

In Search of the Origin of the Notion of *aequitas* (*epieikeia*) in Greek and Roman law

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1 Introduction

It is now more than 60 years since Fritz Schulz' monumental work, *History of Roman Legal Science* was published in Oxford in 1946. Since then there appeared some substantial studies on this subject such as Wolfgang Kunkel's *Herkunft and Sozial Stellung der römischen Juristen* (2nd. ed.1967. rep. 2001). But above all, Tony Honoré's works are outstanding.

This essay has two origins, the one from the IEEE ICRA2013 SCIENCE FORUM - Karlsruhe, 10 May 2013, organised by Professors Yoshihiko Nakamura and Giulio Sandini; the other from the conference of South African Society of Legal Historians, 12-16 May 2013 in North-West Province of South Africa, organised by Professors Rena Van den Bergh and Phillip Thomas.

Special thanks are due to the organisers and the participants at the both occasions. It is hoped that this essay could reduce, even to a tiny degree, the large and long-standing debts of mine to Professor Tatsuya Yoshihara, whose extremely wide range of academic interests and contributions to the 'Altertumswissenschaften' have always astonished his colleagues and friends with pleasure.

Honoré's works can be divided into two groups. The one is concerned with the reconstruction of Justinian's Digests. It started from the article of Honoré and Alan Rodger, 'How the Digest Commissioners worked' in *ZSS* in 1970 and continued until his recent book, *Justinian's Digest -Character and Compilation-* Oxford 2010. The other group consists of a series of the biographical studies of individual Roman lawyers, Gaius (1962), Tribonian (1982), and Ulpian (2nd. ed. 2002).

Schulz' division of the history of Roman legal science is as follows;

Part I, the archaic period;

Part II, the Hellenistic period;

Part III, the classical period;

Part IV, the bureaucratic period;

Schulz concludes; the ideal jurisprudence which Cicero envisages was never achieved and disappeared into the bulk of casuistic solutions which piled up in the classical period. The result of classical jurisprudence was a kind of Digest's model which was not systematized as the one Cicero hoped to be.

What is Cicero's model? Schulz emphasized the importance of the methodology which the philosophers, Cicero and Plato in particular, employed in their philosophical writings. This is the dialectical method in which division and distinction between the concepts play an essential role. Also, it is necessary to define each concept, otherwise it is impossible to draw a distinction between the two. This method can be compared to that of mathematics.

As the result of the dialectical method, the genus and species come out, then by the further dialectic working, the species will be divided into sub-species and going on. As the result of the whole process, a sort of pyramid system will come out and the all the concepts will be grouped into the categories and sub-categories.

2 Tony Honoré on *aequitas*

Tony Honoré, in his book entitled *Ulpian*, claims that Ulpian is 'the first lawyer who can, given the scale of his work and its influence, properly count as the pioneer of the human rights movement' (76). He quotes Ulpian's famous passage, (D.1.1.1.pr,1) and says as follows;

'There he (Ulpian) derives the term 'law' (ius) from justice and relates it to four interconnected elements: art, religion, ethics and philosophy. Law is the art or technique of the good and equitable. Lawyers can rightly be called priests of the law, for they mark off the equitable from the inequitable, the lawful from the unlawful, and try to make people good by providing threats and incentives. They cultivate true, not sham philosophy.' 'The 'elegant' view, that the law is the art of the good and equitable, comes from Iuventius Celsus, who wrote a century earlier.' (76-77)

Honoré goes on to say; Ulpian's thought follows on the same line as Galen's. He combines the belief, stated by Celsus, that law is an art with the view, put earlier by Cicero in the mouths of Atticus and Marcus (Cicero, *de legibus*, 1.5.17), that the discipline of law must be based on philosophy. Ulpian's search for a philosophy underpinning law is not surprising.

To understand his 'true philosophy' more precisely, we must pinpoint the sham philosophy with which he contrast it.

The interpretation of the sham philosophy is as follows; First, it is, as Plato puts it, not Sophistry. Second, the sham philosophy lacks utility, a notion which Ulpian often appeals. Third, it is hypocritical. Fourth it may lend itself to irrational techniques. (78-79).

But Ulpian's view that the lawyers aim at the true philosophy goes, I (Honoré) believe, beyond a concern with right and wrong and a rejection of philosophy that is unpractical, dishonest, or irrational.

One way in which this is shown is in the emphasis in his writing on what is

natural, including natural equity. Ulpian interprets the natural differently from his predecessors such as Gaius. Ulpian takes the law of nature not to be embodied in common custom, the *ius gentium*, but to be morally superior to it. In the conditions of his time this was a rational point of view. Roman law had been extended to all the free peoples of the empire, so that the contrast between civil law and common custom was now of purely historical interest. Roman law had in effect become the *ius gentium*. The role of natural law in justifying some institutions and criticizing others persisted but was wider than the role formerly performed by the *ius gentium*. Slavery is the prime example of an institution contrary to nature but recognized by the *ius gentium*, which 'encroached on' (*invasit*) the law of nature.

Lawyers must be faithful to the wording of the authoritative texts, take account of the purposes they embody, and try to reach conclusions that are morally acceptable in the particular case. Ulpian is conscious of all three aims but inclines to give priority to achieving an equitable solution in particular instance. Nevertheless, it seems that Ulpian's outlook was predominantly Stoic. He shares with the Stoics the view that we are born free and equal and should live according to nature.

The Stoic thinkers and those influenced by Stoicism whom Ulpian is most likely to have absorbed are Chrysippus, the emperor Marcus, and in ethical matters Cicero. Marcianus, almost certainly Ulpian's pupil and the lawyer who most resembles him in style and thought, cites the definition of law by 'the leading Stoic philosopher Chrysippus'. Law is sovereign over all things divine and human. It should preside over the good and the bad alike and be the criterion of what is just and unjust. It should be the leader and ruler of those called by nature to live in society, prescribing to them what is to be done and what avoided. The passage cited from Chrysippus agrees closely with Ulpian's disposition of law in relation to philosophy, religion and ethics. It supports the idea that the philosophy he has in mind is mainly Stoic (79-81).

Then Honoré discusses equity as follows (93);

A Value that Ulpian stresses at least as much as utility is fairness or equity (*aequitas*). Equity is related in his thinking to 'equality', not directly, but in the sense that it requires the interests of each person to be taken into account and given equal weight. --- Ulpian often denounces craftiness (*calliditas*) and stresses provisions in the edict directed against crafty, or those who exploit others, or which serve to protect the ill-informed. The special feature of natural equity is that it operates even when the civil law does not cater for the problem. Natural equity is not fundamentally different from civil equity, but equitable solution to a problem may or may not already have been embodied in the civil law (93).

This is the main narrative of Honoré's view on the philosophy of Ulpian. Honoré tries to understand and appreciate Ulpian's philosophical foundations in much wider contexts than before, which are apparently of Stoic philosophy.

Scholars on the history of Roman legal science have been recently paying more serious attention to the classical and bureaucratic periods (schulz' term) than before. Honoré's works can be called best examples in this direction of the Scholarship.

In his book, Ulpian, Honoré has found a way in which Ulpian places his philosophical grounds on the Stoic is the concept of natural law. This is because, as Honoré argues, after the Antonian Constitution (constitutio Antonina of 212 A.D. the *ius gentium* (customs of the peoples, nations) had merged with *ius civile* and as its result, the natural law came to have a wider capacity and function than before. The natural law (law of nature) has now become a weapon by which the hitherto justified legal institution of slavery and Ulpian did use it not with the purpose of abolishing the slavery but for opening some possibilities of rights of slaves and freedmen and womens. Etc.

This is the main line of Honoré's argument. Then, he talks about the notion of *aequitas*, equity. According to Honoré, Ulpian's view of equity is something like equality, I do not know whether or not, there is an etymological connection between

559— In Search of the Origin of the Notion of *aequitas* (*epieikeia*) in Greek and Roman law (葛西) equity and equality. Honoré's view of Ulpian's understanding of equity does not seem to be well evidenced (93, notes 163-168). Indeed, the validity of the agreement under the influence of the third party is discussed in Hyperides, *Against Athenogenes*. (Kasai (2010), 124)

If there is no fundamental difference in equity between (now new) civil law and natural law, what does it mean by 'ars boni et aequi'. There seems to be no substantial study on the notion of equity in Roman law.

3 *epieikeia* and *eikos* in Greek philosophy, rhetoric and law

In this chapter I shall look at the origin of the notion of equity in Greek rhetoric and law. The Greek word, the meaning of which is equity, is *epieikeia*. This term is the compound word of *epi* (preposition, 'upon') + *eikos*. The literal meaning of *epieikeia* is 'upon *eikos*'. What is *eikos*?

In my essay, 'A space for *epieikeia* in Greek law' (Kasai(2010)), I discussed *epieikeia* mainly in Aristotle's *rhetoric* and the forensic oratory. The main arguments can be summarized as follows;

Firstly, *epieikeia* is discussed by Aristotle's rhetoric in the context of the division of law and the division of law is further discussed in the context of the wrongs or wrong-doings (*adikein, adikia*).

Secondly, the taxonomy of law is as follows; (1) the particular written law which is equivalent to the positive law, (2) the universal unwritten law which is equivalent to the natural law, (3) the particular unwritten law which is either customary law or equity (*epieikeia*). Then, why does *epieikeia* come to play a role in the law? Aristotle says as follows; *Epieikeia* comes from either lawgivers' intention or without their intention. Why does *epieikeia* happen intentionally? It is because lawgivers are well aware that they are not able to define all the possible cases beforehand and so feel it is necessary to declare in general terms, while also adding the provision of *hos epi to*

poly. The meaning of *hos epi to poly* is, 'in most cases', 'not necessarily'. The idea behind this is 'with allowance for exceptions'. This concept is, I think, the key to appreciate Aristotle's understanding of the written law. Put it briefly, it declares an awareness of the incompleteness of the written law.

This phrase also forms a crucial concept in the logical foundations of rhetoric which are discussed in the early chapters of rhetoric, especially in Aristotle's *rhetoric* 1357a34 (*to men gar eikos esti <to> hos epi to poly ginomenon*). *Eikos* is usually translated as 'probability' and it is not difficult to find a close connection between *eikos* and *epieikeia* because both have the common phrase of *hos epi to poly*. This idea can be further traced back to Aristotle's understanding of human action (*pragma*) at which his rhetoric is targeted.

Thirdly, under these conditions, Aristotle also regards human action as not completely determined, but can choose and change. Please note that *pragma* means the result of human action as well as the action itself, and also that the action does include physical one as well as political and judicial one. Therefore the only way of the justification for such decision is *hos epi to poly*.

Lastly, it is also important that the main areas in which *epieikeia* can play a part are civil cases such as negligence and arbitration, not criminal ones. As I said above, the concept of *epieikeia* is introduced by Aristotle in his taxonomy of law and wrongs. Therefore, it can be said that *epieikeia* is useful in the area of civil wrongs. In any case, this seems to imply that Roman lawyers whose main intellectual engagements were with civil law would not find a great difficulty in employing the notion of *epieikeia* although Aristotle does not make a clear distinction between civil cases and criminal cases

It is now clear that both *eikos* and *epieikeia* have been established as key concepts in Aristotle's *rhetoric*. However, Meyer-Laurin warns us of the gaps between legal practice/positive law and legal philosophy notably of Plato and

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Aristotle and argues that in the positive Attic law in the classical period *epieikeia* should be considered not from a perspective of law and equity but from a perspective of procedure and evidence (Meyer-Laurin(2007, originally 1965)). Therefore it can be useful to investigate the meanings and implications of *eikos/epieikeia*, in a much wider context than that of law and rhetoric.

Let us take the first look at *eikos* in the Greek-English Dictionary (Liddell-Scott; *Greek-English Lexicon with a revised supplement*, Oxford 1996).

eiko (v), to be like, impf. it was like, likely, pf., plqpf *eoika*, is used for pres. and impf.

eikon (f), figure, image, likeness, a simile

eikos, part. of *eoika*, pf. of *eiko*, to be like.

eoika pf. of *eiko* with pres. sense; part. *eikos*(M), *eikuia*(F), *eikos*(N) to be or look like; to be fit, 3 sg. It is fitting, right, seemly.

Homer *eoikos*, 3 sg. It is fitting, *eoike*, it seems, seem likely,

e(o)ikotos, adv., similarly, like, reasonably, fairly.

As is shown above, *eikos* and its related words appear already from Homer and very widely, in almost every kind of genre.

Jenny Brian in her recent book, *Likeness and Likelihood in the Presocratics and Plato*, 2012, draws our attention to the Greek terms, *eoikos/eikos*, in the Presocratic philosophers.

Discussing Parmenides' term *eoikos*, Jenny Bryan suggests two aspects of Parmenides' use of this term. The first is the possibility that Parmenides' vocabulary is influenced by forensic terminology. Several of Parmenides' key terms (*semata*, *krisis*, *elenchos*, *pistis*) carry forensic connotations. She argues that this judicial background should inform our understanding of Parmenides' *eoikos*. It is evidence in favour of taking one aspect of its meaning to be something like the notion of 'plausibility' widely employed in the second half of the fifth century BC.

The second is the possibility that Parmenides B8.60 alludes to Xenophanes B35 (Parmenides B8.50-61 (Bryan (2012), 59-60, 106; also, Gemelli Marciano (2007), 22-23; 26-27). She offers possible four interpretations of the line 60, *eoikos*.

(1) similar; (2) fitting or appropriate; (3) specious; (4) plausible. Then, in the section of a short history of plausibility (78-80), she explains why the interpretation of plausible is closely connected to the others by introducing Homeric Hymn to Hermes and also Aristotle's *rhetoric* (1357a34, *to eikos is to hos to epi to poly, to eikos is what happens for the most part*).

Next, she goes on to the forensic connections; *Dike, semata, krisis, elenchus, pistis*, (80-93). For example, she interprets the *pistis* the persuasive force rather than the persuasion itself, or what justifies the result of deductive reasoning rather than the (justified) results itself. From these analyses the following points seem to be important.

- 1 The Greek words of *eikos/eoikos* have, basically, four meanings. The four interpretations such as 'similar', 'fitting/appropriate', 'specious' and 'plausible'.
- 2 These meanings are closely connected with each other and often very difficult to choose the one from the four meanings. They cross over each other. The essential point is that they are used to differentiate one thing, either term or thing itself (material) from the other. To judge whether or not the two things are similar or not, is the beginning of thinking of definition and of the dialectic thinking.
- 3 In this context, if something (or some word) is similar to the fact or truth, or common sense, opinion (*doxa*), it becomes plausible or appropriate. The object to which the something is compared is sometimes not spoken nor explicit.

One of the most famous passages in the *Odyssey* in Book 19, Odysseus, disguised as a beggar, he spoke to Penelope many false things which are similar to the truth, so she wept, (*iske pseudea polla legon etymoisi homoia*; 19, 203). It

should be remarked here that Odysseus' false tale is very persuasive (that is why Penelope believed) because his tale is neither truth nor false, or something between, or strictly speaking, false but similar to the truth, *verisimile*.

- 4 In Parmenides, B8,50-61, the term is used together with other words which have legal connotations, such as *dike* (justice, revenge), *semata* (sign, evidence), *krisis* (decision), *elenchus* (refute, destroy), and *pistis* (persuasion). All those words are key terms both in Greek law and litigation, and rhetoric. Among those words, *pistis* seems to me very important.

As seen in Aristotle's rhetoric, the concept of *eikos* is very closely connected with the notion of *peitho* (persuasion).

- 5 In the field of philosophy the notion of *eikos* and *epieikeia* is mainly discussed in the context of epistemology. The epistemology has been almost never discussed in the study of Roman law.

In Conclusion Bryan says as follows;

There are significant and interesting differences in the way that Xenophanes, Parmenides and Plato in the *Timaeus* each employed the term *eoikos/eikos*. Each characterizes his account as such in order to describe its relation to the truth. Thus, Xenophanes describes his teachings as *eoikota tois etymoisi* because they enjoy some kind of *likeness* to the truth. It may even be that they are accurate. However, by his choice of *eoikos* rather than *homoios*, he seeks to remind us that we can never be certain of the truth of his teachings.

Parmenides, in his labelling his cosmology *eoikos*, admits that it possesses likelihood, i.e. plausibility. But, whilst Xenophanes admits that his account is potentially specious, Parmenides is at pains to emphasize that the *Doxa* is only apparently true. For Parmenides, deceptive cosmologies of the type he presents are, precisely because they describe something unrelated to reality, utterly untrue. To believe them is to be deceived.

Plato's *Timaeus* develops a specifically technical sense of *eikos* explicitly related to *eikon*. His 'likelihood' is the quality possessed by a successful account of a likeness as a likeness.

I have sought to demonstrate that there is an important similarity in the manner in which Xenophanes, Parmenides and the *Timaeus* situate themselves in opposition to their forerunners in epistemology and cosmology. I have argued that each account should be read as reflecting on and aiming to correct the epistemologies of its predecessors. In each case corrective element is indicated in part by the allusive tag *eoikos/eikos*. It (= *eikos*) is, I hope, a potential, if necessarily uncertain, candidate for truth (192-195)

Brian seems to suggest that we understand the notion of *eikos* employed by Xenophanes, Parmenides and Plato in the contexts of their attempts, though in each different way, of its justification as a candidate for truth. In this way she sheds a light on the notion of *eikos* from a positive side, which means that *eikos* looks like the truth. What about a negative side? Does the procession towards the truth always lead to the truth? If the expectation for the truth is betrayed, *eikos* turned out to be denied. One cannot find any word which designates fittingly the object. The greater the expectation becomes, the greater the degree in disappointment and embarrassment.

4 The notion of 'uncanny' in Greek religion

I have so far arguing that the notions of *aequitas* and the Greek equivalent, *epieikeia*, are based on the notion of *eikos*, i.e., likelihood or likeliness. But is there any case in which *eikos* is denied, namely nothing can be likely or look similar to anything. In other words is there something which we cannot describe as anything?

When I was asked to talk about the Robot in the aspect of Humanities for the ICRA (International Conference on Robotics and Automation), I became interested in the theory of the 'Uncanny Valley' and in the term of uncanny itself. Because, the

term of uncanny is the central notion in Greek religion. John Gould, in his article, 'Making Sense of Greek Religion', cites Clifford Geertz' citation of Suzanne Langer (Gould (2001), 207-208);

''[Man] can adapt himself somehow to anything his imagination can cope with; but he cannot deal with Chaos' and goes on: There are at least three points where chaos - a tumult of events which lack not just interpretations but interpretability - threatens to break in upon man: at the limits of his analytic capacities, at the limits of his powers of endurance, and at the limits of his moral insight. Bafflement, suffering, and a sense of intractable ethical paradox are all, if they become intense enough or are sustained long enough, radical challenges to the proposition that life is comprehensible and that we can, by taking thought, orient ourselves effectively within it - challenges with which any religion, however 'primitive', which hopes to persist must attempt somehow to cope.'

Gould concludes this article with Herodotus' famous word, 'gods are both envious (*phthonos*) and uncanny (*tarache*)' (Gould (2001), 233. Also see Versnel (2011)). By 'envious' it means that Greek gods are like humans, human beings. They are similar to each other. If you look at the statues, paintings of Greek gods, Zeus, Poseidon, Apollo, at the museums or books, they look like human beings. They look as the models of human beings. Also, they behave in the same way as humans. They eat, love and hate, and sex. They differ in degree, but not in kind.

But if you look at the other side of Greek gods, they are uncanny. Probably the best example is, Greek Tragedy, particularly Sophocles' *Oedipus tyrannos*. The god, Apollo is uncanny, no one but the prophet, Teiresias, can predict what the god intends to do. Gods are intellectually unpredictable, they are beyond human beings' intelligibility and knowledge (Gould (2001), 231-233).

And also, gods never disclose their physical identities to human beings. The pictures of the gods and goddesses are, needless to say, those which human beings

imagine to be. Indeed, they disguise themselves as sometimes human beings, sometimes animals, sometimes monsters, etc. The metamorphosis is a genre of Classical literature (Buxton (2009)).

Therefore, When I was asked to talk on the robot, I thought that robots are gods. Or, the robotics has something to do with religion. But as I think more seriously of the robot, human beings too are similar to the robot, because they too are uncanny. Human beings too disguise their identities, both physically and mentally.

5 'Uncanny Valley' and Freud's notion of 'uncanny' (das 'Unheimliche')

The idea of the 'uncanny valley' ('Bukimi no tani') was first put forward by Professor Masahiro Mori of Tokyo Institute of Technology in 1970 (Mori (1970), English translation (2012)). Mori's hypothesis is as follows; As the degree of similarity between a robot and a man becomes higher, the robot looks more comfortable and homely to the man. But at some point, the feeling of affinity ('shinwakan') suddenly and sharply declines and the robot comes to look uncanny to the man. Professor Mori called this phenomenon 'uncanny valley'. Why does this phenomenon happen?

The notion of 'uncanny' can be traced back to the notion of 'das Unheimliche' (uncanny) put forward by Sigmund Freud in his essay, 'Das Unheimliche' (Freud (2012, originally appeared 1919)). Based on literary and philological analyses, Freud argues that the counter-concept of 'das Unheimliche', namely, 'das Heimliche' has two meanings. The one is 'vertraut' (familiar, intimate) or 'behaglich' (comfortable). The other is 'versteckt' (hidden, concealed) or 'verborgen' (secluded, hidden).

He continues; the notion of 'das Unheimliche' is the counter-concept only of the former ('vertraut' or 'behaglich'), not that of the latter. Therefore, both concepts do not exclude each other. In other words the 'das Heimliche' in the latter meaning can

become 'das Unheimliche', for example, when it is disclosed or open to public.

Then Freud lists the Indo-European equivalent words which contain the notion of 'das Unheimliche'. Among those words there is a Greek word, which is 'xenos' or 'xeinos'. Now I shall start the analysis of the uncanny with this word (Freud (2012), 11).

6 'xeinos' in Homer

In the study of Classical literature the starting point is always Homer and this is the very case for my paper. In the Homeric epics, both *Iliad* and *Odyssey*, the Greek word, *xeinos* appears very frequently, say, some 300 times altogether. The word *xeinos* is an old form of *xenos* and their meanings are the same. The word *xenos* appears in the later literature in the classical period.

If you look at a Greek dictionary, you will find that this word has the following meanings; 'stranger', 'foreigner', 'outsider', sometimes 'enemy'. The Japanese equivalent is probably 'yosomono' or 'gaijin'. But it also means 'guest', 'guest-friend, (Gast-Freund in German)', sometimes even 'host'. The meanings of these two groups appear to be contradicting, but they are not necessarily mutually exclusive because someone can be both a foreigner and a guest. Why does this term, *xeinos*, has two sets of meanings?

I shall start with the latter meaning of the *xeinos*, which is a guest-friend or a host. The most well-known scene is the *Iliad Book 6*, the encounter scene between Diomedes and Glaukos. They are enemies to each other. Diomedes is one of leaders of the Greek allied forces and indeed one of the strongest leaders. Glaukos is one of the leaders on the Trojan side and he is the one of the twin leaders (the other is Sarpedon) of the Lykians who came to Troy as auxiliaries.

Both leaders encounter each other in the midst of the battle field and are about to fight against to each other. They do not know who their enemies are. In this sense and

up until this moment, they are complete *xeinos*, or very typical examples for *xeinos*. However, the situation has suddenly changed when they, according to a custom, name each other and give a piece of information in details about each family origin which goes back to their grandfathers. Their grandfathers were also *xeinos* to each other but had already established their relationship by way of the hospitality offered and the exchange of gifts. After referring to this relationship, Diomedes and Glauklos both came to recognize and appreciate the relationship which already had been established two generation before.

They call each other '*patroios xeinos*' which literally means '*xeinos* from father's time, namely ancestral *xeinos* or inherited *xeinos*'. It should be noted that the hospitality and gifts offered at their grandfathers' time are rich and 'remembered' by these two leaders, but there seems to be no exchange and hospitality between their fathers' time. Also, Homer did not forget to mention that the equality in value between the two gifts offered by the two leaders was 'broken' because of the intervention of Zeus. Zeus took away the sense of equality between two gifts from one of the leaders. Homer is, indeed, the first economist.

It is, however, not certain why they decide to renew this relationship and exchange their belongings such as armours, and stop fighting each other and depart.

In Homer several other cases of the *patroios xeinos*, most of which are the relationship between Odysseus' son, Telemachos, and other leaders such as Menelaos and Nestor, who are Odysseus' colleagues in the Trojan War. In the *Odyssey*, the first four books of it, which is called 'the story of Telemachos', Telemachos pays a visit to his father's friends who fought together against the Trojans some twenty years ago, in order to get a piece of information of his father Odysseus who had been away from Ithaka for twenty years. No one knows whether Odysseus is alive or not and where he is now. Telemachos and Nestor or Menelaos are complete *xeinos* in the sense that Telemachos had never met them. This is his very first and independent visit to his

father's friends.

However, although they had never met each other, there seems to be almost no tension, embarrassment, or astonishment at their first encounter. And, as soon as Telemachos introduces himself as the son of Odysseus, he is immediately welcomed and offered gifts from them. Telemachos and Menelaos or Nestor are *patroios xeinos*. They renew the relationship established one generation ago. There happens no bafflements.

On the contrary, if there is no established relationship beforehand, it always happens tension, bafflement, astonishment, and risk. We shall look at the two encounter scenes, one between Odysseus and the Phaiakians in Book 6 and 7, the other between Odysseus and Cyclops in Book 9. These two scenes are not only the most famous scenes, but also most informative to know how Odysseus and the other parties both react to each other and what kind of behavior they employ in reaching a stable, even temporarily, relationship.

The first is Odysseus' encounter with Nausikaa in Book 6 and also with Phaiakians in Book 7. Although the Phaiakians appear to be very friendly, Odysseus needs to employ various kinds of behavior in order to be accepted as a *xenos* by them.

The type of behavior which Odysseus employed here is supplication, the full analysis of the supplication as a social and ritualized institution was done by John Gould (Gould (2001), 22-77).

Odysseus wakes up at the Phaiakians' island which he does know. He is extremely hungry and naked. He is compared to a lion who is hunting for food. When he, naked man first met Nausika and her companions, they felt extremely horrified. Not difficult to imagine. Then Odysseus decides not to use the gesture of supplication, that is holding the knees and touching chins, but to ask her for help and food only with words.

By contrast, In Book 7, Odysseus being unseen, but suddenly appeared in front of the king, Alkinoos, and the queen, Arete, and elder leaders at the banquet and sit down besides the ash, near the fire place. Every one there is astonished and horrified. Odysseus takes hold of the queen and ask for help.

In both cases, Odysseus appears uncanny, in different manners.

Next, please look at the pictures of Cyclops. (Lissarrague (2001), see at the end of this article) What does a Cyclops look like? You would be almost unable to distinguish Cyclops from the others, namely Odysseus and his fellow soldiers. Cyclops is slightly bigger than others. But do not miss a pair of the legs which he holds. That is the remaining part of the whole single soldier which he has eaten. We would be horrified only if we notice it. I should like to say that the picture on the ancient Greek vase is both beautiful/attractive and uncanny. I can give you another examples of both beautiful and uncanny (please visit the website of Japanese Noh Mask <http://www.nohmasl21.com/>)

Lastly, we shall look at the relationship between Odysseus and his family, especially Penelope. In principle they are family members and not *xenos* to each other. But in the *Odyssey* the situation is very different because of the twenty years' absence of Odysseus from his home. Please imagine that when Odysseus left his home at Ithaka, Telemachos was just born, so without DNA examination it would be impossible that we recognize each other as a father and a son even if Odysseus discloses his identity. Then, how about Odysseus and his wife Penelope? How long did they spend a time in living together before he left home. Most probably only a few years, I think. Or, even shorter, one or two years.

And Odysseus disguises himself physically and intellectually, he continues to tell a false story (Od. 19, 204, Odysseus gave many false stories, mixed with truth. *'polla phseudea etumoisin homoia'*). Also see, Jenny Bryan (2012), *Likeness and Likelihood*, The mixing between truth and falsehood is a key to understand the

notions of *eikos* and uncanny. That is also a piece of technique of the rhetoric.

To Penelope, Odysseus is a *xenos*. How about Odysseus? Is Penelope is a *xenos* to him? He never thinks of that until the very end of the recognition procedure in Book 23. He was and is the head of his house (*oikos*) and of Ithaka, as he believe. But, it would look different if we look closely at the scene of the final confrontation of the both in Book 23.

Odysseus addresses Penelope twice as 'daimonie' (23, 166; 174) which means here, 'uncanny'. Penelope examines the response of Odysseus, and Odysseus finds her behaviour uncanny. Odysseus is really baffled and horrified. It is extremely difficult to understand what is the meaning of *daimonie*. One of the charges against Socrates is that he believes in *daimon* (Plato's *Apology*).

At this point the tension between Odysseus and Penelope is the highest. Then Odysseus points out a piece of evidence, a secret just between them. After this point, Penelope admits that the man in front of her is Odysseus. And they are united.

Please remember what I said at the beginning of the chapter 5 of this paper. This is exactly what Freud said about 'das Unheimliche', that is 'das Heimliche' becomes 'das Unheimliche' when this is disclosed. Penelope who is examining the response of Odysseus, becomes uncanny to Odysseus and Odysseus discloses their secret, and by doing so, discloses his identity.

One may say that this scene is a fiction and over-exaggerating. But I do not think so. Again please remember the fact that they lived together in Ithaka only a couple of years.

7 Arming against 'uncanny'

What I have been discussing is that the notion of uncanny is deeply connected not with strange things/persons which are outside one's own world and experience but rather with familiar things/persons, namely things/persons which one hitherto

believes to understand. Therefore, once one's expectation of them is betrayed, they will turn out uncanny. He will lose confidence in his ability in understanding of them. His identity is destroyed. In the notion of uncanny it is not the things/persons which look uncanny but the person to whom they look uncanny that matters.

It is often said that the masks in the Greek tragedy and comedy as well as in the Noh play are used to fix the identities of characters in the play. It seems to me that by using masks we, the spectators, try to defend our own identities from uncanny things. In other words we are guarding ourselves against them. As Karl Meuli suggests in his comparative investigations of the wide range of variety in the uses of masks, the masks are called for to arm against the uncanny things/persons, most of all, the death/the dead.(Meuli (1975))

Ironically enough, as Noh masks show us, the masks look different according to the people who watch the Noh play. The very same mask looks different according to the developments of the story and to the feelings of the spectators.

I suspect that the uncanny valley might appear according to the persons who respond to the robots, not the robots themselves. The uncanny valley will become visible when we, not the robots, feel that our each identity is fictitious and fragile.

8 Conclusion -Coping with 'uncanny'-

We have been searching and discussing the origin, if any, of the notion of *aequitas/epieikeia* in the fields of legal, philosophical and epistemological writings and are arriving at the (seemingly) complete contrasting notion of uncanny in the fields of religion and robotics. Do both notions contradict each other? If so, can they compromise with each other by way of separating each own field of function or domicile/dominion; the one in the secular area, the other in the sacred.

That compromise, however, will be able to advance our understanding neither of the secular (law) nor the sacred (religion). The association of the notions of 'similar',

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‘likely’, ‘appropriate’ etc., which are useful and practical in our life and society cannot easily comply with the association of the notion of ‘uncanny’. The latter often defies the alliance with the notion of *aequitas/epieikeia* in the same field, both in law and religion.

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