

## ARISTOTLE AND NATURAL JUSTICE

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professor (PPKE)**Abstract**

In *Nicomachean Ethics* V Aristotle outlines a framework with three elements, political, natural and conventional/legal justice. The paper aims to offer a more detailed picture of their relation and argues that natural and conventional justice are linked together. By distinguishing two phases of conventional justice, those before and after enactment, the first phase expresses a general rule that can be enacted in different ways. Such a general rule may also correspond to natural justice. The paper is about to show also that, on Aristotle's view, natural justice does not imply strict regularity since nature itself allows for variations and natural laws apply only for the most part, which gives room for equity.

Keywords: justice, nature, convention, general rules, enactment.”

Aristotle's account of justice in the *Nicomachean Ethics* Bk. V is complex. He makes many distinctions. First of all, he distinguishes universal from particular justice, saying that the former is associated with what is lawful and the latter with what is equal (or fair, ἴσον). The former is also characterized as complete virtue in relation to another person (1129b15-17, 1130a10-13), that is, as the exercise of all virtues towards other people, whereas the latter is a particular virtue and contrasted with graspingness (πλεονεξία), with the drive to get more than appropriate. Within particular justice, he also distinguishes between distributive and corrective justice. It is here that the doctrine of justice as a mean state has been exposed in full. Finally, for present purposes, we reach the distinction between natural and conventional justice (1134b19). The distinction is also important for it gives rise to the notion of equity. Aristotle's argument is short but the main lines may be clear enough. The crucial claim at the beginning of ch. 7 is that natural justice has the same force (δύναμις) everywhere (πανταχοῦ) and does not depend on whether we endorse it or not. Later on (1136b34-1137a1), he adds that conventional justice differs from what is just in the

primary sense.<sup>1</sup> However, the thesis has been formulated in a context indicating that the range of natural justice is limited. It is a part of political justice and differs from the other part of political justice, which is called conventional justice (1134b18-19). Therefore, if we want to have a clear notion of natural justice we have to get a clue about the notions of political and conventional justice as well.

Political justice itself seems to be the part of justice in general (τὸ ἀπλῶς δίκαιον). It is found where “people share their lives together with a view to self-sufficiency: people who are free and equal either proportionately or arithmetically” (1134a26-28).<sup>2</sup> This seems to be the genuine form of justice, however, because people not living together in *polis* under the rule of law can be just in way but their justice is a resemblance of political justice.<sup>3</sup> Living in *polis* is a prerequisite for genuine political justice. They cannot be just properly speaking for, according to the general definition, “the just man is the one who is in conformity with the law and favouring equality (fairness)” (1129a33), which implies that the notion of justice is somehow connected to the notions of lawfulness and equality (or fairness) alike. Laws, again, require a community arranged in accordance with rules, some of them are written. The primary manifestation of justice, then, is in the sphere of politics broadly speaking, that is, in the sphere of civic activities. This is all the more understandable for unlike Plato, Aristotle conceives of justice as a primarily interpersonal virtue. All the conduct we show towards others falls within the scope of justice, whereas we cannot exercise justice towards ourselves (1134b12-3). It allows him to say that in a sense justice is an excellence responsible for providing happiness for the community of citizens (πολιτικὴ κοινωνία, 1129b18-19).<sup>4</sup> For this reason, we may consider it the paradigmatic type of justice. As a political animal by nature, man can only flourish in the context of *polis*, the highest form of human association, and therefore the full range of human virtues (excellences) can prevail in such environment only. For law

<sup>1</sup> In *Rhetoric* I 10, 1368b7–8 Aristotle talks about a kind of law (νόμος) that is unwritten, acknowledged everywhere and universal, and says that universal law is the law of nature (I 13, 1373b6). One might tempt to identify this law with natural justice (see, e.g., Jean-Yves JOLIF in *Aristote, Éthique à Nicomaque. Introduction, traduction et commentaire* par René Antoine GAUTHIER et Jean-Yves JOLIF. Louvain-le-Neuve, Peeters, 2002<sup>2</sup>. (Louvain, Publications Universitaires de Louvain, 1958–59<sup>1</sup>.), Vol. II/1, 391.) but here we are dealing with the distinction between φυσικόν and νομικόν justice and the latter term may seem to cover all that is related to law or convention. On the other hand, universal law is said to be according to nature and there is a natural justice and injustice that is common to all (φύσει κοινὸν δίκαιον καὶ ἄδικον, 1373b5–6). Aristotle takes the example of Antigone who declares that it is naturally just to bury her brother even if the law of the city forbids it.

<sup>2</sup> Translation is by Christopher ROWE in *Aristotle. Nicomachean Ethics. Translation (with Historical Introduction)* by Chr. Rowe and *Philosophical Introduction and Commentary* by S. Broadie. Oxford, OUP, 2002. Translations from the Greek are mine unless stated otherwise.

<sup>3</sup> Justice between slave and master, or between child and father is based on a relation between unequals, just as the relation between wife and husband, although it is said to resemble political justice more (1134b15). Being a form of village (κώμη) where despotic conditions prevail (*Politics* I 2, 1252b16–24), kingship also belongs to this category.

<sup>4</sup> To put it otherwise, happiness is the common benefit for the citizens and involves a life in accordance with what is just unqualifiedly (*Politics* III 6, 1279a18–19),

intends to determine interpersonal relationships as well, justice must be related to the laws; in an ideal state such as Aristotle's *politeia*, they coincide. However, they differ in deviant forms of states and therefore we cannot identify justice with law-abiding in general.<sup>5</sup> Another important consequence of the classification is that natural justice is not prior to political justice. It is a part of it and therefore there is no natural justice that could be conceived of as a pre-political phenomenon. Political justice comprises natural justice as a whole comprises a part. It implies that justice according to nature cannot be prior to political justice. It does not follow, however, that their relation is a genus-species one. If it were a genus-species relation, it would lead to a consequence that is not attested in Aristotle's text. Genus-species relation, and priority, involve definitional priority. If it were a definitional priority, however, then the definition of natural justice would contain a reference to political justice as a *genus proximum*. There is no such reference in the texts. Moreover, the relation of whole to part is not the same as the relation of a genus to its species. One might argue that the genus-species relation is a kind of whole-to-part relation but one has to accept also that the latter is more comprehensive. As a matter of fact, if we take a look at ch.11 of *Metaphysics* Bk 5, which is on the different senses of priority, we read that something is prior in respect of its nature and substance if it is possible for it to exist without other things that are posterior, whereas they cannot exist without it (1019a2-4, 13-14). If natural justice is part of political justice then it is clear that the former cannot exist without the latter, whereas the whole can exist without *this* part. It does not imply, again, that their relation is a genus-species one for natural justice is not defined with reference to political justice. Much could be said on the priority relations that are applicable to the one element or another of justice, but for present purposes, it is neither necessary nor feasible.<sup>6</sup>

The question I shall be concentrating on has a more limited range. It concerns the description of natural justice and its relation to conventional justice. The thesis I argue for is twofold. It says, on the one hand, that conventional justice seems to depend on natural justice and the dependence is, again, mereological (involving a whole-to-part relationship), and, on the other hand, that natural justice is variable because the laws in nature themselves are also variable in a sense and to some extent. Its variability is, however, restricted. If true, the thesis offers a further support for the claim that nature serves as a normative ground for justice<sup>7</sup> (or law) for conventional justice is depends on natural justice which in turn belongs to political justice.

Let me start with the issue of relationship. In order to explain the difference between natural and conventional justice one may assume that natural justice relates

<sup>5</sup> On this issue, see Marco ZINGANO: 'Natural, ethical, and political justice'. In: Marguerite DESLAURIERS & Pierre DESTRIÉE (ed.): *The Cambridge Companion to Aristotle's Politics*. Cambridge, CUP, 2013. 203.

<sup>6</sup> For a fine analysis of this relation, see Michail PERAMATZIS: *Priority in Aristotle's Metaphysics*. Oxford, OUP, 2011. He makes many points that are useful for an analysis of the different aspects of justice.

<sup>7</sup> It has been argued for by George DUKE: *Aristotle and Law. The Politics of Nomos*. Cambridge, CUP, 2020. 129.

to laws that reflect natural arrangement and contrast strikingly with laws that are made by agreement. It is a matter of agreement whether the sacrifice would be of a goat, not two sheep, or – to give a modern example – we need a law prescribing which side of the road to drive on, but it does not really matter which side we choose collectively. There is a general law that can be served in different ways. If we want to determine the relation between the two kinds of justice it seems that we are faced with two options; either we think that natural and conventional justice constitute two kinds political justice that are independent from one another or that one has a priority over the other. If we prefer the first option, we might think of the traditional contrast between νόμος and φύσις where, in one account, the two are mutually exclusive.<sup>8</sup> In the second case, it is most likely that it is natural justice that has a priority over conventional justice, which implies that conventional justice draws on natural justice. Aristotle's division might give someone the impression that natural and conventional justice are independent subspecies of political justice, but a closer look at the exposition reveals the reason why it may not be the case.

Conventional justice is described first as “what in the beginning makes no difference whether enacted or not, but when enacted *does* make a difference” (1134b21).<sup>9</sup> It shows, I suspect, that conventional justice has two phases or levels, separated by the moment of enactment in individual circumstances. Before implementation, it does not make a difference, which means that it is general. Moreover, we also read (b23-4) that it encapsulates laws that are laid down to meet particular cases such as the sacrifice to be made to the Spartan king, Brasidas. The reference to the king suggests that conventional justice here is a justice made for a particular case and possibly derived from some general principle. On the other hand, the former description is based on the distinction between the state of justice before enactment and the state of being enacted. This is the distinction between the first and the second level of conventional justice. The second level is characterized quite clearly; it contains the particular manifestations of conventional justice. Why does Aristotle say, however, that there is no difference in the beginning, only in the state of being enacted? One possible answer is that there is a general justice/law which is executed in different ways. At the beginning, however, we are dealing with the same general law. To take two examples, sacrifice must be made but it can be either of a goat or two sheep, or ransom has to be paid for a captive but the exact amount may vary from place to place. This general law may be the framework within which particular laws or particular kinds of conventional justice are formulated. However, we do not have to say that the first level of conventional justice is to be identified as a kind of written law; it may be constituted by well entrenched habits or practices as well. It remains to examine how the first level of conventional justice relates to natural justice.

<sup>8</sup> It seems that the Cynics adopted this position, see the thorough discussion in Marie-Odile GOULET-CAZÉ: *Le cynisme, une philosophie antique*. Paris, J. Vrin, 2017. 485 ss.

<sup>9</sup> νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐδὲν διαφέρει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται, διαφέρει. (emphasis is mine, P.L.)

We can start with the statement that natural justice has the same force (δύναμις) everywhere. It seems that the term δύναμις refers to the scope or validity of the law, implying the possibility of enforcement. It is a kind of general justice that may entail a certain indeterminacy. It can be called general because it has the same force everywhere. The possibility of indeterminacy has been indicated by the remarks on the two of its species, as we shall see. In general, it may not require long argument to show that conventional justice varies. As for natural justice, there may be a few reasons to attribute it some form of variability.<sup>10</sup> It may be the case even if we agree that it has a divine status.<sup>11</sup> The first level of conventional justice also has a certain kind of generality. Ransom must be paid for prisoners of war but the exact amount varies depending on the circumstances. From this point of view, natural justice and the first level of conventional justice are very much the same. At least, the text does not allude to any explicit difference between them. It is likely, then, that natural justice encompasses the first level of conventional justice. But how does natural justice work? If it is natural and has something to do with natural law, its working must resemble the way natural laws work in general.

One may claim that, for nature is prior to sheer convention, respect for social laws, the basis of political justice, can be expected only if they are neither arbitrary inventions nor reflecting the interests of a particular social group only. If, however, there is a kind of social law which is rooted in nature then it has to resemble other types of natural law. If this is the case then, due to the assumption that natural laws are eternal, social laws of this kind also must be eternal. In Aristotle's times, some people, possibly Sophists, thought that all kinds of justice belong to conventional justice. There is no such thing as natural justice since justice in general is liable to change. By contrast, if there were natural justice it would be immutable. Just as the fire burns upwards both here in Greece and in Persia (1134b25) all the time, so too natural justice is supposed to be always the same for every region. Whereas what is by nature is immutable and has the same force everywhere, they see things related to justice in change. As a consequence, these Sophists separate justice from nature and by denying the possibility of natural justice they confine justice to the realm of sheer convention. Their views represent a fairly strong version of the contrast between convention and nature (νόμος-φύσις). Aristotle deviates from their views for he says that, although in our world there are things that are by nature, everything is capable

<sup>10</sup> The case for the variability of natural justice in each *polis* has been defended by Pierre AUBENQUE: 'La loi chez Aristote'. *Archives de Philosophie du Droit*, 25 (1980), 147–157., who lists both philological and philosophical reasons to support it (see also id., 'The twofold natural foundation of justice according to Aristotle'. In: Robert HEINAMAN (ed.): *Aristotle and moral realism*. London, UCL Press, 1995. 35–47.) It has been criticized at length by Pierre DESTRIÉ: 'Aristote et la question du droit naturel (*Eth. Nic.* V 10, 1134b18–1135a5)'. *Phronesis*, 45 (2000), 220–239. <http://dx.doi.org/10.1163/156852800510199>, who points out that the phenomenon of variability does not compel us to admit that natural justice varies from *polis* to *polis*.

<sup>11</sup> I am referring to the claim (made by BROADIE op. cit. 348.) that natural justice may correspond to a law that is divine (prescribed by the divine intellect) (*Politics* III, 1287a28–29). The question is to what extent divine law allows for exceptions in the sublunary nature.

of being changed.<sup>12</sup> He rejects the conventionalist premise that natural processes are governed by invariable necessities. It does not mean, however, that his rejection of conventionalism involves that the distinction between natural and conventional (i.e., legal) justice would lose its meaning. We have to bear in mind only that it is not variability that forms the dividing line between the two kinds.

Unfortunately, Aristotle is much clearer in dissociating himself from the conventionalists than in explaining the difference between natural and conventional justice so conceived. He says it is plain which justice is natural and which is conventional. Some commentators excuse this shorthand explanation by pointing out that Aristotle, just like Plato, has no patience with conventionalism, both of them thinking it is blatantly wrong.<sup>13</sup> At any rate, he elucidates the difference with analogies; the right hand is superior by nature and yet it is possible that everyone should become such that they use both hands equally well. The suggestion may be that natural justice is not opposed conventional one.<sup>14</sup> He also adds that just arrangements based on agreement and advantage are like units of measurement; “they are not everywhere of equal size but larger where people buy and smaller where they sell” (1135a1-2, trans. by Chr. Rowe). The analogies suggest slightly different approaches. The first, the one with the hand, suggests that there is a superior element that can be supplemented on occasions. There is a possibility that we can use both hands with equal success, although the right hand is the more natural for use. The second is a general expectation – there must be some measure – which can be met in different ways depending on the situation. Despite the difference, however, we have to see that in both cases natural justice is involved in conventional justice; in the first as an ingredient of a new compound (using not only the right hand, which superior by nature, but the left as well) and in the second case as a genus. It provides us with the chance of introducing mereological explanations. Now, I have not found any sign in Aristotle of a discussion of the relation exemplified by the right hand, but there is ample evidence for his analysis of the genus-species relation.<sup>15</sup> It is a mereological relation. In ch. 25 of *Metaphysics* Bk. V we read that “[...] the results of any non-quantitative division of a form are also called its portions; that is why people assert that forms/species are portions of their genus” (1023b17-19). Later on, we also read

<sup>12</sup> 1134b32: εἴπερ ἄμφο κινητὰ ὁμοίως, δῆλον. I am following Bywater’s interpunction, not Susemihl’s suggestion (εἴπερ ἄμφο κινητὰ, ὁμοίως δῆλον) and understands ὁμοίως with Rowe as ‘alike’, not as ‘in equal manner’. The two types of justice are changeable alike, but not changeable in the same way or to the same extent.

<sup>13</sup> See, e.g., Plato’s arguments in *Republic* I. Aristotle discusses moral conventionalism in *Nicomachean Ethics* I 3, on which recently see also Lesley BROWN: ‘Aristotle (with the help of Plato) against the claim that morality is ‘only by convention’’. *Ancient Philosophy Today*, I (2019), 18–37. <http://dx.doi.org/10.3366/anph.2019.0003>

<sup>14</sup> Using the right hand only and using both hands equally well (i.e., being ambidextrous) are not mutually exclusive in the sense as, say, even and odd are so.

<sup>15</sup> The example of right hand can be interpreted as supporting the claim that the natural is that which holds for the most part and most of the time, see Fred D. MILLER: *Nature, Justice, and Rights in Aristotle’s Politics*. Oxford, Clarendon Press, 1995. 75.

that parts of the definition can be regarded in a certain way as parts of the thing defined and because the definition of a species must include a reference to the genus (“man is a rational *animal*”) the genus can be called part of the species. Due to the fact, however, this kind of relation is a logical relation, based on the analysis of definition, we may leave it out of consideration because the relation we are discussing is not formulated in terms of definition. From this point of view, then, conventional justice is part of natural justice. They are not independent from one another; they are not independent subsets of political justice.

Let us turn to the character of natural justice. First of all, we have to have in mind that it is natural not because we have it by nature. Justice is a virtue of character and as such it is a disposition which we can acquire through habituation (*NE* II 5, 1105b19–1106a12). We have the capacity to become virtuous but it does not mean that all of us can fulfil that possibility. If so, how shall we explain natural justice? Or, perhaps, it is better to ask for an explanation of what is just (*δίκαιον*) by nature. The reason why it is natural is not that we have or approve it by birth. It is common acquisition (*Rhetoric* I 10, 1368b7). As a consequence, it is a certain kind of generality that provides its essential character. It has the same force (*δύναμις*) everywhere and does not depend on whether we endorse it or not. Generality, however, links it to the laws in nature. If we want to understand what natural justice is, we have to start with an explanation of the character of nature and natural laws in general. The thesis I put forward says that natural justice is changeable because nature itself is subject to change. In what sense is natural justice subject to change? If we stick to the analogy with nature there are two claims to be made, one is weaker, the other is stronger. In the weaker claim, the emphasis is on the particular decisions and actions that may vary but are subsumed under immutable and universal laws. The stronger claim, however, does not allow for universal laws either. It insists not only that just decisions and actions – the manifestations of justice as a virtue – are different depending on the particular situations, but also that the standards by which they are characterized as just are not universal. Since justice is connected to law, this kind of variability applies to natural law as well.<sup>16</sup> To shore up the stronger claim we can refer to Aristotle’s description of the laws in nature. In *Physics* Bk. 2, ch. 8 he claims that things that are due to nature occur as they do always or for the most part.<sup>17</sup> As nature has two realms, the region of celestial bodies and the sublunary world, and the motions of celestial bodies is completely regular, we can characterize them as occurring always in strict

<sup>16</sup> To mention but two highly influential studies, this possibility has been defended by Leo STRAUSS: *Natural Right and History*. Chicago, University of Chicago Press, 1953. and Joachim RITTER: ‘Naturrecht bei Aristoteles’. In: id.: *Metaphysik und Politik. Studien zu Aristoteles und Hegel*. Frankfurt, Suhrkamp, 1977. 133–181. (first published in 1962).

<sup>17</sup> The – in all likelihood – pseudo-Aristotelian *Magna Moralia* also characterizes the natural as holding for the most part and the greater time (I 33, 1194b37–9, 1195a3–4). The treatise has been considered genuine and therefore discussed with respect of the Aristotelian theory by Peter SAMPSON: ‘Aristotle on natural justice’. *Studia Gilsoniana*. 3 (2014), 367–376. <http://dx.doi.org/10.33366/anph.2019.0003> He argues for the highly restricted range of the variability of natural justice although to be more persuasive the claim should have been supported by a direct demonstration of the authorship of *MM*.

regularity. By contrast, the sublunary world, our world, does not allow for such a strict regularity. As consequence, the laws here are not universal properly speaking for they must leave room for exceptions. They hold only for the most part and cannot refer to physical necessity. If something in nature happens by necessity it must occur always in the same way. Exceptions may be various in kind. They are best discussed in the biological works. It is not only the explanation of animal behaviour that has to accommodate exceptions but of the structure of animal bodies as well. Although Aristotle often associates things occurring for the most part with what comes about by nature, we find passages where some of these exceptions are considered contrary to nature and therefore they cannot be called natural. Aristotle gives us an example in his work on the generation of animals. “For the monstrosity belongs to the class of things contrary to nature, not any and every kind of nature, but nature taken as what holds for the most part; nothing can happen contrary to nature considered as eternal and necessary, but only in those cases where things generally happen in a certain way but may also happen in another way.” (*GA IV 4*, 770b15-18) The reason why they are contrary to nature is that monsters such as calves with two heads are dysfunctional. Other exceptions, however, are perfectly natural. He discusses some cases in his work on the parts of animals. He claims that in most animals, for instance, the liver is provided with a gallbladder, but the latter is absent in some, such as rues or seals (*PA IV 2*, 506b21 ff.). It does not mean that animals without gallbladder on the liver are incapable of living; they just do it in a different way. Both examples show that variability implies that natural justice allows for exceptions, not that there is a huge variety, equally viable possibility. The examples also suggest that the range of variability can be different. The first example allows for a fairly limited number of exceptions, whereas the second alludes to a much more generous approach. Aristotle lists a great number of species lacking gallbladder.

In Aristotle’s view, the characteristic of the subject matter determines the method of science as well. It implies that some kind of congruence holds between the exactness or inexactness of the accounts and the nature of the subject matter. Because human behaviour belongs to the events in the sublunary world, it denies strict regularity; it applies to the exemplary, i.e. virtuous human behaviour as well. Consequently, the sciences dealing with human affairs – ethics, politics and economy (the science of household) – cannot aspire to full accuracy either. In the first book of *Nicomachean Ethics* (ch.3, 1091b11 ff.) we read that in ethics we cannot expect mathematical exactness. Another, well-known consequence is that right human behaviour cannot consist in following rules. Just like Plato, Aristotle rejects the view that virtuous behaviour is nothing but following established rules. In their views, contemporary ethics is full of generalizations which are undermined by acknowledged counterexamples. If, then, natural justice can be expressed in terms of laws, just because these laws are natural, it cannot be universal. It means that it does not apply at all times.

With all this having in mind, we can return to the notion of natural justice. If things in sublunary nature are subject to laws that are flexible themselves and natural justice works like a natural law, then natural justice also admits variety. It seems that this variety is twofold. At the level of basic natural justice, nature itself may admit of



exceptions. At the level of particular decrees such the one on the sacrifice to be made to Brasidas, they may vary according to the circumstances. Different manifestations or formulations of this kind of justice meet the standard of being natural only if they are functional. (And Aristotle has a long story in *Politics* on what functionality may mean in this context) In the world of living beings monsters are called unnatural because they are dysfunctional. By contrast, presence or absence of the gallbladder does not add to or subtract anything from the well-being of the species. Many species can do without a gallbladder attached to the liver. Furthermore, it seems that natural justice contains conventional justice.<sup>18</sup> The rejection of conventionalism carries the weight since as a consequence, scenarios such as the one we know from Sophocles' *Antigone* are gone.<sup>19</sup> There is no natural *versus* conventional justice as such. It does not rule out that we enact bad decrees on the basis of natural justice. But this is a contradiction between the result of a particular enactment and the justice formulated in general terms. Moreover, in subsuming conventional justice under natural justice Aristotle makes it impossible that the one oppose the other. Before enacted, i.e. turned into particular decrees, conventional justice seems to correspond to natural justice. This is his answer to the old age problem of νόμος contra φύσις. However, it does not rule out a possible conflict between various proposals for conventional justice or just action. The reasons for this may be familiar by now. First, there can be several forms of conventional justice understood as particular exercises of a generic pattern. Second, even on the minimalistic scenario, in relying on natural laws justice admits slight variety, natural justice may not be uniform either.

<sup>18</sup> Similar point, on different grounds, has already been made by RITTER (op. cit. 156–157., 167–168). He argues that natural justice is the ground against which conventional laws and decrees are to be judged. It implies that the natural justice is tied to conventional justice, which makes judgement on the basis of the former sensible. His thesis has been reformulated by ZINGANO op. cit. 204. ff.

<sup>19</sup> Her example is mentioned in the context of discussing natural law as common to all (*Rhetoric* I 13, 1373b10–12). It seems that when Aristotle says here that natural law is common whereas conventional is particular (λέγω δὲ νόμον τὸν μὲν ἴδιον) then he refers to conventional law as an implemented law, not the law or convention before implementation. Before implementation, as we saw it earlier, there is no difference in convention; local differences come with the process of implementation.

