

## **The Concept of Fairness in Aristotle's Philosophy**

di

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**SOMMARIO:** 1. The concept of Fairness is a commonplace in Philosophy. – 2. Fairness is made of intuitions. – 3. The aporetic structure of Fairness. – 4. Fairness participates to political life. – 5. Fairness is the fruit of dialectics. – 6. Fairness aims at the Common Good. – 7. Fairness is the correction of human laws. – 8. Fairness gives the direction of peculiar justice. – 9. Fairness is the judgment itself.

### **1. The concept of Fairness is a commonplace in Philosophy of Law.**

As with any trite expression, many legal philosophers have endeavored to give a specific definition to the concept of Fairness<sup>1</sup>. Shared by all as a reasonable truth, the commonplace is a map of the understanding of the values that constitute the

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<sup>1</sup> For examples:

- John RAWLS introduces the concept of fairness in his book *A Theory of Justice*, Harvard University Press, Cambridge, 1971. Rawls proposes the idea of justice as fairness, in which he argues that principles of justice should be determined through a hypothetical social contract in an original position, where individuals are behind a veil of ignorance regarding their own status, abilities, and circumstances.

- Amartya SEN, in his book *Development as Freedom*, Alfred A. Knop, New York, 1999, views fairness as an integral part of his capability approach to justice. Sen's concept of fairness emphasizes the importance of expanding people's capabilities and freedoms to live the kind of lives they have reason to value.

- Ronald DWORKIN discusses the concept of fairness in his book *Justice for Hedgehogs*, Harvard University Press, Cambridge, 2011. He argues that fairness involves treating all individuals with equal concern and respect, regardless of their personal characteristics or circumstances. Dworkin emphasizes the importance of fairness in addressing inequalities and ensuring that all members of society have the opportunity to flourish and participate in public life on equal terms.

reflection of human beings in their lives. In Aristotle's philosophy<sup>2</sup>, Fairness is a commonplace which referred to the concept of *endoxa*. It is a standard type of argument about natural values shared by everyone or by the majority, or by all experts, or by the majority of these, or at least by the most famous. An Aristotle's confusion lies between *endoxa* and mere opinions, or *doxai*. A confusion that naturally leads to a devaluation of the true value of Fairness because mere opinion does not guarantee truth in any way, not even for a philosopher like Aristotle. Now, it is to say that *endoxa*, for Aristotle, are indeed opinions, but they are not just any opinions; they are opinions endowed with shared particular values. In the *Posterior Analytics*, Aristotle insists on the likelihood (*eikos*) of "an endoxal premise (*protasis endoxos*), or what is known to happen or not happen, to be or not to be usually (*hôs epi to polu*)<sup>3</sup>". In the passage in question, as can be seen, the endoxal premise is said to be true "usually," that is, not always, but in the majority of cases, and therefore almost always. Likelihood is not what is similar to the true, and therefore not true, but what is true almost always, that is, the probable, or rather the highly probable. As *endoxa*, Fairness's principles have a rather high truth value for Aristotle, even if they are not actual principles, that is, necessary truths.

## 2. Fairness is made of intuitions.

A likely truth about Fairness emerges from intuition, which speaks to us spontaneously. The scientific reasoning is always based on a first intuition as Aristotle says: "(...) *except intuition nothing can be truer than scientific knowledge, it will be intuition that apprehends the primary premises -a result which also follows from the fact that demonstration cannot be the originative source of demonstration, nor, consequently, scientific knowledge of scientific knowledge. If, therefore, it is the only other*

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<sup>2</sup> Our reflections on the Concept of Fairness in Aristotle's Philosophy owe much to the works of Michel VILLEY (*La formation de la pensée juridique moderne*, Paris, Les Éditions Montchrétien, 1968), Pierre AUBENQUE (*La prudence chez Aristote*, PUF, Paris, 1963) and Enrico BERTI (*Le ragioni di Aristotele*, Laterza, Roma, 1989). However, we have decided to not address the questions of (so numerous) Aristotle's commentators; thus, none are mentioned. The sources of this article are based solely on the *Corpus Aristotelicum*.

<sup>3</sup> ARISTOTLE, *Prior Analytics*, II, 27. Translated by R. Smith, Indianapolis, Hackett, 1989.

kind of true thinking except scientific knowing, intuition will be the originative source of scientific knowledge"<sup>4</sup>. The interweaving of intuitions and the difficulties in expressing them turn our mind into a feeling of wonder that invades us; this feeling of wonder opens the door to philosophy: "It is through wonder [*dia to thaumazein*] that men now begin and originally began to philosophize"<sup>5</sup>. Meanwhile Mathematics possesses a perfect rationality, Fairness does not because the human language just needs reasonableness, to have values which are true in most of the time and in most of cases.

### 3. The aporetic structure of Fairness.

The origin of philosophy is 'the wonder that things are what they are', but the corollary of wonder is *aporia*<sup>6</sup> that is to say, a state of affairs such that it involves at least an apparent contradiction; hence any human discourse on Fairness presents itself not as a completed knowledge, but as a search that is, moreover, inconclusive. Fairness is not and could not be a deductive structure, but only an aporetic one. Instead of the aporias of systematizing interpretation, we must substitute a philosophical interpretation of aporia and for the failure of systematization, a methodical elucidation of the failure. Fairness, as it is communicated in dialogue and codified in human language, is a likelihood; it is only an approximation of what the science of the nature of things will teach us. Language opens a path, a direction of research: it indicates on which side Fairness can be sought, but it never goes all the way to them. The likelihood of Fairness remains a presumption of truth; but likelihood is wider than truth, and the weakness of legal discourse lies precisely in that, it is content with the generalities of Fairness (within which it merely needs to know that truth itself is situated). Aristotle notes then the inherent weakness of any written law, which pretends to be universal, while human actions, which it purports to

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<sup>4</sup>ARISTOTLE, *Posterior Analytics*, II, 19. Translated by G.R.G. Mure. <https://classics.mit.edu/Aristotle/posterior.2.ii.html>

<sup>5</sup> ARISTOTLE, *Metaphysics*, A, 2, 982, b, 17, translated by H. Tredennick. See <https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0052%3Abook%3D1%3Asection%3D982b>

<sup>6</sup> *ibid.*, 982, b, 13.

govern, are of the order of the particular<sup>7</sup>. The ambiguity is therefore the inevitable counterpart of the universality of words, itself a consequence of the disproportion between the infinity of singular things and the necessarily finite nature of language resources. In other words, the legality of the action is at most the necessary condition of justice, but the likelihood of Fairness appears to be its sufficient condition.

#### 4. Fairness participates to political life.

It is not easy to penetrate the genuine meaning of any Greek word. Any translation takes our mind in a linguistic structure that is estranged to the Greek way of thinking. For example, the Greek word *dikè* is often translated by justice, but fairness may be more appropriated. It is known that in Greek mythology, *Dikè* is the goddess of fair judgements. She is often depicted as a young, blinded woman carrying scales and is associated with the fair order of human society. It is to add that the word *dikè* (*δίκη*) is to be found in the word *dikaion* (*δικαίον*). As a neutral substantive, *dikaion* indicates a “being” and also a social relationship. *Dikaion* is often ill-translated in English by the word “right”. *Dikaion* is based on the nature of a social relationship, and as a result, it is misleading to translate *dikaion* by the word “right” (which nowadays refers to a personal legal power). Fairness is a much better translation of *dikaion*, which is to be understood objectively (*ob-jectum*), as the expression of justice that nature lays in front of us. The reality of Fairness (*dikaion*) is at the heart of political life (*koinonia politiké*), understood as the gathering of the interests of individuals who are keen to live together to practice good and noble things<sup>8</sup>. *Dikaion* bears witness to the impulse (*hormé*)<sup>9</sup> of humans to live together in a natural sociability that surpasses the first communities, such as the household or the village. As a political animal (*zoon politikon*)<sup>10</sup>, human nature leads each of us to live within a political community (*polis*). According to Aristotle, human sociability

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<sup>7</sup> ARISTOTLE, *Nicomachean Ethics*, 1137, b, 13. trans. W.D. Ross, New York, The Modern Library, 1992.

<sup>8</sup> ARISTOTLE, *Politics*, 1281, a, 4.

<sup>9</sup> *Ibid.*, 1253, a, 29.

<sup>10</sup> *Ibid.*, 1252, b, 9.

finds its highest point of excellence in the *polis*, which surpasses in ontological quality the earlier communities of the household or the village. The *koinonia politiké* integrates naturally humans within its whole; they cannot be separated from it<sup>11</sup>. While communal life is natural, this does not mean that the *polis* spontaneously arises from nature. To establish it, human intervention is necessary<sup>12</sup>. The realization of the polis by humans, in turn, gives each individual the possibility to actualize their full human nature. Thus, Fairness is tasked with providing a likely excellent order to human relationships that keeps alive the *polis*.

##### **5. Fairness is the fruit of dialectics.**

The etymology of dialectics, *dia-lectos*, teaches us that it signifies the exchange of words between different interlocutors. In this sense, dialectics is practiced every day by those gathering together, who receive advice relating to a given situation. Dialectic does not solely aim to persuade, but also tries to evidence Fairness. This being so, any persuasion that aims to produce certain dispositions in the listener (by method of leveraging his personal feelings) is quite opposed to dialectics. The art of persuasion succumbs to the tyranny of fallacious words, to the power of seductive verbs with no regard to Fairness. Evaluating Fairness in a relationship is no longer the goal; conversely, the imposition of a conception of things that serves only one's interests, becomes the focal point. In this sense rhetoric is opposed to dialectics. Instead, dialectics is a guiding thread, a collective effort to regulate social life. Regardless of the result of these multiple deliberations, dialectics appears to be the means to express Fairness in any organized social life. Dialectics is a search aiming to overcome any divergences of opinion, in order to reach a common truth (*endoxa*), which proceeds from an exchange of points of view between several people, allowing the rejection of unilateral positions. Dialectics focuses on a particular knowledge of Fairness. In the end, a judge concludes the dialectics. The judge proclaims what seems to be the right result, once the elements have been

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<sup>11</sup> Ibid,1337, a, 27-29.

<sup>12</sup> Ibid, 1253, a, 30.

debated. Legal conclusions, notwithstanding the authority submitting them, are ultimately questionable. Having been born in dialectic, these conclusions remain as such, but their very existence produces the Fairness of a particular social relationship.

## 6. Fairness aims at the Common Good.

The common good refers to a social organization that distributes goods necessary to be fed, to defend oneself from danger and to seek happiness. Fairness recognizes the hierarchy of citizens, based on their merits and directed toward the common good. As a result, different members of the *polis* (or the State, to use modern political terms) can be entitled to receive different proportions (from another member) of the common good according to their merit (or excellency<sup>13</sup>) in the community. The content of Fairness in any community is a quest. There is no pre-conceived, proper, end-state legal distribution of rights. As a process that attends to the common good available and the merits of people understood in a broad fashion (as encompassing the resources they possess), Fairness cannot determine *a priori* what specific and particular goods people should have. For example, Fairness does not tell us in what way common health goods should be shared. Fairness acknowledges the contingency of social norms with regard to the distribution of common goods. As a consequence, for example, it can be deemed “fair” in one country to give “free” state-supported health care to everybody. On the contrary, in another country, it can be “fair” to give no one “free” state-supported health care. The same can be said about the same country in different periods of its history. Fairness offers no universal solution to the question of how to distribute goods. Ultimately, Fairness involves a tragedy, because the distribution of common goods always involves a decision that is hard, provisional, and less than ideal. Nonetheless, human beings are biological beings and human societies put in place a material inter-aid to survive in their natural elements. Furthermore, unlike other

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<sup>13</sup> The ‘excellency’ refers here to the Aristotle’s concept of *áristos* (Ἀριστός), it is the ability to flourish one’s talent. (*Nicomachean Ethics*, 1120, a, 6). It differs from the modern political concept of aristocracy.

gregarious animals, humans master symbols in a unique way. Human beings are biological beings, but they are above all symbolic beings! Language is the best illustration of the singularity of humans in the world of living things. Animals communicate with each other without ever reaching the degree of symbolic sophistication of human language. Certainly, we can find similarities between the ability of certain animals and the one of humans to communicate emotions, to build habitats, to teach the offspring, but these comparisons always suffer from a radical inequality. The genius of human language is incommensurable. The symbolic creation of humans is unrivaled in the animal world. In that sense, legal language about Fairness is a symbol that defines the human condition.

#### **7. Fairness is the correction of human laws.**

The current and recent evolution of fundamental rights protecting freedom first, followed by the legal framing of social demands, then by the right to a sane environment is not a simple historical evolution of written human rights. More than differences in the generation of written human rights, we have here to consider the various symbolic expressions of Fairness. Fairness adapts its field of expression, but speaking here of a progress of Fairness is abusive. It is indeed difficult in the social contingency to distinguish what constitutes an irreversible progress of Fairness. An adaptation to reality is always necessary, a dialogue is always established to amend the moving contours of Fairness. However, Fairness can also be seen a perennial horizon of human solidarity. Forgetting to recognize the vulnerability of other humans' existence, not to think to protect them, to behave as if other humans did not exist, those are acts or values that deny the human solidarity as well as the concept of Fairness, because as Aristotle says: "*it is fair not to regard personal failings [hamartēmata] and mistakes [atukhēmata] (...) And to be forgiving of human weakness is fair*"<sup>14</sup>. In this perspective, Fairness obliges us not to see other humans as things, as burdens that we can get rid of. Looking at and

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<sup>14</sup> ARISTOTLE, *On Rhetoric*, 1374, b, 15, trans. George A. Kennedy, Oxford, Oxford University Press, 2007. Note that Kennedy translates *ēpieikeia* as "fairness."

talking to other humans mean taking seriously the protection of human beings. Fairness turned out to be a symbol of solidarity that can be identified in Aristotle's concept of *ēpieikeia*, often ill-translated in English with the word 'equity'. In his book *On Rhetoric*, Aristotle explains that Fairness is a universal, immutable and solidary law superior to arbitrary human laws: "*ēpieikeia always remains and never changes, nor do common laws, for it is according to nature, while written laws often change.*"<sup>15</sup>. To illustrate his point with a famous ancient example, Aristotle cites the primacy of the unwritten rule of Antigone over the positive law of Creon: "*By law (nomos) I mean, on the one hand, the particular law (idion), on the other, the common law (koinon); by particular law, that which, for each people, has been defined with respect to it; and this law is sometimes written, sometimes unwritten; by common law I mean the law according to nature (kata physin). For what is just and unjust by nature in common (physei koinon dikaion kai adikion), all men perceive (manteuontai) even when there is no community or agreement among them; this is obviously, for example, what Antigone speaks of in Sophocles, when she affirms that it was just to defy the prohibition and bury Polynices; for this is just by nature (physei on touto dikaion). Law that is neither of today nor yesterday, that is eternal and of which no one knows the origin.*"<sup>16</sup> The detailed study of Antigone clearly shows that the deadly conflict between the heroine and Creon is built on the tragic paradox of a composition that is both impossible and necessary between "current law" (Creon's edict) and "ideal law" (Antigone's unshakable principles).

#### **8. Fairness gives the direction of peculiar justice.**

In the *Nicomachean Ethics*, Aristotle's conception of *ēpieikeia* appears to be different from the one in *Rhetoric*. The difference lies in the fact that Fairness in the *Nicomachean Ethics* is defined as a component of political justice, rather than an ideal standard that would distinguish itself by its universality (like the unwritten natural law that the Stagirite speaks of in the *Rhetoric*). Fairness in the *Nicomachean*

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<sup>15</sup>Ibid, 1375, a.

<sup>16</sup>Ibid, 1373, b, 4-13, referring to Sophocles, *Antigone* v. 456-457. Aristotle revisits the question in *Rhetoric*, 1375 a 33 sq.



*Ethics* guides legal justice based on the observation of the nature of things, but Fairness does not “correct” the human law according to a universal principle. *Epieikeia* in the *Nicomachean Ethics* is not the submission to the rules of an immutable law, Fairness’s role is not to correct positive law, but rather to direct the judicial debate. Fairness is a direction of justice, a guide centered on the needs of the particular to adapt the human law to the circumstances of the case. This operation does not follow the structure of the written law, but it proceeds from an inductive reflection on justice. Aristotle uses the Greek word *epanorthoma* in order to refer to the improved work of Fairness on reality, starting from the nature of reality itself. The positive law is compared to a rigid metal rule, unsuitable for accurately measuring the edges of a sinuous object. *Epieikeia* enriches written law by understanding the particular nature of each individual case. The Fairness, which Aristotle states, should be understood as a malleable rule, is likened to the lead rule in use on the Greek island of Lesbos; a lead rule that adheres to and outlines the measured things<sup>17</sup>. The written law is inherently incomplete. No jurist has from the outset the sufficient intelligence to deduce the particular just from the general justice of the law. The fault lies not with the law or the legislators, but with the changing nature of human things<sup>18</sup>. For Aristotle, the fair decision does not arise from *episteme* (sciences). On the contrary, it is the recognition of the limit of legal science that gives all the value of fair judgment, which eventually leads Aristotle to say that “Fairness is the judgment itself<sup>19</sup>”!

#### **9. Fairness is the judgment itself.**

Fairness frees itself at the very moment of the decision, allowing justice to become particularized. The fair judgment (*epieikés*) reveals the virtue of Fairness (*ēpieikeia*) of the judge. According to Aristotle, Fairness is a direction towards justice, a justice animated by the appropriateness of a fair distribution of goods. The direction of

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<sup>17</sup> ARISTOTLE, *Nicomachean Ethics*, 1138, a, 2

<sup>18</sup> Ibid, 1137, b, 17.

<sup>19</sup> Ibid, 1137, b, 29.

Fairness to qualify things uses the 'right reason' (*orthos logos* in Greek<sup>20</sup>), which is by no means an easy path; it is a steep path, all uphill, pushing our intelligence to reach the peaks of understanding of a particular case. This meaning is indicated by the etymology of Greek prefix *orthos* which carries the denotation of "steep," indicating something rugged, something very high. Fairness is an intellectual dynamic for finalizing a judgment, hence the famous pseudo-Aristotelian formula: "*Fairness is the justice of the concrete case.*" For Aristotle, *ēpieikeia* relates to the naturality of the concrete case. Fairness is physiologically linked to judgment. Aristotle's Fairness appears to be an intellectual virtue, certainly not quite "rigorous" and hardly "scientific" for the positivist lawyer, but Fairness is able to penetrate in a more reasonable than rational way the sensible and the singular. Faced with the indetermination of human things, the lawyer needs to understand the real that always remains indeterminate; Fairness fulfills this role. Fairness is flexible; it is, as we recall, like the malleable lead rule used in the construction on Lesbos, which "*according to the shape of the stone changes and does not remain identical.*"<sup>21</sup>

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<sup>20</sup> Ibid, 3, b.

<sup>21</sup> Ibid, 1137, b.