

Aristotle's Concept of Law: Beyond Positivism and Natural Law

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This paper presents an interpretation on Aristotle's distinction between natural law and positive law. According to this interpretation, the traditionally assumed thesis on Aristotle's "iusnaturalism" should be severely rectified otherwise dismissed. It is not either to be found in Aristotle's legal reflections any variety of "legal positivism". Departing from a natural law reading of the famous passage of Nichomachean Ethics where Aristotle draws the distinction between the two forms of political justice, natural justice (physikon dikaion) and legal justice (nomikon dikaion), we cannot find conclusive reasons to see therein a conceptual dualism between natural law and positive law as it has been traditionally understood. Rather it must be concluded that the true conceptual line is not that relating natural and legal justice but the one relating political (politikon dikaion) and legal justice. Under this reading, not only legal justice but also the so-called natural justice should be included within the Aristotelian concept of positive law in terms of a philosophically grounded universalism in the realm of practical reason as opposed to a metaphysical, natural-law view (that is, ultimately a theological one). This is indeed corroborated by an analysis of the central role played by the notion of praxis, with its epistemological background, in Aristotle's works on ethics and politics, and in particular by an analysis of his theory of law.

In this essay, I shall explore an interpretation on the well-known Aristotle's definition of "legal justice" as it appears in his *Nichomachean Ethics* in contrast to that of "natural justice". The proposed interpretation claims that such distinction cannot be understood in terms of a dualist, dichotomic opposition between "positive law" and "natural law". It departs then from the traditional iusnaturalist reading of that Aristotelian topic as it was received from the Thomist-scholastic synthesis, especially in the realm of legal philosophy. Both the ontological and moral-theological premises of iusnaturalism are incompatible with the practical philosophy of Aristotle and in particular with the legal philosophy that—I will defend—underlies the distinction between legal and natural justice. The iusnaturalist reading also contradicts the main assumptions of the Aristotelian epistemology and its foundation of "practical reason", a view that shall be herein emphasized. But it is not only about "rescuing" Aristotle out of the main stream of the iusnaturalistic tradition: it also implies a refutation of a

“legal positivist” reading of the Aristotelian concept of law. Both interpretations are intimately related to each other from a conceptual point of view (besides a historical one) and share a number of common assumptions —showing once more the truth of the saying *contraria sunt circa idem*. The Aristotelian reflections on the matter can be said to contain *in nuce* the fundamental concepts of all the subsequent varieties of iusnaturalism and legal positivism. Still, they do not tolerate their identification with any of them.

In the following pages, which are, as said, a merely exploratory attempt of interpretation, my purpose is to point out how the Aristotelian notion of positive law is embedded in politics and even in morality, yet without embracing the —allegedly insurmountable for western legal philosophy— dualism of the received view between positive and natural law. Of course, this is by no means an absolutely new view. There is a number of interpreters that have departed from the traditional classical iusnaturalistic vision (scholastic or rationalist) rejecting a metaphysical conception of “nature” in favor of a more historicist one, turning back again towards practical philosophy.¹ Many other interpreters have stressed the idea of political justice as a major hermeneutical key for the understanding of Aristotelian “natural justice” (Miller, Yack, Burns, Destrée, Bodéüs, Wormuth, Nusbaum...). However, it is worth questioning the extent to which the claim on natural justice being morally-politically embedded *actually* means a departure from the received view and its dualism. Besides, there are very few commentators (Schroder and Yack among them) that pay special attention to the Aristotelian definition of “legal justice”, i.e. to “positive law” instead of to “natural law”, which, as noticed, it has been the common approach. To my understanding this is indeed the central theme to be analyzed, especially from a legal philosopher’s point of view. The law plays a nuclear role in Aristotle’s practical philosophy, as a mediating device between morality and politics. Even if his concept of law prefigures that what later will be known as iusnaturalism and legal positivism (Conklin 2001: 21ff.), in a retrospective reading —so my argument runs— it leads to a superseding of the dichotomy between natural law and positive law. At the same time, this allows to highlight some enriching aspects of his theory of law for,

¹ Here there must be cited the names of Gadamer, Ritter, Strauss, Voegelin, Weil, Salomon, Aubenque, and of course the communitarians. Hegel himself could be placed at the front of this tradition when he says that Aristotle "could not have had the concept of a so-called natural law (if this is in fact missed) that has to do precisely with the idea of abstract man" which is characteristic of the *abstraktes Recht* of modern state (Hegel 1971 [1833]: 227).

once released from iusnaturalism's metaphysical assumptions, it may be related to important issues that are under discussion in the current legal philosophy.

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My comments shall be then on the famous passage right at the beginning of section 7 Book V from *Ethica Nicomachea*:

“[1134b 18] Of political justice part is natural, part legal — natural, that which everywhere has the same force and does not exist [20] by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner's ransom shall be a mina, or that a goat and not two sheep be sacrificed, and again all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas, and the provisions of decrees. Now some think that all justice [25] is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognized as just. This, however, is not true in this unqualified way, but is true in a sense; with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature. [30] It is evident which sort of thing, among things capable of being otherwise, is by nature, and which is not but is legal and conventional, assuming that both are equally changeable. And in all other things the same distinction will apply; by nature the right hand is stronger, yet it is possible that all men should come to be ambidextrous. The things which are just by virtue of convention [1135a] and expediency are like measures; for wine and corn measures are not everywhere equal, but larger in wholesale and smaller in retail markets. Similarly, the things which are just not by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere and by nature the best [5]”²

I. Legal, natural, political justice.

When one approaches this passage in search for a definition of “law”, the first difficulty one runs into is that it is about “justice” (*dikaion*); thus, a concept that one may initially consider to be distant from the former one. The second difficulty encountered is that such a definition seems to be inescapably trapped into a sharp dichotomy confronting “natural justice” (*physikon dikaion*) with “legal justice” (*nomikon dikaion*). We must deal with both of them from the very beginning.

Clearly, the translation of the Greek terms is philosophically-laden in an unavoidable way. This makes the text subject not only to philological interpretation but also and specially to philosophical interpretation. So, translating *to dikaion* by “justice” (“what is just”, “the things that are just” for the plural *ta dikaia*) has necessarily the effect of placing us *ex initio* in an

² Aristotle, *Ethica Nicomachea* (trans. W. D. Ross, Oxford 1925), Book V, Ch. 7, 1134b18–1135a5.

extra-legal field: i.e. in the moral field or in the ethical, critical morality point of view. This is implicitly understood as an ultimate, absolute and more fundamental point of view about law (the very notion of “nature” serves as a means for that). If we were to translate instead those terms as “things recognized as just” (as Ross does) or as “rules of law” (as Aubenque does some times: 1998: 42; 2004: 10) or simply as “law”, either with capital letter (“natural/conventional Law”) or with small letter (“natural/conventional right”; even “natural rights” [Kraut 1996: 757ff., 773-4] ... or just as “rights” [Miller (1995: 112, passim)]), then the idea of justice gets rather circumscribed within the legal-political domain (even solely within the legal one). Thus the notion of “political right” (or “political justice”) achieves different connotations implying different relationships with morality and law. As it will be shown, what is at stake behind these different translations is the very question on how does law relate to morals and politics.

Concerning the second question, the fact that Aristotle considers both legal justice (*nomikon dikaion*) as well as natural justice (*physikon dikaion*) as distinct kinds or parts of political justice (*politikon dikaion*)³ has been purported to be a sign of the high sophistication of the Aristotelian doctrine; certainly of a greater degree than the classical dualist division of law or justice according to which Aristotle appears as the true father founder of iusnaturalism⁴ —an ascription that has been widely acknowledged even from a non-iusnaturalist approach⁵. In effect, it can be defended that the deep true conceptual line in the Aristotelian doctrine is not the one relating natural and legal justice but the one relating political justice and legal justice⁶. As it will be elaborated below, the notion of political

³ It is true though that the ambiguity of the original text favors different interpretations on *how* political justice comes to be subdivided or specified in natural and legal, yet it does not raise any doubts at all on the fact *that it does* so. W. D. Ross speaks of different “parts” whilst other versions translate it as “kinds” “forms”, “species”, etc. As Yack points out, both varieties of justice “represent two *kinds* of justice found in the political community rather than higher and lower *standards* of adjudication” (1990: 220). On different translations and possible “vertical” or “horizontal” readings see Burns 1998.

⁴ As Shellens remarks (1959: 72), “philosophers and historians almost invariably claim that Aristotle is the father of natural law”. Similarly, Destrée recognizes him as the “spiritual father” of the natural law problem (Destrée 2000: 220) and Trude as “the philosophical founder of authentic natural law” (Trude 1955: 177).

⁵ See for all Bobbio 1993: 36-7.

⁶ See Burns 1998: 144-5.

justice is indeed a crucial element to a sound and accurate reconstruction of the Aristotelian concept of law. I shall argue that this interpretative key —yet often obscured by other keys in many commentators— represents the best critical approach to dismantle any kind of iusnaturalistic reading of the Aristotelian text and any flat positivistic one, too.

The central question here is whether the Aristotelian concept of law does or does not include the notion of “political justice” besides that of “legal justice”. In the case of a positive answer to this latter question, the concept of law should somehow include the notion of “natural justice” too. Quite the case, since as opposed to precedent thinkers the idiosyncrasy of Aristotelian concepts is that the distinction between what is natural and what is legal or conventional takes place *within* the realm of the very political justice (Miller 1995: 75).

Let us assume that those features attributed by Aristotle to “legal justice” give support to the identification of this latter with the notion of “positive law”, either as “legislated law” in the sense of a norm (*nomos*) that has been enacted as a general norm by a legislature (*nomothetes*), or decreed as a particular norm for concrete situations (Aristotle seems to be considering both judicial decisions and decrees). Since the idea of a “posited” or positive norm is here at stake, we would not incur in any interpretative anachronism at all were we to project the notion of *ius positivum* or *iustitia positiva*, even if that terminology, as it is known, did not appear until many years later, during the early Middle Ages.⁷ It is also well known that the Greek notion of *nomos* evolves from its initial meaning as custom or pre-legal social uses of a diffuse nature to written law as a kind of norm that has been publicly deliberated or sanctioned by means of a collective decision; this in its turn may confirm social uses or practices of the former kind⁸. Stated in early Middle Ages’ terms, Aristotelian legal justice is therefore *ius ab hominibus institutum*, that is, “law the sources of which are to be found at any rate in human activity” (Opalek 1982: 449), and specially the *ius positum* as a result of the legislature’s activity. In contemporary terms, the law which “is posited, is made law by the activities of human beings”; that is to say, by social practices and, specially, by legislative and judicial practices.⁹

⁷ See Gagner 1960: 210ff.; Kuttner 1936; Ullmann 2008: 62.

⁸ See Romilly 2002, *passim*. On the transition along the 5th century from *thesmos* (socially accepted norm or customary law) to *nomos* (norm enacted by a political legislature), see Schroeder 2003: 38 ff. See also Jones 1956: 102ff.

⁹ Raz’s “social thesis” (1979: 37ff.; quotation in p. 38).

To define legal justice, Aristotle seems to be using at least six features or criteria closely related among each other. In the literature on the issue these defining criteria have been traditionally interpreted as distinctive features of positive law against natural law. Most of them, still not all, can be drawn on from the above quoted text:

i) *Conventionality*. Aristotle speaks using interchangeable terms of that which is just by virtue of law and that which is just by virtue of convention (*nomikon kai synthekei*); He speaks of just things “by virtue of convention and expediency” or “by human enactment [*taxei*]” (1135a10).

ii) The *practical* nature of positive law. Aristotle links “those things recognized as just [*dikaia*]” —law in its wide sense— to “human affairs” (*anthropina*), and specifically to the acts and decisions of law-makers (or judges and rulers) by means of which legal conventions are established. All these acts are a sort of social practice (actually, political), a kind of *praxis* that has to do with “prudence” (*phronesis*)¹⁰; that is, with deliberation (*bouleusis*) and preferential election (*prohairesis*) as features of human practical rationality.

iii) The *particularistic* nature of positive law. Even if it is a compound of rules, and rules that can be told somehow general, law is confined to the whole, complex net of acts and decisions in which human practice consists of. Yet, those are *singular*, concrete acts and decisions. This turns rules governing them into particularistic practical rules, thus far beyond from any sort of absolute universal rules. Were we to speak about the legislature or the judge, legal norms —positively established themselves by means of particular practical operations— are then always drawn on the practical particular and they point towards the practical particular. Their scope of action could never go beyond that practical framework. Accordingly law is particular too, namely it is fragmented along different societies (particularly [*idios*] “established by each people in reference to themselves”, *Rhetoric*, I, 13, 1373b6ff.).

iv) *Contingency*. Legal practices belong to “things capable of being otherwise” as long as they are subject to “people’s thinking this or that”. Positive legal rules may initially have any content whatsoever; it is just the fact of their being stated by convention that makes them such rules and gives this or any other content to them. Actions being subject to legal regulation are “originally indifferent” and stop being so just “when they have been laid down”.

¹⁰ “[T]he law [*nomos*] has compulsive power, while it is at the same time a rule proceeding from a sort of practical wisdom [*phroneseos*] and reason” (*Eth. Nic.*, X, 9, 1180a21-22).

v) *Indeterminacy*. The content of legal rules is exclusively a function of the very course of concomitant human practices; accordingly it is a function of those decisions to produce and apply them. However, this is an *open-textured* course: those decisions are not determined by any content previous or external to their deliberative and executive production in every singular case. In other words: these practices are *constitutives* of those rules, not the other way round. So “when the thing is indefinite [*aoristou*], also the rule is indefinite” (*Eth. Nic.*, V, 10, 1137b29-30).

vi) *Variability*. Positive law is subjected to change, it is essentially *mutable* or *changeable*, both historically (from a chronological point of view, i.e. considering here the evolution of a certain legal order) and geographically (from a spatial point of view, i.e. considering here several legal orders). As long as justice is concerned, “all of it is changeable [*kineton*]”.

Above all the others, the first and the last features —conventionality and mutability of positive law— are capturing the attention of interpreters. As a consequence, the interpretation of the concept of “natural justice” is somehow the outcome of it being projected under the light of those other features which, in the Aristotelian text, are standing as the counterpoints to the formers, i.e. immutability and necessity. Additionally, the opposition universal/particular (third feature) plays a role since this opposition is of a special significance in the logic and epistemology (as well as in the ontology) of Aristotle; this is too a crucial point in the Thomist interpretation. And thus it is in this apparently unavoidable way that we are led to the canonic formulation of the classical dichotomy, forged on the contrast between a Positive Law, as mutable, conventional and particular norm, and a Natural Law, as immutable, necessary and universal norm. This interpretation places the Aristotelian doctrine in a philosophical development drawing on the former distinction between *physis-nomos* introduced by sophists in the 5th century, continued after him by the stoic tradition, later on adopted by the theological Middle Ages philosophy, and then eventually secularized by modern iusnaturalism.

However, such a lineal interpretation —from *physikon dikaion* to natural law— has many weak points. It does not take sufficiently into account, or it even neglects, some of the other features in the Aristotelian characterization of positive law; specifically, the notion of *praxis* (second feature). Still, this is the fundamental concept giving unity to the whole Aristotelian practical philosophy: it is by means of this notion that the connection among law, ethics and

politics can be established and it is too the one that allows, particularly, by means of this latter connection, to place back in its right place the notion of “political justice” (*politikon dikaion*). Thus, any attempt to an oversimplifying dualistic sort of reading is condemned to failure. I shall defend then that an appropriate reading of the Aristotelian notion of “natural justice”, far from taking us to that metaphysical concept of “natural law”, should emphasize instead law’s practical nature. It will be then shown that criteria of justice (for instance, moral principles) are to be considered already incorporated within its framework, operating at its very same scale, rather than being external normative contents acting as absolute determinants of positive law as iusnaturalism postulates. What Aristotle calls “political justice” is precisely the law’s institutional architecture in which moral contents and values, among others, operate. Before further elaboration on this, let us see whether and to what extent the iusnaturalist interpretation is capable of resisting confrontation with the text itself.

Attribution to “natural justice” of the features of immutability and necessity is not obvious in the Aristotelian passage we are dealing with. It is true that Aristotle starts with a definition according to which “natural justice” is that which “has everywhere the same force [*dynamis*]” and that he introduces a clear naturalistic metaphor (the fire “burns both here and in Persia”, 1134b26) and speaks of the right hand that is “by nature stronger”, 1134b29) as an example of the idea that whatever is “by nature is unchangeable” (1134b25). It is also true that from the very beginning the idea of natural justice being independent of human opinion is introduced. Yet, there is something not to be neglected even in a merely literal reading of the fragment. It should be noted that Aristotle is speaking in an indirect style, that is, as it is usual in his method, here he is echoing *other authors’* opinions and their interpretation of natural and legal justice (“some think that...”, “they see...”, 1134b24-27). So, he is making sort of *transferred* assessments, specifically critical transferred assessments, i.e. exactly, assessments that he does *not* agree with. These are basically the following two:

a) *Justice as such is legal or conventional*. This is the thesis according to which there is not such a thing as a “natural justice” (that would be a sort of *contradictio in adiecto*). So, justice —law— is in its whole essentially variable, particular and contingent. Aristotle seems to be attributing this thesis to sophists. He rejects it himself, even if with some precautions (“This, however, is not true in this unqualified way, but is true in a sense”). And the reason for that it is that even if change itself is closely related to a conventional decisional practice

that is consubstantial to any sort of positive law (even to any sort of justice), it would also be compatible “in a certain sense” with the presence of necessary or permanent elements¹¹. The task then consists in the identification of that sense and those elements. The entire denial of its presence leads us to relativism and voluntarism: and it might be that “with the gods” (he adds, not without a sense of irony)¹² will and necessity are all the same but, contrariwise, “with us”, there is *also* a natural justice. So, legal or conventional justice is a *necessary* but not a *sufficient* criterion for the definition of law. Apparently, this is an argument in favor of the iusnaturalist position (there should be objective, universal criteria of justice among men). However, this opinion collapses to a great extent once this thesis is connected to the following one.

b) *Natural justice is invariable*. Aristotle also attributes this thesis to the mentioned position; that is, those who believe that all justice is legal and that there is not such a thing as a natural justice do so *because* they take for granted that anything “which is by nature is unchangeable and has everywhere the same force” (1134b25-26). And it is strictly in the context of that indirect attribution that he introduces the naturalistic reference to fire. Now: Aristotle rejects this thesis too as erroneous. He does indeed immediately state that natural justice is changeable (and, therefore, any justice is so).¹³ And the reason for that cannot be but the necessary dependency it shows —as a variety of *justice*— of human decision-making practices. So the distinction between conventional and natural elements takes place *within* “things capable of being otherwise”, law and justice here included. Aristotle tells us to be “evident” which are the former and the latter ones; still he gives no explicit indication in this

¹¹ As Gauthier-Jolif put it, “all things recognized as just being variable is not incompatible with the fact that some of them are based on nature” (1970: II, 394). In a similar sense, Aubenque 1998: 41ff.; Miller 1991: 280ff. Of course, the key question is what kind of nature is it assumed and which are its epistemological relations with law.

¹² Irony can only be noticed if one takes into account that, in the framework of Aristotelian theology, God or the Pure Act has neither communication nor any kind of relation with the human sub-lunar world, otherwise its own condition as Pure Act would be degraded. See Aristotle, *Metaphysics*, XII, 7, 1072b23-30. We will return later to this point. As it has been remarked by Gauthier/Jolif (1970: II [vol. 3]), 394, the only purpose of the reference to gods is to emphasize the idea of mutability of human matters, justice included.

¹³ “[A]ll of it [i.e., justice] is changeable; but still some is by nature, some not by nature” (*Eth. Nic.*, 1134b29). “[...] assuming that both are equally changeable [...]” (1134b29).

regard.¹⁴ The interpretative keys thus should be drawn from a reconstruction of the premises of his philosophical system (where, other ways, the two mentioned critical thesis also must be found). But it seems clear for now that Aristotle does not only refute the thesis according to which natural justice does not exist (sophists' relativism) but also he refuses the thesis on the existence of an immutable legal justice (this latter criticism is clearly addressed against the Platonic idealism on the Good). Accordingly what has many times been interpreted as a contradiction in Aristotle —i.e. he speaking of natural justice as something variable— should be rather considered the contradiction of that interpreter who assumes the ungrounded supposition according to which A. should profess a certain kind of iusnaturalism based on the metaphysical postulate of an immutable, universal natural law.¹⁵

For what has been said so far it should be clear though that the Aristotelian is not a *dualist* theory fragmenting the law into two elements or species, i.e. positive and natural law, as iusnaturalism postulates. The distinction between natural and legal justice does not allow drawing a contraposition between them both as global totalities one external to the other. The text is rather pointing at an *internal* connection between their constituent elements¹⁶, as suggested by the fact that they both share certain common properties. Variability does *not* operate as a distinctive criterion, but as a binding element between the conventional and the natural dimension of law: both are “equally changeable [*kineta homoios*]”. We are therefore not compelled at all to exceed the realm of law, the realm of “positive right” (Bodéüs 1999: 71, 80). It rests open however the question on how this should contain elements that are both “in a sense” irreducible to conventionality even if variable and not existing “by people’s thinking this or that”. All sort of justice (natural too) would have some conventional and variable nature, all sort of positive law would have some necessary and permanent nature (“everywhere the same force”). This element of necessity and universality clearly distances Aristotle from any kind of legal positivism reducing law to its mere nude conventionality —

¹⁴ Gauthier/Jolif (1970: II, 395) following Joachim, modify the traditional punctuation of the text placing the Aristotelian assertion under question mark. On the interpretative difficulties arising from this, see Destree 2000: 230-1.

¹⁵ As Destree (2000: 222ff.) underlines, the variability of natural justice is the “fundamental assertion” within the Aristotelian text and this is so in spite of it having been minimized or misunderstood by traditional interpretation. See the same opinion in Yack 1990: 218.

¹⁶ See Destree 2000: 228.

and so legal philosophy to a sort of “ideological-positivist” conception¹⁷. The Aristotelian position, in its criticism of the received distinction *physis/nomos*, is philosophically much more complex and subtle. Against positivism, A. is assuming in fact the relevance of a “naturalist” point of view, the claim of which is to contemplate positive law under the light of a certain kind of necessity and universality. Now, it is *not* anyhow an iusnaturalist position. Even more, it contains the most powerful refutation of the iusnaturalism as philosophical theory of law.

II. Praxis versus Physis: the epistemology of practical reason.

The interpretative hypothesis here adopted is that the “natural” element of law or justice cannot be found in the sphere of *physis* but in that of *praxis*, namely the framework where political and moral realities belong (the framework of *polis*). In other words, the notion of nature mentioned in the texts at stake is a nature already (epistemologically and ontologically) *interpreted* from the perspective of the political and moral practice—it belongs then to the practical philosophy. So, the internal connection between legal and natural justice could only be drawn on the *political* nature that they share, being as they are them both constituents of a superior and wider totality. The conventional character of legal justice has to do with the set of singular practical decisions involved in the processes of enacting and applying legal rules. This is a necessary dimension of law, still not the only relevant one: it must also be connected to the *institutional* structure of law as the “invariable” context of its practice, a dimension which is precisely characterized by the fact that it establishes internal relations to politics and morality. This context represents the “natural” background of legal conventions (somehow structural, permanent or universal elements). It does not nevertheless go beyond the domain of *praxis*.

This hypothesis can be corroborated by means of two argumentative lines which show convergent results. On the one side, an ontological line exploring what kind of nature underlies the notion of “natural justice”. On the other, an epistemological line exploring what

¹⁷ For instance, for Kelsen, Aristotelian natural law “is simply a constituent part” of the “positive law of the state”, so the idea of natural justice serves “only for the purposes of the justification of positive law” in the sense that a purely ideological political doctrine of a “conservative” character will do (Kelsen 1973: 132; 1945: 439ff.; 1960: 376).

position does the notion of *praxis* and practical rationality have in the Aristotelian approach. In what follows, I will refer basically to the latter.

As we have seen above, in Aristotle's account natural justice includes the property of variability. What is the impact of this feature on those attributes from which, presumably, immutability resulted? We said those attributes were basically two: necessity and universality. How should the thesis on the universality and necessity of natural law —i.e. its having “everywhere the same force”— be interpreted if variability is to be predicated of it too?

The notion of universality in Aristotle's thought has been often interpreted in a purely logical or formal terms, just adopting the extensional perspective of the class-logic as developed in the syllogistic of the *Prior Analytics*. However, this perspective should be complemented with the *Posterior Analytics*, where Aristotle puts forward his theory of science¹⁸. It is in this work where the notion of universality appears as being connected to the notion of necessity, and the latter in its turn to the notions of causality and truth: that is, particularly to the subject matter or content of each very discipline and not merely to its logical-formal or discursive structure, which is common to all of them. Precisely one main point of Aristotle's epistemology is that it is problematic to consider logic principles being applicable in the same way to different sort of discourses. Science (*epistéme*), the principal exponent of which is geometry, is a theoretical-demonstrative kind of discourse, and demonstration (*apodeixis*) can only be about the necessary (*anagkaion*), i.e. only when supported upon true principles (*he alethôn*) which manifest the cause (*dí aitías*). For the value of the universal comes out from the very fact that it finds its grounding in the cause (*Post. Anal.*, I, 31, 88a5). Genuine universality (*katholou*) comes from the necessity of the causal link, and so in the *Posterior Analytics* it is purported to be a kind of determinism.¹⁹ Given that the cause throw us before a necessary (material) truth we can establish the genuine logic or

¹⁸ Some interpreters (for instance, Barnes) maintain that Aristotle's theory of science is prior to his theory of the syllogism and thus it determines its structure. See Smith 1982.

¹⁹ “We suppose ourselves to possess unqualified scientific knowledge of a thing, as opposed to knowing it in the accidental way in which the sophist knows, when we think that we know the cause on which the fact depends, as the cause of that fact and of no other, and, further, that the fact could not be other than it is. [...] Consequently the proper object of unqualified scientific knowledge is something which cannot be other than it is” (*Post. Anal.*, I, 2, 71b9ff.).

formal universality (*kata pantos*), i.e. an objective (*kath' hautou*) or essential (*pan kat' eidos*)²⁰ universality that can be articulated then by the syllogistic mechanism as knowledge of that which cannot be otherwise —i.e. is necessarily as it is.²¹

So it runs the Aristotelian thesis according to which there is nothing but a universal science (*Post. Anal.*, I, 30ff.). This is a *critical* epistemological thesis as a result of which all other discourses on particular, contingent or changeable matters, that is, those that “can be otherwise” are put under question. In these kinds of discourse it is not possible to speak about necessity, therefore nor can we speak of genuine universality, even if logic principles are applicable. And this is so since its material scopes are not susceptible of objective universalization, and hence neither of a genuine causal-universal knowledge of a determinist nature²². This latter being a distinctive feature of demonstrative sciences, the only that could be appropriately called “theoretical sciences” —constituting a contemplative, purely intellectual or disinterested kind of knowledge (natural sciences, mathematics, etc.).

Now, precisely, that particular and contingent material fields are the realm of “human affairs” (*anthropeia*), i.e., there where the existence of things depends on human action (*praxis*) and thus always revolves around its own execution and own products.²³ Moral, legal and political realities are therefore here concerned. The principles governing them cannot actually be universal for they are *ex post actione* principles.²⁴ Consequently, they are to that extent affected by the contingency, variability and particularism of human actions themselves. We do not find in here a true universal knowledge but equally particular and contingent kinds of knowledge, given at the very *same scale* than action itself (for instance, rhetoric and dialectics, ethical and political prudence, the whole variety of techniques...) and of a probable, doxastic and accidental nature.

²⁰ That is, opposed to (for instance, in the inductive syllogism) to a merely enumerative or statistic universality (*pan kat' arithmon*). See *Post. Anal.*, I, 5, 74a31.

²¹ *Post. Anal.*, I, 4, 73b26.

²² “Therefore no attribute can be demonstrated or known by strictly scientific knowledge to inhere in perishable things” (*Post. Anal.*, I, 8, 75b24).

²³ “In the things capable of being otherwise are included both things made and things done”, and specifically the realm of *phronesis* (*Eth. Nic.*, VI, 4, 1140a1; 5). On actions as causes of different moral ways of being, see X, 9, 1181b15; II, 2, 1103b30.

²⁴ *Metaph.*, VI, 1, 1025b20ff.; *Eth. Nic.*, VI, 5, 1140b15.

However, Aristotle assumes at the same time that ethics and politics have to be interpreted in terms of the rational grounding entailed by the *logos* that internally inspires them²⁵. Thus the emerging of the notion of “practical reason”: reason that gives support to ethical and political action, which is always *logos*-accompanied action (*kata logon prattein*); and of the idea of “practical science” (*episteme praktike*) too. This makes evident Aristotle’s attempt to rationalize the *praxis* by means of an analogical extension to it of the structure of the logic of scientific-demonstrative rationality. But practical reasoning (*sylogismos ton prakton*) as opposed to scientific is interwoven in the (moral, political) practice itself where it emerges, and lacks of ontological grounding *beyond* the sphere of action of individuals. That is, it lacks of an *objective* grounding in a naturalist strict sense. This practical immanency of theory is in contrast with scientific theories, which are independent of any practical or technical application—they contain “contemplative” truths, non-dependent on any *deliberation* at all²⁶.

Thus, practical reasoning involves action when it comes the time to obtain, deliberate, balance and choose those principles or reasons (norms and goals) which appear to be relevant under the particular circumstances where it is performed. Practical principles are *deliberative* as long as they must be specified for each particular situation by means of alternatives of action. Due to their material content they only come into existence in individuals as the point of imputation of the action and rests on its very performance.²⁷ Not only the major and minor premises but also the conclusion involves the agent’s practical decision: practical syllogism is an inference the conclusion of which is not a new statement (*protasis*) but an action

²⁵ For instance, right at the beginning of *Eth. Nic.*, after maintaining that the “just actions [*ta dikai*], which political science investigates, admit of much variety and fluctuation of opinion, so that they may be thought to exist only by convention, and not by nature” (I, 3, 1094b14ff.), he refutes this idea as being in fact merely an appearance: only those opinions and theories having a “rational founding [*echein tina logon*]” must be taken into consideration (1095a30).

²⁶ Cf. *Metaph.*, I, I, 981a5-981b10; VI, I, 1026a10ff.; XI, 7, 1064b2-3; *Post. Anal.*, 100a5ff.; *Eth. Nic.*, III, 3, 1112a20-1112b30.

²⁷ “We deliberate about things that are in our power and can be done [...] every class of men deliberates about the things that can be done by their own efforts”; “By ‘possible’ things I mean things that might be brought about by our own efforts”; “It seems, then, as has been said, that man is a moving principle of actions; now deliberation is about the things to be done by the agent himself” (*Eth. Nic.*, III, 3, 1112a18ff.). Human teleology in terms of means/ends is shaped then at a *practical* objects’ scale, which is the scale of *possible actions* the deliberation and performance of which involves the agent so far as their meaning derives from the particular situation or the series of particular practical situations conforming human life (see Rhonheimer 1994: 236ff.; Wieland 1990).

(*praxis*)²⁸. Practical reason is not merely about *reasoning* but also and above all about *acting*. And thus radical plurality comes into place (“the good is said in many different ways”) and so it does not only its singularity (itself always being referred to particular individuals and situations), but also its contingency and fallibility in the transition from principles to conclusions (*akrasia*). There could not exist universal ethical norms to achieve the good life, but at most models of wise (*phronimos*) or virtuous man (*spoudaios*), which is the unique “standard and measure” (*kanon kai metron*).²⁹ Eventually, the initial analogy turns to highlight the radical epistemological incommensurability between the two forms of rationality, theoretical and practical, between *episteme* and *phronesis*³⁰.

The consequences of this epistemological approach are dramatically destructive for the iusnaturalistic claim. This can be characterized by the postulate of the existence of certain “natural” contents or groundings that, on the one side—in their universality—are beyond the purely particular realm of both human conventions or practices (such as legislators’ will) and, on the other, are absolutely determinative of such a conventional practice. Both features (independence from human voluntarist decisions and deterministic or necessary contents for positive law—both of them criteria for its critical evaluation in terms of justice— would be the features *par excellence* of natural law. Now, which are those universal and necessary contents that are predicated from the perspective of iusnaturalism of Aristotelian “natural justice”? They could only be of two kinds:

α) Contents of a *theoretical* discourse, considered to be located in a *different* plane to that where any sort of practice evolves (and therefore the practice of legal justice or positive law too). We would speak then of the relation of determination that *natural* factors exert upon it, either shaping the basic “infrastructure” of *praxis* or standing above it (in a *supernatural* plane).

²⁸ Cf. *Eth. Nic.*, VII, 3, 1147a26ff.; *De motu animalium*, 7, 701a4-33; *De anima*, 434a16ff. See Anscombe 1957: 60; 1977: 68ff.; Michelakis 1961: 63ff.; Nussbaum 1985: 183ff.; Oriol 2004: 16ff.

²⁹ *Eth. Nic.*, III, 4, 1113a34 [189]. See Aubenque 1963: 51 (sp. ed.).

³⁰ “Therefore, since scientific knowledge involves demonstration, but there is no demonstration of things whose first principles are variable (for all such things might actually be otherwise), and since it is impossible to deliberate about things that are of necessity, practical wisdom cannot be scientific knowledge nor art” (*Eth. Nic.*, VI, 5, 1140a32-1140b1; cf. 1142a23-25). See Granger 1976: 317, 336; Shiner 1994: 1257ff.; Reeve 1992: 73ff.

β) Contents of a *practical* discourse, considered to be at the *same* plane than practice (*mores*, ethical criteria, systems of values, critical morality, political determinants, etc.).

Both possibilities give account of the basic forms of iusnaturalism that took place along history after Aristotle. We could refer to them, following certain academic use, as the “ontological” and “deontological” varieties of iusnaturalism³¹ (even if merely for denotative purposes since this distinction lacks of sound grounding as we will see below). The important point for our purposes is that both ways of giving account of the concept of a “natural law” are incompatible with the Aristotelian assumptions. The first because the naturalist contents at stake are not really a *law*; the second because they are not really *natural*. Let us briefly elaborate on these two points:

A) There can be neither a “justice” nor a “Law” as part of “nature”. This is so as far as the *praxis* cannot be —*qua tale*— the subject of a theoretical discourse. Of course, laws or nomological-universal, naturalistic structures do exist and affect human *praxis* (for instance, those of the kind we currently call ethological or socio-biological), but such structures are not *by themselves* necessary determinants of human *praxis*, since it evolves in a different autonomous level which is epistemologically irreducible to them. Even if there were to exist objective-causal grounds involved in action, and even if they could be themselves analyzed from a theoretical-scientific point of view, we could not obtain in that way any *norm* at all — that is, any principle for moral or political action. These can only be *deliberately* articulated and chosen by means of the practical agent’s operations. On the contrary, in theoretical discourse there is no place to deliberation at all.³² And when that deliberation incorporates those nomological grounds, then these would not be determinist and necessary anymore because they will need to be translated into particular courses of conduct adapted to the practical agent’s own teleology (i.e., practical rules or norms) and thus susceptible to “be otherwise” —that is, they will be changeable and contingent. Norms cannot be thus natural, and if they were natural then they could not be norms.³³ The gap between theoretical and

³¹ Cf., for example, Weinreb 1987.

³² “Now about eternal things no one deliberates, e.g. about the material universe or the incommensurability of the diagonal and the side of a square” (*Eth. Nic.*, III, 3, 1112a21ff.; cf. VI, 5, 1140a32).

³³ Just after having related ethics to custom at the beginning of Book II Aristotle says: “From this it is also plain that none of the moral virtues arises in us by nature; for nothing that exists by nature can

practical reason acknowledged in Aristotle's epistemology provides us with the first and most powerful impugnation of the "naturalistic fallacy". Norms cannot be deduced or obtained from nature since they must be established by human decision (*prohairesis*). It is not possible to locate in "nature", as if they were objective contents, those which are indeed rules (or any other practical contents of the law such as values or principles), and which only *ex post*, by means of conventional, *positive* choices and decisions of the legislator, can be turned into law.

B) Here the point is about determination of some norms (those norms of the positive law) by means of *other* norms. The same "category mistake" is made however since certain instances are introduced as if they were "natural" when they are actually *norms*, and then not contents of *physis* at all (but contents of *praxis*). Hence, the ambiguity of the underlying concept of nature, itself presented with justificatory purposes as if it were an objective instance of determination. This intends to conceal from us an elemental fact: that such a claim fails as long as the relation between practical norms can only be in its turn *practical* and then contingent or indeterminate. In other words, the relation between for instance morality and positive law is not an *objective* —theoretical— relation between normative contents but a relation based upon the practical *deliberation* of the corresponding legal *authority* to decide whether those presupposed "natural" contents are or not to be translated into law and in which manner. It presupposes then a practical reasoning: the presence of universal and necessary ("natural") contents in the *praxis* cannot adopt anymore the form of a theoretical-scientific

form a habit contrary to its nature. For instance the stone which by nature moves downwards cannot be habituated to move upwards, not even if one tries to train it by throwing it up ten thousand times; nor can fire be habituated to move downwards, nor can anything else that by nature behaves in one way be trained to behave in another. Neither by nature, then, nor contrary to nature do the virtues arise in us; rather we are adapted by nature to receive them, and are made perfect by habit" (*Eth. Nic.*, II, 1, 1103a25ff.). Then, there is a natural determination over those capacities on which acquisition and improvement of virtue operate, but they belong *per se* to a different level, that of *praxis*, and not to nature itself. In this latter it will lack of any sense to speak of "customs" or "habits" since they are exclusively *anthropocentric* (deliberative, practical) concepts, that is, moral-political. Aristotle's reference to "natural virtue" in *Eth. Nic.*, VI, 13, 1144b4-9 is yet a reference to *behaviour* dispositions those considered as assumed basis for *praxis* (virtue "in the strict sense" is only the one "which involves practical wisdom"). The same is found in *Pol.*, VII, 13, 1332a38ff.: men become good thanks to three factors (nature, habit and reason), but since only men are guided by reason virtue consists precisely in *departing from* nature. Thus there is no place for a "natural" justice as a sort of an ethical or political virtue. To acknowledge this fact impulses us to the second of the two alternatives we refer to in the text. This second alternative takes *praxis* as a sort of "second nature" under the assumption that man has not actually "nature" but "history" (see e.g. Voegelin 2002: 150). It is also then the starting point for the historicists and deontological readings of Aristotelian natural law.

discourse. From an epistemological point of view, the question about the existence of *theoretical* necessity (and hence universality) in positive law (legal justice) must be negatively answered.

The foregoing reasons make it implausible to maintain that underlying Aristotle's natural justice there is a postulate of a *ius naturale* in the sense of "an ideal law which can be known and appraised with an even greater measure of certainty than all existing legislation", to express it in D'Entrèves' words (2004: 93), or in any other sense one shall give to it. It is not adequate to translate *physikon dikaion* as "natural law" neither under a naturalist meaning (the first type we distinguished) nor under a moral one (the second type). All these are not only retrospective but also anachronistic interpretations of the Aristotelian text, i.e. interpretations which are philosophically inconsistent with the epistemological assumptions of his system. They both are indeed strongly connected to each other, since somehow they find their common origin in the reading that Thomas Aquinas made of the Aristotelian text, from which stem in its turn the dualist interpretation we are trying to escape from.³⁴

³⁴ "Political justice [*iustum politicum*] is rightly divided in these two parts [i.e., *iustum naturale* and *iustum legale*]. For citizens practice justice because nature put it into human mind and because it is enacted [*positum*] by law", and "nature —the cause of the *iustum naturale*— is the same everywhere [*ubique*] among men". Therefore, "the *iustum naturale* does not consist in what seems or does not seem to be [*videri vel non videri*], that is, it does not arise from some human opinion but from nature". So, "the reasons for changeable things [*mutabilium*] are of an unchangeable kind", and "the legal or positive justice [*iustum legale sive positivum*] has always its origin in natural justice [*iustum naturale*]" (Th. Aquinas, *In decem libros Ethicorum*, V, 12, nn. 1017, 1018, 1023, 1029 [my transl.]). As it was later developed in the *Summa*, natural law bases its universality and immutability on a projection to the practical field of the Aristotelian doctrine of the first principles of the theoretical field (ibid., n. 1018; Rhonheimer 1994: 535ff.). Natural law is human practical reason as long as it reflects certain universal and self-evident first principles showing the created world order and indicating, through *synderesis*, what man ought to do. As for its general principles, it is the same for all the men, and it does not change. However in its human *application* those latter generate secondary principles or conclusions that may be exposed to error and fallibility (*Summa Theologiae*, I-II, q. 91, a.2, a.3; q. 94, a.4, a.5). Thus natural law turns out to be *qualified* in the particular circumstances in which it is applied in human practice, and so may change, being at the same time in itself natural (i.e., universal and immutable). Now, this is essentially the same interpretation underlying most contemporary rehabilitations of a iusnaturalist reading of Aristotle in so far as they, once allegedly having let aside a universalist, metaphysical concept of nature, resort to a *particular* concept of natural justice (a "human nature", a "nature of things" or *Natur der Sache*, often understood in historicist terms). This particular nature is still an *application* or *manifestation* of the former in human practice or history, and that is why it is called "natural" *in spite of* its variability. See e.g. Gadamer 2007: 390ff., 614; Strauss 1953: 159ff.; Ritter 1961: 15ff., 24ff.; Voegelin 2002: 140ff.; Sigmund 1971: 12, 39; Miller 1996: 893; Aubenque 1980: 154; etc.

The epistemological irreducibility of *praxis* to *physis* has substantial ontological consequences. The most important of those is that the iusnaturalistic interpretations which are based upon the cosmologic teleologism of Aristotle's general ontology³⁵ are also groundless. The cosmological idea of Nature (universe as *complexio omnium sustantiarum*), even if it answers to the hierarchical-teleological structure in which each being constitutes its own perfection as actualization of a potency by means of the action of the efficient and final causes (under the limit-idea of Pure Act) is nevertheless not a *practical teleology*. For this to be the case (as it will happen under the Christian worldview) it is required the idea of a God as a universal creator-legislator, a *dator formarum*, and with it that of a *deontological* universe. Still, even if Aristotle is the author of the idea of a metaphysic God, the Pure Act, and in this sense one can affirm that "his original metaphysics was theology" (Jaeger 1948: 216), it is *neither* the architect of the world *nor* it has any contact with it at all³⁶. Consequently, Aristotle believes it to be ridiculous the idea of a "divine justice"³⁷. In the Aristotelian metaphysics, *praxis* constitutes only a chapter of his *physis* (this understood in an ontological-general sense), not its invasion. As it has been argued by Aubenque, it is the bastion of contingency and human freedom in a necessitarist world. In conclusion, in the Aristotelian metaphysics *praxis* constitutes only a chapter of *physis* (this understood in an ontological-general sense), not its absolute invasion. This latter would have implied its theological anthropomorphization as it was later postulated by the thomist moral onto-theology based upon an eternal law and a divine providence from which human reason is presumed to find "natural ethical principles" inherently given in the order of the real (Schroeder 2003: 44-5). As it has been argued by Aubenque, Aristotle's *praxis* is rather the bastion of contingency and human ("too human") freedom in a necessitarist world. The "ontology of ethics" (to use

³⁵ Cf. *Metaph.*, V, 4, 1015a35ff., where the *ousia* or *eidos* of things that exist "by nature" is identified with their *telos*.

³⁶ In Aubenque words: "Aristotle's God does not create. He lets it be" (Aubenque 1962: 372 [sp. transl.]). Kelsen, for instance, interprets along these lines the Aristotelian metaphysics, thus considering it an ideology of inactivity and political resignation (1979: 156ff., 191).

³⁷ Cf. *Eth. Nic.*, X, 8, 1178b10ff. Compared to his predecessors, Aristotle's philosophy operates a desacralization of the concept of law (Aubenque 1980: 150), as a result of his criticism of the different "normative" uses of the concept of nature (with its theological background) running from the times of the sophists, not to mention poets' and dramatists' uses of the same term. This tradition had ended up by stuffing that concept with ambiguity and ambivalence: nature could be good or bad, divine or bestial, rational or blind (see Romilly 2002: Ch. VIII).

Voegelin's expression, from which he draws a conclusion opposite to ours; cf. 2002: 148ff.) cannot embrace the *Scala naturae* so far as the former appears to be organized in virtue of contents (such as *eudaimonia* or justice) that are essentially linked to the ethical and political *praktikon* thus leading us to a totally different, split-off meaning of "nature"³⁸. This represents an insurmountable obstacle to any interpretation inclined to speak either of a law in nature or a natural right or to identify therein "practical correctness standards".

III. Law as praxis.

This is corroborated by the Aristotelian political philosophy and precisely by virtue of the role played in it by law. In effect, the constitution —embodiment of political justice— is for Aristotle the formal and final cause of the *polis* (cf. Miller 1995: 79). It is not however a natural cause (*physis*) but a practical one resulting out of the activity of human legislator who takes aim at a practical purpose (a normative organization of the *polis* which is oriented to the common good). Justice is "the order of the political community [*politikes koinonias taxis*]" (*Pol.*, I, 2, 1253a24; cf. IV, 1, 1289a15ss.). It is about a consciously deliberated order (*taxis*) which entails coordination of human actions by means of practical reason; it is not about a *kosmos* or natural order determined by objective and necessary regularities (see Miller 1995: 28, 45, 336ff.; Yack 1993: 88ff.). The practical sphere, comprising ethics-morality-politics, is then the appropriate framework for the notion of justice to be placed (instead of any naturalistic notion of "nature").

And this is how, turning back to our initial text, Aristotle locates the practice of positive law right at the middle of the scenario and with it, legislators' and judges' decisions which are the means by which legal conventions are established in the political community. This is presented as a *constitutive* practice, a practice that creates its own scale of signification, its own autonomous "code" in terms of norms and values. This is the general sense we should

³⁸ Aubenque 1963: 17, 165 (sp. ed.). The ontology of *phronesis* is an "ontology of contingency" (ibid., 79). On the relation of this to the indeterminacy of future events, see ibid. 108, 123ff. The ontological difference between the *telos* in the metaphysical sense —that to which all being tend "by nature"— and the *telos* in the practical sense —human deliberative agent being here involved— should then not be surprised. More the same as for the notion of universality that in general A. identifies with nature (that what exists "either always or for the most part", *Physic*, II, 8, 199b23-24; *Met.*, VI, 2, 1027a10). This universality is substantially different indeed whenever it may or may not include human actions.

give to the clause Aristotle uses to define legal justice: “that which is originally indifferent [*diapherei*], but when it has been laid down [*thontai*] is not indifferent”. That original indifference means, overall, that human practice is under-determined by any naturalist factors at all: these allow *many* different deliberations without determining *by themselves* one particular norm better than any other—it is only the *prohairesis* of the practical individual in making those decisions what insufflates norms and values to the natural world. Thus, this is how it should be interpreted the critical meaning of that reference to the fire which “burns both here and in Persia”: those who were to believe that natural justice has this kind of necessity and universality over positive law make an epistemological mistake (they erroneously take practical reason as if it was theoretical reason) and an ontological one (the metaphysical hypostasis of norms as natural entities). As it is also critical the other Aristotelian reference of a naturalist content: “by nature the right hand is stronger”, but this does not make it be neither good nor bad; further this can be modified by virtue of social norms, thus through education “it is possible that all men come to be ambidextrous”. “Men do many things against habit and nature, if rational principle persuades them that they ought” (*Pol.*, VII, 13, 1332b6-8). Nature only stops being indifferent then just whenever, and due to the fact that, those norms are laid down.

Much the same can be said, on the other hand, for those moral contents in a pre-legal sense (positive morality) or for moral standards of justice (critical morality or ethics). Here it is at stake the *normative justification* of legislative conventions and, in general, critical evaluation of positive law. Is legal justice—convention as established by the positive legislator—the only relevant and ultimate criterion of justice? Does Aristotle—as Hobbes later on did—maintain that *auctoritas, non veritas facit legem*? In order to give an appropriate answer to this, it shall be enough to take into consideration that the idea of convention and the idea of authority lying underneath Aristotelian positive law is an entirely rationalist idea. It resorts to the legislator’s “decision” and “will” but it is neither decisionistic nor voluntaristic; it resorts to the “form” of positive law, but it is not formalist. And it is not so because positive law is that institutionalization of practical rationality that connects morality and politics to each other: that is the meaning of its being a part of “political justice”. It is in this—into the unity of practical reasoning—where those *contents* of “natural justice” are to be found.

Aristotle draws a clear picture of the institutional structure of legal practice and its rationality, globally as well as in its constituent elements (legislative and judicial practices). As a whole, law is a second-order institution that somehow totalizes first-order social practices and this is always a political, “architectonical” enterprise: for laws are “the ‘works’ of the political art”, and “in their enactments on all subjects [*peri hapanton*]” they affect all men and aim at “common interest of all” and self-sufficiency (*autarkeia*), “so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society”³⁹. Law selectively intervenes upon customs and positive moral norms. As a result of this intervention, certain guidelines are universalized for all the individuals as *citizens*. Thus the importance of the law: as a practical device which is necessary for the construction of a state taking the way from ethics to politics⁴⁰. It is the legislator who in a single act and after long deliberation introduces a normative, prospective universal that aims at making “the citizens good by forming habits in them, and this is the wish of every legislator”⁴¹. For sure, the notion of deliberation involves a practical reasoning by the legislator, whereas the notion of habit implies that this universal is a practical rule bound to be accomplished in the future by citizens, or enforced upon them by the judge as an “intermediate” or “mediator” between the legislator and the citizens⁴².

And this is the reason why the text here commented attributes to the legislative practice a *constitutive* character, thus making a qualitative difference. Law cannot be deduced either from the social practice’s precedent state or from the preexistent norms operating in it. It can only be deduced from the very fact of it having been established, “posited” by the legislator with this or that other content, and so from the practical effects that it will entail for the future too. Here we come across the starting-point of all later theories of legal *positivity* (*Kein Imperativ ohne Imperator*), which necessarily refer to the *practical* character of law as an

³⁹ *Eth. Nic.*, VI, 8, 1141b25; X, 9, 1181b1; V, 1, 1129b15ff.

⁴⁰ See Chap. 9 of Book X of the *Eth. Nic.* On law as a kind of mechanism for the modification and reform of moral and customary rules by political authority, see Schroeder 2003: 20-1.

⁴¹ *Eth. Nic.*, II, 1, 1103b1ff. “Of things just and lawful each is related as the universal to its particulars; for the things that are done are many, but of them each is one, since it is universal” (V, 7, 1135a6ff.). “[L]aws are made after long consideration [...] the decision of the lawgiver is not particular but prospective and general” (*Rhet.*, I, 1, 1354b1ff.).

⁴² *Eth. Nic.*, V, 4, 1132a20ff.

institution, to put it in Austin words, only “existing by position”⁴³. Consequently: being previously indifferent (*diapherei*), once it is established it is not indifferent anymore.⁴⁴

It is not however a matter of *moral* indifference. This is the usual interpretation, and the traditional, iusnaturalist one too⁴⁵. According to it, law lacks of substantive validity unless it *specifies* by means of its particular positive rules moral norms (i.e. “natural justice”). So, law is a *part* of morality (a “special case” of moral discourse, in terms of Alexy). On the contrary, legal positivism defends that law and morality must remain separated not only from the perspective of the identification of law but from the perspective of its justification too. Now, Aristotle’s theory proves to be irreducible to any of these two theses.

As we have seen, legal rules considered as *posited* rules are for Aristotle just only “in a sense” (1129b11). Aristotle rejects a purely positivistic view of legal practice and its characteristic “separation thesis”: justice not only concerns to legal *form* —authority— but to its contents too, and not any content whatsoever makes law just. Legal rules do have an internal connection to moral contents. Now, this is not *more scholastico* either. It is rather derived from the fact of law constituting a form of *political* justice. Positive law —legal justice— does not relate to morality as if they both were disjunctive spheres, external to each other. That is, in terms of static, *logical* relations between general and particular, *genus* and *species*, form and matter: viz. *theoretical* relations. Rather their relation is a dynamic, *practical* or historical one, thus given in the transition from moral norms to a re-organization of the standards of justice at a new level: that of a political community.

Laws are general rules not just in the logic sense of the term but also in the sense of being *generally* followed and enforced in social practices. Only through laws and through the

⁴³ Austin 1970 [1861]: 2. In the same sense Kelsen 1960: 201: “The norms of a legal order must be produced by a particular act of imposition [*Setzungsakt*]. They are enacted norms, i.e., positive norms, elements of a positive order”.

⁴⁴ Closely related to this it is too Raz’s *practical difference thesis*, that is, the thesis about the practical difference that the legislator as a normative authority introduces when it gives a solution to coordination problems by way of establishing new conventions or incorporates previous conventions. The decision that was taken by the legislator purports a change in that what those subjected to its authority must do, and it does so by means of taking sides for one of the previously equally acceptable multiple options that could be adopted: those are indifferent until the very moment when the authority pronounces itself (Raz 1986: 30ff., 60).

⁴⁵ Cf. Leyden 1967: 3; Barker 1959: 321ff.; Miller 1995: 75; Burns 1998: 146, 154; Yack 1990: 219, 220.

relations of freedom and equality they impose in society is political justice possible (*Eth. Nic.*, V, 6, 1134a28ff.). This is justice “according to law and between people naturally subject to law” (1134b13ff.). The “naturalness” of this kind of justice is then essentially related to the structural conditions of the constitution of a political society or *politeia*⁴⁶. Political justice is *institutionalized* justice, that is, *administration* of justice (*dike*) exclusively attached to law (*nomos*) and consisting of decisions or judgments (*krisis*) on what is just (*to dikaion*) that are obligatory in the sense of being backed by coercion⁴⁷. The realm of the justice is the realm of that which is “legal and equal [*to nomimon kai to ison*]” (V, 1, 1129a34), and both are contextual and relative to positive law as a practice: that practice connected to the institutions of legality or “rule of law” within the frame of the *polis*. In this institutions “we do not allow a man to rule, but rational principle” (*Eth. Nic.*, V, 6, 1134a35.). So equality (*to ison*)—which is justice’s essential content—reveals itself as a truly *political* concept the universal dimension of which derives from an analysis of the structure of positive legal orders to the extent to which they are based on the “rule of law”: “for where the laws do not govern there is no constitution [*politeia*]” (*Pol.*, IV, 4, 1292a32). And a rule-based system of legal justice reveals itself to be a sort of “political constant”, since all regimes adhere to some sort of justice (III, 9, 1280a9).

However, the authority of legal justice is neither based upon a merely formal-procedural (Fuller 1969: 33ff., 153ff.) nor content-independent (Kelsen 1960: 201ff.) kind of rationality. Its consisting of institutional, authoritative decisions supported by official coercion does not nevertheless isolate law from moral discourse. To the opposite, they are strongly connected to substantive moral reasons: “For practically the majority of the acts commanded by the law are those which are prescribed from the point of view of virtue taken as a whole [*hole arete*]; for the law bids us practice every virtue and forbids us to practice any vice. And the things that tend to produce virtue taken as a whole are those of the acts prescribed by the law which have been prescribed with a view to education for the common good” (V, 2, 1130b18ff.). From a justificatory (not only a genetic) perspective, and against formalism, the legal institution is not self-referred. As a political institution, it does tend not only to achieve the end of common

⁴⁶ Cf. Nussbaum (1985: 212). It is about “reasons for rules” themselves: reasons justifying the political authority and its “asymmetry” (e.g., the promotion of equality, fairness, stability, efficiency, allocation of power, etc.). See Schauer 1991: 135ff.

⁴⁷ *Pol.*, I, 2, 1253a32-33. Miller 1995: 58-9.

coexistence but also that of the *good life* or “life according to virtue [*bion ton kat’ areten*]” (*Pol.*, III, 9, 1281a6; III, 13, 1284a2; IV, 2, 1289a30ff.; VII, 1, 1323a14ff.).

Legal rules have normative groundings beyond legal practice. They indeed refer to moral conventions which are not created but rather presupposed by them as something given. Still, those moral grounds are *normatively* relevant to law only when *incorporated* by law, viz., codified and formalized in terms of general positive legal rules within the political frame. This means that moral reasons are not valid *proprio vigore* as an allegedly “natural”, objective order but only as being part of the practical reasoning of legislators and judges. So the law is neither a mere “specification” or “particular case” of morality, nor is its relation to this latter merely “declarative” as argued by traditional (deontological) iusnaturalism. Moreover, given that positive law is the only institution through which moral norms and values can be universalized in the *public, political* sphere, being then applicable to *all* citizens, it turns out that morality itself is the one to be in need of the law⁴⁸.

It is clear then that it lacks of any plausibility to hold that such moral contents belong to a universal “natural justice” placed *beyond* the framework of political justice. The interpretation that Thomist iusnaturalism advocated for as well as that of other conceptions seeking since Kant to derive the contents of justice for positive law from a universalist ideal-critical morality are flawed. From an Aristotelian approach (rather close to the Hegelian *Sittlichkeit*) a plain metaphysical hypostasis of moral norms underlies those interpretations. These norms are neither “previous” nor “external” to positive law; they are instead always incorporated to it insomuch as *internally* tied to the complexity of the very practice of legal institutions⁴⁹. It is not required to cross the limits of political justice in order to ground and critically evaluate positive law in terms of justice. The best evidence for this is provided by the very important notion of *epieikeia* or equity, by means of which values underlying legislative rules come into

⁴⁸ As Miller (1995: 59) puts it: “[L]egal judgement is indispensable for the habituation and moral development of the citizens. Hence, human beings require a legal and political system in order to acquire ethical virtue”. That is the reason why the universal, unqualified sense of justice (*haplos dikaion*) is closely tied to “virtue taken as a whole [*hole arete*]” (*Eth. N.*, 1130a10), for it presupposes the legal institution as the promoting device of all the ethical virtues now in the political sphere.

⁴⁹ As Burns (1998: 155) puts it: “They exist *immanently* within the principles of political justice of a particular polis”.

play in adjudication so that to rectify the scope of such rules⁵⁰. So the existence of a *critical* morality based on justificatory principles, ideals or values upon which legislative rules rest is itself, still only partially, a result of law as a political institution.

Consequently, resorting to an ideal-universal system of moral principles as an absolute ground for positive law has been always under one risk: that the alleged *superfluosity*⁵¹ of positive law may turn against, especially if it is the case that the very contents of justice of such principles precisely *demand* the institutionalization of a system of decisions politically organized (i.e. a system of legal justice) so that to resolve those *practical* problems that moral discourse is not able to resolve on its own⁵². For example: the problem about how much it should be paid for a prisoner's ransom or about what should be offered as a sacrifice to the gods. This sort of problems cannot be solved only by deliberative *regressus* to the generic relevant principles: whether all prisoners should be ransomed and the gods honored (which are not only moral principles, but also political). The *progressus* or establishment of a practical rule that sets a particular course of action rather than other (the price of a mina, the sacrifice of a goat or two sheep) is required. Since principles can be mutually articulated in many different ways, many rules and particular decisions might be *indifferently* obtained from them alone. The relationship between the principles of morality and the legal rules cannot

⁵⁰ Cf. *Eth. Nic.*, V, 10, 1137b10-41; *Rhet.*, I, 13, 1374a25ff.; V, 1354b7. The *epieikeia* is a characteristic feature of *positive-legal* adjudication as far as it deals with decision on particular cases brought before the courts. Since legislative rules are referred to general types of actions, then when "a case arises on it which is not covered by the universal statement" (*Eth. Nic.*, 1137b20; *Rhet.*, 1374a30) it is necessary for the judge to adapt and rectify the rule at stake. Aristotle establishes here the basic theses of the legal method of interpretation (*Rhet.*, 1374b10-15). Specially and above all he establishes the fundamental thesis on the defeasibility of rules in those cases of over- and under-inclusiveness according to the principles and rationales that underlie these rules (for "the legislator himself would have so done"). The *epieikeia* reveals two structural properties of the law: the indeterminacy of its rules and the incorporation of moral criteria when attempting to reduce it in each particular case. As Aristotle remarks, equity is "better than one kind of justice —not better than absolute justice but better than the error that arises from the absoluteness of the statement". Though having been traditionally understood as a referral instance to "natural justice" or "natural law" (cf. Th. Aquinas, *In dec. Eth.*, V, 16, n. 1081; Gauthier/Jolif 1970: II, 432ff.; Trude 1955: 124ff.; Gadamer 2007: 391), equity can only take place *within* the framework of a system of legality (Ferrajoli 2000: 156, 162; Yack 1990: 227-8; Shiner 1994: 1250). Yet if it operates resorting to a justificatory connection to principles and moral values that are placed beyond that system and towards which the legal practice refers.

⁵¹ See Nino 1994: 130ff.

⁵² Cf. Alexy 1989: 212ff., 292ff.; Finnis 1980: 281ff.

thus be a mere derivation from the general to the particular. It is, once more, rather a *constitutive* determination in which the authority introduces a before-and-after point.⁵³

And precisely here lays the source of variability and contingency of legal orders, since moral conceptions vary and so it does political good, for this “is said in many different ways”. Different goals might be assigned to the *polis* by the constitution —there is no an indefectible “natural good” determining political *praxis*— and again those goals might be compounded and articulated into law in many different ways. We get here to the famous final clause of our text: “the things which are just not by nature but by human enactment [*anthropina dikaia*] [i.e. positive legal orders] are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere [*pantakhou*] and by nature [*kata physin*] the best [*ariste*]” (1135a3-5). Once more the philosophical-critical methodology underlying this assertion presupposes that the perfect constitution cannot be conceived as a supra-historical ideal model to be placed beyond the practical variable domain of the *positive*, actually existent legal orders.⁵⁴ It is a regulative ideal *immanent* to the historical-practical process of development and transformation of legal orders, instead of interpretations of neither a timeless human nature nor a universal ideal justice only satisfied “as far as actual circumstances permit” (Miller 1995: 377). The concrete institutions belonging to each of those legal orders are the only critical *kanon kai metron* for the rationalization, reform or improvement of any other given legal order and thus providing a model that can be postulated as the best “in its kind” or “by nature”. Even Aristotle says that more than one constitution

⁵³ The semantic vacuity or tautological character of the principles of natural law is a problem that arises in the scholastic’s *iuris naturalis scientia* when it tries to *logically deduce* the positive law from them. In fact, positive law (or any other content) could not at all be obtained by deduction from those principles, but only by determination of the legislator’s will once considered the different socio-political circumstances (*per modum particularis determinationis*). Thus giving place to the plurality and contingency of positive law (*diversitas legis positivae*) as well as to its eventual deviation from morality (*corruptio legis*). Cf. Th. Aquinas, *Sum. Theol.*, I-II, q. 95, art. 2, a. 4. The internal contradiction that this introduces, as universality and immutability of natural law principles is put into question, tries to be solved in an *ad hoc* manner by resorting to the above mentioned distinction between primary principles (unchangeable) and secondary principles (variable or historical, *apud nos*). See e.g. Leyden 1985: 72. This distinction remains in force in the background of practically all the contemporary interpretations of the Aristotelian texts (even those that have criticized the traditional iusnaturalist dichotomy in the light of the political nature of both natural and legal justice: see e.g. Burns: 1998: 154ff.).

⁵⁴ Aristotle is himself rather critic as to any utopian ideal of regime hardly able to come to existence (see *Pol.*, IV, 11, 1295a25ff.).

might be the best one.⁵⁵ So, relativism is discarded by the critical distinction between correct and deviated constitutions⁵⁶. Practical philosophy is committed to the rational, normative enterprise of constructing universal models under a legislative-policy perspective⁵⁷. Natural justice is then about the universal *in* the law, thus it is connected to the actual practice of legal justice institutions given in their particular political and moral context. The Aristotelian definition contains, in a nutshell, the basic axioms of a true philosophy of law —one quite different from both iusnaturalist metaphysics and formalist positivism.

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⁵⁵ Kingship in Book III and aristocracy in book VII (see *Pol.*, IV, 2, 1289a30-32). Miller 1995: 191ff.

⁵⁶ Cf. *Pol.*, III, 9-13. The criterion of correctness of political constitutions is internally connected to the Aristotelian theory of general laws and legal justice: “And ‘right’ [*orthon*] must be taken in the sense of ‘equally right,’ and this means right in regard to the interest of the whole state and in regard to the common welfare of the citizens” (*Pol.*, III, 13, 1283b40-42).

⁵⁷ Cf. *Eth. Nic.*, X, 9, 1180a32ff.; 1181b5ff.; *Rhet.*, I, 4, 1360a31ff. See Michelakis 1961: 79ff.

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