sénèque. Vocabulaire et composition*. Bruxelles: Latomus, 1973. 39f, n. 1.): “Either the obscure passage summarises the content of the first part that may be analysed and defined by ourselves directly on the basis of the text [...]; or the point in question comprises a reference that does not correspond to the actual first part, and is the trace of an intention the author did not carry out, and therefore it is not of fundamental importance for the structural examination that has to be based on reality rather than intention.”

own.” (1.3.1) The manuscripts of the text, however, seem to contain only the first part, and some introductory paragraphs from the second one, while the rest is lost to us. The fragmentary state of the text allows us to think of several possibilities in terms of its history. The most obvious one is that Seneca has completed his work, but the latter part of it was lost during the centuries. Another possible explanation is that Seneca did not finish writing the treatise—in that case, one could speculate whether the extant part of Book II is the final draft or just a rough sketch—or even whether it was written by Seneca himself or by some impostor later on.³ The reason why one should consider these interesting possibilities is the difference between the topic, the style, and even the vocabulary of the two books.⁴ There are some parts that contradict each other more or less explicitly: any attempt of an interpretation has to face that problem.

Yet what is much more important for those investigating the history of legal thought is the question of the legal character of the concept of clemency as it is elaborated on by Seneca. I am going to mention here only three pieces of 20th-century classical scholarship that all address this problem to some extent.

Manfred Fuhrmann’s 1967 article, *Die Alleinherrschaft und das Problem der Gerechtigkeit*, gives a most detailed interpretation of the treatise and claims that it was composed on the basis of subtle ideas on clemency as a legal concept.⁵ According to Fuhrmann’s final analysis, clemency can be understood as an equivalent of *aequitas*, the principle of Roman law that served particular justice as opposed to the general justice of the laws. He then tries to identify clemency as the consideration of mitigating circumstances which cannot possibly be included in general rules but are capable of being pondered by the judge.⁶ Fuhrmann’s ideas have provoked a response from the part of another German classicist, Karl Büchner.⁷ In his devastating critique of Fuhrmann’s theses Büchner argues among other things that the concept of clemency is far from being a legal one. On the contrary, it lacks any reference to rules: it is that very character that makes it an adequate topic for a treatise addressed to the omnipotent ruler of Rome. Although law is one of the contexts where the prince can properly practise his clemency, Büchner adds, one should not regard that connection as necessary.⁸ Unlike Fuhrmann and Büchner, Bernard Mortureux approached Seneca’s text through its composition. In his study published in the same year as Fuhrmann’s article,⁹ he uses law as a background for, or as the paradigmatic instance of the manifestation of clemency.¹⁰

³ For discussion of these problems, see e.g. B. MORTUREUX: Les idéaux stoïciens et les premières responsabilités politiques: Le “De clementia”. In *Aufstieg und Niedergang der römischen Welt* 2.36.3 (1989) 1645ff.

⁴ See the third part of my paper below.

⁵ M. FUHRMANN: *Die Alleinherrschaft und das Problem der Gerechtigkeit* (Seneca: De clementia). *Gymnasium*, 1963/70. 481ff.

⁶ See eg. *ibid.* 205f.

⁷ K. BÜCHNER: Aufbau und Sinn von Senecas Schrift über die Clementia. *Hermes*, 1970/98. 203ff.

⁸ See esp. *ibid.* 222f.

⁹ MORTUREUX (1973) *op. cit.*

¹⁰ See *ibid.* 65ff, where he claims that the first half of Book I deals with clemency on a philosophical level, showing that it “conforms to *ius*”, while the second half is mainly concerned with practical morality, and presents the *clementia* of the prince as “conforming to *aequitas*”.

In the following I will examine the content of both Book I and what is left of Book II, trying to identify what role the legal allusions play in the depiction of clemency and how clemency is linked or opposed to justice. I am going to argue that although Seneca's treatise is not composed as a textbook reiterating Stoic views in a systematic form, its extant text can be understood as parts of a well-composed work that has a recognisable plot. Within that plot, legal hints play a more important role than just that of a background or example. Moreover, the inherent future-oriented tendency of clemency makes that virtue part of the more general concept of justice, and it also links it to law as conceived of by Seneca and his Stoic predecessors.

I

Let us first see, then, how the text of Book I is built up and how the virtue of clemency appears in it. Although virtues do not have a prize but themselves, Seneca states, Nero might be proud as he takes a look at himself and his deeds of an emperor. "Serving as a mirror", he puts a short speech in Nero's mouth, that both tells about his unlimited power and his humane and clement use of that power. Seneca then adds that Nero is much more admired by all his subjects than was any of his predecessors, and that it is due to his virtues, among which clemency is the most admired one: the reason for that is the fact that clemency is the virtue that serves every human being, because there is no "man so wholly satisfied with his own innocence as not to rejoice that mercy stands in sight, waiting for human errors." (1.1.9) Furthermore, clemency might sometimes favour even those, who are really innocent or virtuous, because it may occur that good fortune and virtuous deeds are subject to punishment. (1.2.1) Yet clemency should not be exerted without any distinction: "for it is as much a cruelty to pardon all as to pardon none." (1.2.2) The rest of Book I then serves as an epideictic speech, presenting the clemency of the ruler from various points of view. The basic claim of Seneca is that "of all men none is better graced by mercy than a king or a prince." (1.3.3) He further argues that the clemency of the ruler does not only serve his subjects, but also his own good, because the ruler and the ruled are linked to each other like the soul and the body: by favouring each other, they also act in their own interest. Moreover, the ruler's position is one of very strict obligations following from his power. Here, Seneca makes use of an analogy: the power of the emperor is like the power of the gods, "In this lies the servitude of supreme greatness – that it cannot become less great." (1.8.3) His actions are paid attention to by all his subjects: he cannot do anything without public attention. His immense power therefore causes fear even in those who are not struck by it. Therefore, Seneca warns, "the cruelty of a king by removing his enemies increases their number; for the parents and children of those who have been killed, their relatives too and their friends, step into the place of each single victim." (1.8.7)

Seneca gives an example for the clemency of the good ruler: he mentions Augustus' behaviour against Cinna, who planned to kill him. He then compares the young Nero to Augustus, and states that he is a much better ruler, because his clemency was not preceded by a huge number of cruel deeds. Clemency, he continues, is the main difference between the king and the tyrant, and it is the reason why a tyrant cannot

live in security, while the good king is best protected by his own subjects. A second analogy is that of a father, who uses his power over his children only in their interest, even if he has to punish them. That is supported by another Augustan example, in which the *princeps* took part of a *iudicium domesticum*, and suggested that the son who had attempted to kill his father had to be relegated rather than killed or imprisoned. But it is not only the father who is in a superior position: the military officers rule the soldiers, the horse-breaker rules the horses, the hunter rules his dogs, and they all have to temper their harshness against those subordinated to them. Punishment is then compared to healing, since sin is the disease of the soul. “[T]he aim of the prince–Seneca claims–should be not merely to restore the health, but also to leave no shameful scar.” (1.17.3) Even in the case of slaves, one has to exert clemency – and the subjects of the ruler are not to serve his interests, but he is supposed to protect them. The clemency of the good ruler is his most beautiful virtue and his strongest protection.

Seneca then scrutinizes the question of punishment. In the case of an injury committed against him, the ruler has to be even more lenient than in others’ cases. He does not need to seek comfort or safety by retaliating for his injuries. His clemency is the best evidence of his superior position, and it also serves his good reputation, since those to whom he granted a pardon will be the living proof of his virtues. As for the injuries committed against others, the ruler has three principles to take into account: the punishment has to correct the guilty, to serve as an example for all the others, and to provide safety for the innocent by eliminating the sinners. All the three objectives are best served by clemency, since grave and frequent punishing leads to the devaluation of punishment, and it also shows how many the guilty are in the society. The last chapters of Book I emphasise the link between cruelty and tyranny, making a contrast to the clemency of the good ruler.

II

Let us now take a closer look at the passages where clemency appears in an explicitly legal context. The first such passages can be found in the introduction, where the speaker is the *princeps* himself. He claims that he is “the arbiter of life and death for the nations” (*vitae necisque gentibus arbiter*), that “it rests in my power what each man’s lot and state shall be” and „from my utterance peoples and cities gather reasons for rejoicing”, as the fate of the nations “is mine to decree” (*mea iuris dictio est*) (1.1.2). Later on, he also says that “I so hold guard over myself as though I were about to render an account to those laws which I have summoned from decay and darkness into the light of day.” (1.1.4) These statements all serve the aim of circumscribing the position of the good ruler, the *bonus princeps*, who is above all human beings, even above human laws – only the immortal gods, of whom he is the representative on earth, could “require a reckoning” from him. Seneca then adds some praise in his own words, mentioning that under the reign of Nero, “justice [is] enthroned above all injustice” (*ius supra omnem iniuriam positum*). (1.1.8) In the second part of the introduction, Seneca defends his choice of topic against those, who claim that clemency only favours the guilty, “since it is superfluous unless there has been some crime, and since it alone of all the virtues finds no exercise among the guiltless” – he answers that “though it is

those who deserve punishment that invoke it, yet even the guiltless cherish it.” Then he adds two more arguments: on the one hand, clemency might save innocents, “because at times fortune takes the place of guilt”; on the other hand, clemency sometimes helps the virtuous as well, as “from the state of the times, there arise certain acts which, while praised, may yet be punished”. Seneca has to admit that clemency is most often exerted towards the sinners: in that case, “there are a great many people who might be turned back to the path of virtue if ‘they are released from punishment’.” (1.2.1) Yet clemency has to distinguish between the corrigible and the incorrigible, in order to avoid injustice – “but since a perfect balance is difficult, if anything is to disturb the equipoise it should turn the scale toward the kindlier side.” (1.2.2) These introductory statements illustrate the twofold character of the Roman concept of clemency.¹¹ On the one hand, clemency refers to moral and political considerations that are outside of the legal sphere: their origins may lie in the Roman idea of the relationship between the community and the defeated enemy, and that of the relationship between the *pater familias* and his children – without any reference to a state legal order and its coercive power. Both ideas appear in the text of the *De clementia*, where they play the role of comparisons, helping the author to build up arguments based on analogies. There is, however, another sphere associated to the concept of clemency, that of the gods. As several parts of the fictive speech of Nero show it, the political propaganda of the new *princeps* was strongly drawing on—not necessarily Roman—religious ideas.¹² Here too, Seneca is going to create an argument of that. But what is more interesting for us, the clemency of the gods is likewise outside of—we might say above—human laws. Yet Seneca tries to bring all these aspects closer to the relatively new idea of clemency as the virtue of the political ruler acting as a judge. That latter aspect of clemency first appears in the speeches of Cicero, where he pleads for some of Caesar’s enemies after the civil war.¹³ In that context, Cicero tries to persuade Caesar not to punish those who could be rightly considered as guilty of crimes committed against his person – and the *res publica*. What is new in that concept is that it implies the superior position of the one exerting clemency, while it also refers to the laws of the *res publica*. Now, Seneca tries to combine the two aspects in his treatise. He suggests that the *princeps* stands above all laws: he claims that his word is the law for the nations and that Nero behaves *as if* he was responsible to the laws he brought back from oblivion (Seneca does not go into details about the exact character of these laws). And yet he claims, albeit indirectly, that the ruler is subject to the will of the gods: he eventually should give an account of the whole of humankind to them. That is later confirmed by an analogy: just as the gods are lenient towards the ruler, also the ruler should be lenient towards their subjects.¹⁴

¹¹ For an overview see K. WINKLER: *Clementia*. In *Reallexikon für Antike und Christentum*. Vol. 3. Stuttgart: Hiersemann, 1957. 206ff.

¹² See P. GRIMAL: *Le De clementia et la royauté solaire de Néron*. *Revue des Études Latines*, 1971/49. 205.

¹³ Cicero’s speeches *Pro rege Deiotaro*, *Pro M. Marcello*, and *Pro Q. Ligario* have to be mentioned here.

¹⁴ This twofold approach to the position of the ruler corresponds to the Hellenistic theories of *endoxos douleia* and *nomos empsukhos*. On these (Stoic and Neopythagorean) theories and their influence on Seneca’s argument see T. ADAM: *Clementia Principis. Der einfluss hellenistischer Fürstenspiegel auf den Versuch einer rechtlichen Fundierung des Principats durch Seneca*. Stuttgart: Klett, 1978, esp. ch. 2–4.

At the end of the introduction, Seneca focuses on the question of crime and punishment. That might well be read in a way that those who oppose clemency could be understood as some in Nero's political environment, who think that the new *princeps* should be more severe against his enemies.¹⁵ Yet I think that the traditional reading of that passage, ie. that the opponents of clemency would be fundamentalist Stoics – like those, whose opinion is put forth at the beginning of Book II, has at least something of truth. The problem of punishment and the question of how clemency has to be exerted appears three times in Book I in a context that evokes—to say the least—some legal imagery. These are, on the one hand, the two examples taken from the life of Augustus, and, on the other, the remarks on the causes and aims of punishment by the *princeps*.

As for the first example, where Augustus is informed that Cornelius Cinna plans to kill him and hesitates whether to punish the traitor or not, and then—following the advice of his wife—decides to let him go unpunished and, what is more, as his friend, the political aspect of clemency seems to outweigh the legal considerations. Yet it has been observed that the situation in which Augustus speaks to Cinna is similar to that of a judicial process. Strangely enough, Augustus himself plays the role of the accuser and the judge, but also that of the defendant, bringing up some considerations that could justify Cinna's decision.¹⁶ We know that from the time of Tiberius, Roman legal procedure began to be shaped according to the changed political conditions: there appeared the *cognitio extra ordinem*, reflecting the supreme power of the *princeps*.¹⁷ Taken together with the utilitarian considerations which appear both in the advice of Livia and in the comments Seneca adds, the legal scenery emphasises the fact that in the principate the person of the ruler becomes identified with the *res publica*. Consequently, I do not think that political and legal considerations should be separated from each other when interpreting that short narrative. The same goes for the second example. Here, Augustus takes part of a *iudicium domesticum*: the senator Tarius is to pass judgement on his son, who has tried to kill him. The clemency of the *princeps* manifests itself in the fact that having decided together that the son is guilty, he suggests the mildest punishment possible: the son should go into relegation, but not too far from Rome, in order not to cause grief for his father. The most interesting detail of the story is that Augustus is making efforts to act as a private man, to detach himself from his role of the omnipotent *princeps*. He leaves the sphere of the *iudicium domesticum* to be ruled by the *pater familias*, and lets him exert clemency on his own right. He behaves, once again, as if he was subject to the laws – although Seneca tells us that he could have taken the process in his hands or could have influenced the vote about the guilt of the son.

Seneca's explanations on the reasons why the prince might consider it justified punishing somebody and why he still should be rather lenient in every case, were summarised above. Here again, legal and political considerations seem to be very

¹⁵ As eg. BÜCHNER op. cit. 207 does.

¹⁶ MORTUREUX (1973) op. cit. 27.

¹⁷ Ibid.

closely connected to each other, as they were in fact at that period of Roman history. The link is, as I already mentioned, the person of the *princeps*. Seneca has to take monarchy into account: it is that very cause why he has to address the ruler of the *res publica* in his treatise, and also the reason why he deals with *clementia* rather than *aequitas* – I am going to come back to that after discussing the second part of the treatise.

III

Book II begins with a story about Nero: Seneca quotes his words: “I wish I could not write”, which he told when he had to sign some sentences. This is followed by the definitions of certain virtues and vices that seem to be very close to each other. *Clementia* and *severitas* are presented as virtues, and therefore, Seneca claims, they cannot be opposed to each other. The two opposing vices are *misericordia* and *crudelitas*. What is common in both virtues and both vices respectively is that *clementia* and *severitas* are moderate, while *misericordia* means relentless mercy and *crudelitas* relentless severity in the punishment.¹⁸ These oppositions seem very clear, but they make the whole of the text somewhat puzzling: first, *misericordia* was referred to as something morally good throughout Book I; second, they still do not tell us enough about the relationship between clemency and justice.

As for the first problem, one could answer that the introduction clearly shows that Book I and Book II differ both in their topic and their point of view. On the one hand, we have seen that Book I is devoted to the importance of clemency, showing how closely it is linked to the nature of human beings in general and the position of the *princeps* in particular. Book II, in turn, deals with the conceptual analysis of clemency: it is intended to help the reader to distinguish between clemency and those vices that are easily mistaken for it. On the other hand, it is also told in Book I that it is hard to act with real moderation. The practical principle of decisions should be that if one misses the just measure (*aequum*), then it is better to do so for the sake of humanity (*in partem humaniorem*) than to err in the opposite direction. Book II, in contrast, deals with concepts and their ideal content: Seneca explicitly tells that Nero has the potential to be a good ruler – but he does not say that the virtues can be found in him in their perfect forms.¹⁹

As for the relationship between clemency and justice, we have seen that Seneca admits it is easy to miss the just measure in punishment and mercy. Yet I think that there is a passage that might be particularly illuminating. In distinguishing between pardon (*venia*) and clemency, Seneca claims that the latter does nothing „as if it were doing less than is just, but as if the justest thing were that which it has resolved upon.”

¹⁸ On the opposition of *clementia* and *misericordia*, see G. FLAMERIE DE LACHAPPELLE: Trois traits négatifs de la *misericordia* dans le second livre du *De clementia* de Sénèque. *Les Études Classiques*, 2006/72. 309.

¹⁹ Cf. J. DINGEL: *Misericordia Neronis*. Zur Einheit von Senecas “De clementia”. *Rheinisches Museum*, 1989/132. 166.

(2.7.3) Already at the beginning of the conceptual analysis, Seneca mentions that some might think that clemency cannot be a virtue, as it implies that someone gets less than his due share, i.e. is punished less than what he deserves. Now, if one has to maintain the position that clemency is a virtue, it cannot contradict justice, which undoubtedly is a virtue. But how to understand, then, the phrase “as if the justest thing were”? Different interpretations of that passage were suggested so far in scholarly literature.²⁰ In my opinion, the question can be best answered with reference to the timely dimension of clemency. In that case, it leads to the interpretation that pardon (*venia*) simply states that someone deserves to be punished, but refrains from punishing – committing thereby injustice. Clemency, in turn, is well aware that someone’s deeds deserve punishment – but also takes into account the possibility that the guilty one might also perform some honourable deeds in the future, which can compensate for their sins.²¹

IV

Summing up the lesson of the *On Clemency* for legal philosophy, I am going to reconsider the content of Book I, and the judicial scenes in particular, with the help of the insight concerning the temporal dimension of clemency.

It was already stated by Karl Büchner that clemency has a character of looking into the future – yet he considered that to be a feature that links clemency to the aspect of usefulness (*utile*).²² Not contesting that Seneca shows—particularly in the example of Augustus and Cinna—how useful it is if the ruler can make his enemies his friends through clemency,²³ I think one has to bear in mind that in Stoic ethics usefulness and rightfulness are but two aspects of the same concept of virtue. The temporal aspect of clemency thus makes part of both the *honestum* and the *utile*. This can be observed in the second example as well: what is emphasised by Augustus during the trial of the delinquent son is that his nature is not incorrigible (1.13.7: *se, quod proximum erat ab innocentia, timide gessisset*) that alludes to Seneca’s introductory remark that clemency only has place towards those who can be led back to innocence (1.2.2).

Büchner still argues that clemency is not necessarily connected to the sphere of law, although it can well work within that sphere. One has to admit that virtues can hardly be identified with particular juristic concepts, as eg. Manfred Fuhrmann identifies clemency and *aequitas*. Yet I think that in the context of the *De Clementia* the legal allusions have a greater role than just that of scenery of the illustration. In the case of Nero, one cannot exactly distinguish between what is legal and what is moral or political. It is, to be sure, a consequence of the political reality witnessed by

²⁰ See eg. BÜCHNER op. cit. 206, and *ibid.* n. 1.

²¹ The temporal dimension of justice would need a more thorough examination, which would reach well beyond the limits of the present paper. I only would like to cite here a passage of Aristotle’s *Rhetoric*, where he speaks of equity (*epieikeia*): „Equity bids us [...] to ask not what a man is now but what he has always or for the most part been” (1374b15–16, transl. W. RHYS ROBERTS).

²² BÜCHNER op. cit. 208, speaking of “the future from the statesman’s point of view”.

²³ Cf. MORTUREUX (1989) op. cit. 26.

Seneca. But it also allows him to place the reign of Nero within the context of the order of the universe – we might say, within the context of natural law. It is through that framing that the responsibility of the *princeps* can gain its normative character, just as the duties of the citizens towards the *princeps* could be confirmed by a natural-law argument underlying the ideas of Seneca.

It is commonly held that—in the words of Michel Villey—“Stoicism [...] is a *moral* doctrine rather than a political or legal one.”²⁴ One has to bear in mind, however, that Villey looks at the history of ideas from the perspective of *la pensée juridique moderne*: instead of discussing modern authors, he retells the story of pre-modern legal thought for his contemporaries, applying the modernist distinction between law and morals. Justified as it may be, this point of view cannot—and is not intended to—account of Seneca’s ideas of clemency. True, according to textual evidence, Stoic philosophers used the notion of law in the sense of cosmic laws that rule the universe, independently of human legislation. As Malcolm Schofield puts it, in Stoic thought “political vocabulary is depoliticized.”²⁵ But Seneca is not only speaking of law or morals in general, but he also places clemency within the framework of Nero’s reign. On the one hand, he speaks of law in the Stoic sense, where he makes Nero mention laws he “brought back from oblivion”, while on the other hand, he illustrates the practice of clemency by examples where the ruler is acting as a judge.

Seneca makes it clear that the *princeps* is not bound by human laws. His only duties are those against the gods, ie. those that follow from natural law. But the *princeps* is governing his subjects through the rules he makes and enforces, ie. through positive law. From the fact that he can apply or put aside previously existing positive rules it does not follow that his decisions do not have legal force. To sum up: clemency is not a concept of positive law, since as a virtue it is part of the natural law – on the other hand, however, it functions within the sphere of (human) law, at least if it is exerted by the *princeps*.

²⁴ M. VILLEY: *La formation de la pensée juridique moderne*. Paris: Presses Universitaires de France, 2003. 101, with reference to his *Leçons d’histoire de la philosophie du droit*. Paris: Dalloz. 1962.

²⁵ M. SCHOFIELD: Social and political thought. In *The Cambridge History of Hellenistic Philosophy*. Cambridge: Cambridge University Press, 1999. 766.

