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Title

Aristotle, Contract Law, and Justice in Transactions

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Keywords

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Abstract

This article sheds new light on Aristotle’s conception of voluntary corrective through an engagement with Peter Benson’s theory of transactional justice as expounded in his new work, *Justice in Transactions: A Theory of Contract Law*. Benson relates his theory transactional justice to Aristotle’s conception of voluntary corrective justice. He also states that his theory ‘engages some fundamental themes and outstanding questions arising from Aristotle’s account’ (2019, 30). The article provides a faithful reading of the nature and working logic of voluntary corrective justice as envisaged by Aristotle to argue that Benson neither thematises the link between his theory and Aristotle’s conception of voluntary corrective justice, nor sheds new light on Aristotle’s thought on justice more generally. In fact, the article shows, Benson’s views on justice are incompatible with Aristotle’s. This is unfortunate, the article concludes, for Benson’s contract law theory is otherwise fascinating and analytically coherent.

[A] Introduction

As is well-known, Aristotle’s analytical works (those comprising the collection known as *Organon*) have exerted a profound influence on Western jurisprudence, particularly in relation to epistemological discourses on the study and practice of law (Errera 2007). Equally significant for Western jurisprudential consciousness and thinking are Aristotle’s views on justice. Nonetheless, as George Duke (2019, 2) has recently pointed out, there has been a ‘partial neglect of Aristotle’s thought on *nomos* in recent Anglo-American literature’ (2019, 2). Duke is right: save for some specialist accounts (such as James Gordley’s, Ernest Weinrib’s, and Nicholas J McBride’s), the general sentiment in Anglophone legal scholarship has been that, as Donald R. Kelley had put it as early as 1990, ‘[b]eyond [some influential] terminological prescriptions concerning [*n*]omos, Aristotle had little to say about law’ (1990, 26; emphasis added).

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Duke is also correct in holding that an examination of Aristotle's understanding of, and approach to, law is made difficult by the fact that Aristotle '[did] not propound a systematic legal theory in the modern sense' (2019, 1; see also *ibid.*, 16)—or what we, modern subjects, would call 'a science of jurisprudence' (*ibid.*, 1; see also Talamanca 2020, 47). This is somehow puzzling if one considers that Aristotle's was 'probably the most comprehensive system of thought ever devised' (Stalley, 2009, vii).

Given the limited amount of specialist scholarship on Aristotle's conception of justice in Anglophone legal literature, Peter Benson's attempt at framing, in his new monograph *Justice in Transactions: A Theory of Contract Law*, a theory of contract law inspired by Aristotle's thought on justice ought to be warmly welcome. *Justice in Transaction* has been acclaimed as 'magisterial' (Bix 2020, 363); 'an outstanding work of scholarship' (Campbell 2020, 282); and 'one of the most important contemporary contributions to the understanding and justification of the law of contracts' (Nadler 2022, 9). More enthusiastically still, it has been said that 'if one seeks a detailed, systematic, deeply elaborated account of the common law of contract from a liberal theoretical perspective, *Justice in Transactions* has no rival' (Sage 2021, 922). It is hard to disagree with these comments: insofar as one considers the theory it sets forth in its own terms, *Justice in Transactions* is indeed a major contribution to contract law both as an academic discipline and professional practice.

Unfortunately, though, commentators of *Justice in Transactions* have overlooked an important detail—namely, that, right from the start of his analysis, Benson relates his theory of transactional justice to Aristotle's conception of voluntary corrective justice. In doing so, Benson also states that his theory 'engages some fundamental themes and outstanding questions arising from Aristotle's account and subsequent theorizing about justice in transactions as a whole' (2019, 30). As this pivotal passage has gone unnoticed in the appraisals of *Justice in Transactions*, it is yet to be determined whether the contract law theory Benson

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sets forth is in fact compatible with Aristotle's thought on justice, as well as whether it sheds new light on it as it promises to do. Accordingly, this article specifically focuses on the link Benson draws between his theory and Aristotle's views on justice. Shedding new light on the nature and working logic of voluntary corrective justice as envisaged by Aristotle, it argues that insightful though his account of contract law is, Benson neither thematises the link between his theory and Aristotle's, nor engages Aristotle's philosophy of justice more generally. In fact, the article shows, pursuant to his aim to craft a contract law theory suitable to present-day regulatory and market dynamics, Benson's views on justice turn out to be incompatible with Aristotle's.

The article proceeds as follow. It first outlines the main tenets of Benson's contract law theory (Section B). It then expounds Aristotle's account of justice, situating it within its proper political-ethical context (Section C). Having set the level of discussion, it moves on to juxtaposing Benson's and Aristotle's conceptions of justice, showing why and how they differ (Section D). Concluding remarks follow.

[B] Benson's Theory of Contract Law

Benson's main aim is two-fold: first, to develop 'a public basis of justification' (2019, xii, 3, 12, 25, 29, 319, 395) for contract law; secondly, and relatedly, to move beyond promissory and economic theories of contract which, on his view, are unable to provide the 'distinct normative conception' (ibid., 3) informing the law of contract. The first aim takes its inspiration from John Rawls' political philosophy (ibid., xii, 3). Specifically, it draws from Rawls' liberal 'ideas of public justification and the reasonable' (ibid., 11) and revises them so that they can be employed as a normative referents 'for transactional relations' (ibid.; see also ibid., Ch 11). Animated by this Rawlsian spirit, what makes Benson's justification of contract law *public* is the fact that it is grounded on 'terms and reasoning [...] [that] are open to view as well as

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common, available, and reasonably acceptable to parties generally’ (ibid., 13). More particularly, ‘[t]he justification is [...] public only inasmuch as it is something that *all* parties can reasonable and identically be expected to share’ (ibid., emphasis in original). Thus understood, the terms and reasoning that make up the law of contract ought to be subjected to the professional scrutiny of those who are tasked with ‘the interpretation, assessment, and application of the [...] considerations’ (ibid.) which compose it. As Benson observes, in Common law jurisdictions,¹ it is courts ‘performing [their] adjudicative function’ (ibid.) that are tasked with these activities. This, however, should not lead one to assume that the theory Benson envisages cannot be made work for ‘other modern system of contract law’ (ibid., 29) as well, such as those ‘belonging to the civilian tradition’ (ibid.). Indeed, due to its drawing from a series of notions and values which define modern liberal political economies, Benson’s theory is, to an extent, well-suited for Civil law systems as well.

Regarding the second, and related, aim, it ought to be noted that the peculiar normative conception of contract law Benson sets forth is crafted from within the law of contract itself: ‘[it] is drawn from its principles and doctrines [...] [it] constitutes their organizing idea, underpinning and explaining the whole of contract law as well as its various parts’ (ibid., 3). In short, Benson’s contract law theory aims to be analytically self-sufficient and internally coherent (ibid., 395).

In setting out these two inter-related aims, Benson further specifies that his conception of contract law ‘embod[ies] a distinct conception of justice: justice in transactions’ (ibid., 30). The main point here is that, on Benson’s account, combining law and justice is a necessary step

¹ Benson uses small ‘c’ when referring to the Common law as a legal tradition. For my own part, I prefer using capital ‘C’. ‘Common law’ and ‘common law’ are two different things: the former is a legal tradition; the latter is a part of the law of it which includes elements of both case law and customary law.

WARM THANKS TO AMICUS CURIAE FOR ALLOWING REPUBLICATION for a theory of contract law to be ‘morally acceptable’ (ibid., ix, Ch 11). Referring to the *Nicomachean Ethics*, 1131^a–1133^b, Benson notes that the notion of ‘justice in transactions’ was first theorised by Aristotle, who referred to it as ‘corrective justice’ (ibid., 30). He further specifies that justice in transactions divides into ‘voluntary and nonvoluntary’ justice (ibid.).

Crucially for our discussion, Benson not only hinges his contract law theory on Aristotle’s conception of *voluntary* corrective justice; he also claims that his theory ‘engages some fundamental themes and outstanding questions arising from Aristotle’s account and subsequent theorizing about justice in transactions as a whole’ (ibid.). As I shall argue in Section D, to the extent that Benson aims at fashioning a contract law theory ‘that is independent and complete in its own framework’ (ibid., 19; see also ibid., 28, Ch 12), he can be said to having achieved his objective: his theory is indeed ‘intelligible in its own terms’ (ibid., 29). However, to the extent that Benson aims to relate his conception of transactional justice to Aristotle’s account of voluntary corrective justice and shed new light on Aristotle’s philosophy of justice more broadly, it regrettably misses the mark. For now, though, let us set out the theory’s basic thrust.

From the very outset of his analysis, Benson makes it clear that his conception of contract law is ‘latent in the main contract doctrines and principles’ (ibid., 9; see also ibid., 29, 320, 475) that make up this branch of law. Accordingly, *Justice in Transactions* embarks upon an intellectually rich and compelling journey through the whole of the contract law dimension, from contract formation to remedies, ‘to illuminate the internal rationality of contract law’ (ibid., 5). Divided into two parts, one exploring various contract law principles and doctrines, the other substantiating the proposed theory in detail to demonstrate its ‘intrinsic reasonableness’ (ibid., 319), the book is testament to Benson’s profound knowledge of the law of contract and scholarly acuteness. It not only features a great variety of examples and insights regarding ‘the principles, standards, and values of contract law’ (ibid., 19); it also meticulously engages with a wealth of established legislative, judicial, and scholarly views on the subject.

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Of particular interest is Benson's framing of contract as 'transfer of ownership' (ibid., 21).

The latter is a central notion in Benson's account. It recurs throughout the book and is discussed in detail in the first Chapter opening the second part (i.e., Chapter 10). By it, Benson means that, juridically, contracts are 'an interaction [...] of representational acts' (ibid., 320) by which 'each party reciprocally and identically mov[es] a substantive content from its side to the other' (ibid., 321). Thus, in and through this mutual (i.e., relational) interaction, of which the parties' promises are the main propellant, 'each side objectively recognized the other's exercise of exclusive rightful control over what he or she either gives up or take' (ibid.; see also ibid., 386).

While, at first glance, this seems all rather straightforward, the following points are worth emphasising. First, Benson's conceptualisation of contracts as instances of 'transactional and [...] representational acquisition [of ownership]' (ibid., 25) is entirely dependent upon, and thus revolves around, the notion of consideration. This Benson states clearly in several key-passages of *Justice in Transactions*. Thus, and by way of example, we read that '[the] promise-for-consideration relation is the basic contractual relation' (ibid., 22). Accordingly, all 'other [contract law] doctrines and principles' (ibid.) are conceived as 'fill[ing] out and specify[ing] its essential aspects and effects' (ibid.). Not coincidentally, consideration is discussed in the book's very first Chapter (where Benson holds that it 'provid[es] the basic and general framework for the contractual relation as such': ibid., 40), and then again in the Chapter opening the second and last part of the book (Chapter 10), where the conceptualisation of 'contract as representational transfer of ownership' is fully thematised. On this point, Benson's reading of the (Common) law of contract's dependency on the bargaining logic of consideration is in line with earlier accounts emphasising the pivotal role played by the 'consideration-offer-acceptance' 'indivisible trinity' (Hamson 1938, 234) in contract law theory (critically, see Siliquini-Cinelli, 2017).

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Secondly, categorising contracts as platforms for the transfer of ownership requires one to clarify what is meant by ‘transfer’ and ‘ownership’. Regarding the former notion, Benson specifies that insofar as they are ‘transactional’ (2019, 327), contracts are ‘derivative’ (ibid.) forms of acquisition. Among other things, this means that a juridical precondition for any transaction is that the object being transferred must already be under the parties’ ‘exclusive rightful control’ (ibid., 329; see also ibid., 349f). Regarding the interrogative as to what can be transferred by means of contractual arrangements, Benson states that the answer can only be reached by reflecting on ‘the kind of ownership interest that is immanent, though not always explicitly operative, in all forms of derivative acquisition: a purely transactional ownership interest’ (ibid., 339). Accordingly, the object of a contract ‘may consist of goods, services, opportunities, liberties or currency’ (ibid., 431). The fact that the object of a contract can be any of these things is due to the role played by consideration in contractual settings: insofar as consideration is conceived and employed ‘abstractly’ (ibid.), ‘anything determinate’ (ibid.; see also ibid., 323) can be exchanged.

This leads me to another salient tract of Benson’s contract law theory—namely, its liberal character, which informs and shapes its moral foundations and implications. Benson discusses the moral-political aspects of his theory in the last two Chapters of *Justice in Transactions*. The whole analysis takes over a hundred pages, excluding endnotes. It is simply impossible to set it out in its entirety in the remainder of this Section. I shall therefore limit myself to pointing out what I believe to be its main elements.

Firstly, Benson grounds the moral justification for his contract law theory on two key-individualistic principles, which he categorises as ‘moral powers’ (ibid., 369). These are:

[A] moral capacity [for the contracting parties] to assert their sheer independence from their needs, preferences, purposes, and even their circumstances; and, second, a moral capacity to

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recognise and to respect fair terms of interaction that treat everyone as independent in the specific sense supposed by the first moral power. (ibid.)

The first is ‘a negative moral power’ (ibid., 370; emphasis in original). That is, it situates both parties within an ideal contractual framework where they can act as individuals free from any constraints. It is precisely this understanding of the parties’ juridical positioning and contractual ‘potentiality’ (ibid., 371) that enables Benson to release his theory from any extra-judicial elements: as he writes, the public justification for contract law he envisages is freed from any ‘moral, aesthetic, religious, or philosophical ideas about which transactors, as members of a liberal society, cannot reasonably be expected to agree’ (ibid., 14; see also ibid., 366, 474–5). The parties’ reciprocal respect for this, we may say, *ontological* condition expressing ‘the normative significance and implications of our independence’ (ibid., 371) constitutes the other half of contracts’ moral basis. Thus understood, the parties’ ‘juridical autonomy’ (ibid., 373, 394) expresses itself most completely in the notion of ‘private ownership’ (ibid., 26, 325, 362, 363) which, not coincidentally, and as just seen, lies at the center of Benson’s theory (see also ibid., 390).

The latter argument is taken up again in Chapter 12, where the ‘stability’ of contractual encounters *qua* transfers of ownership is made dependent upon the compatibility between the proposed juridical conception and ‘other domains’ (ibid., 396) beyond the juridical sphere, such as ‘market relations’ (ibid.). The whole of Benson’s analysis in this Chapter, counting over eighty pages, is geared towards supporting this central claim. In a nutshell, while not dismissing the relevance of economic considerations for the correct appraisal of what contracts and contract law are for, Benson moulds his theory in such a way that it provides contracts with an ‘institutional role’ (ibid., 426) that ultimately takes precedence over an economic understanding of transactional encounters. According to Benson, it is *only* for the law of

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contract ‘to make explicit and to establish in its proper form the norms that are identically and reciprocally willed by individuals as such transactors in [the present-day] system of exchanges’ (ibid.). Thus, what readers are presented with is a hierarchy of institutions, so to speak, with (contract) law featuring at the apex, and economics (i.e. market dynamics) placed under it (see e.g. ibid., 417, as well as ibid., 445, where Benson states that ‘legal institutions fix and guarantee the market’s normative, noneconomic *presuppositions* [...] [its] *necessary conditions*’; emphasis added²).

Among the other elements comprising the moral basis of Benson’s contractual analysis, worth mentioning for the purposes of this article is the Kantian one. Benson draws from Immanuel Kant to provide his theory with the other-regarding connotation a too individualistic approach to contractual relations would lack. The Kantian ingredient of Benson’s theory comprises two duties humans owe one another: ‘a general noncoercible duty of beneficence’ (ibid., 404), and a duty to ‘respect’ others as ‘free and equal’ (see e.g. ibid., 394, 466, 471, 476) members of a liberal-democratic society. The former duty is open-ended. It requires one to ‘promote the happiness of others’ (ibid., 405) in the sense that we shall do good to others ‘not primarily on the basis of one’s own notions of happiness, but by appropriately taking into account *their* own’ (ibid.; emphasis in original). On this operational logic of (ethical) responsibility, an individual makes as her own the ‘interests and ends’ (ibid.) of another one. The latter duty brings to fulfilment, and thus is both theoretically and practically indiscernible from, the first one. It a ‘duty of fidelity’ (ibid., 407) prescribing ‘[n]ot only [that] the promisor take[s] as his end the doing of something that is in some sense subjectively wanted by the promise’ but also, that

² Cf. Irti (2011, 75); Campbell (2020).

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[T]he promisor [...] make[s] explicitly or implicitly clear to the promisee that this is what the promisor proposes to fulfill and must do so in such a way that the promisee can in turn incorporate the promisor's adoption of this end as an ingredient in *her*—the promisee's—own thoughts, feelings, and plans. (ibid.; emphasis in original)

The combination of these two moral elements, both of which presuppose the categorisation of individuals as 'responsible agents' (ibid., 370), leads to what Benson identifies as 'a liberalism of freedom' (ibid., 468ff)—a pivotal notion in his theory of contract to which I shall return below (Section D).

Finally, for contracts as derivate, transactional modes of ownership acquisition to operate stably, a juridical correlation with the distributive type of justice is required. For, according to Benson, there cannot be justice in transactions, which are 'nondistributive in character' (ibid., 448), without a solid correlation with the other, distributive type of justice. Benson's attempt at correlating the two forms of justice sets his contractual analysis within a coherent, closed analytical system of legitimation. The discussion Benson embarks upon to support his claim is, arguably, the most intellectually compelling of the whole book. For not only Benson returns to his earlier reflections on the structural relationship between the economic and legal dimensions contract law embodies; he also holds that for this relationship to work, 'transactional principles' (ibid., 456) ought to take juridical precedence over distributive ones. This I gather from such Rawlsian (ibid., 456) statements as those according to which distributive principles 'only *indirectly* constrain individual transactions' (ibid.; emphasis added) and 'ought to accommodate fully [...] the principles of transactions' (ibid., 457). Ultimately, it is the law of contract that 'accepts or, better, takes into account the norms of distributive justice' (ibid., 466; see also ibid., 465)—not the other way around. In so arguing, Benson offers valuable insights on 'the important and challenging issue' (ibid., 462) of the

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interaction between fundamental rights (or ‘basic liberties’: *ibid.*, 465) and contractual rights
(for a comparative analysis, see Siliquini-Cinelli & Hutchison, 2017, 2019).

[C] Aristotle’s Philosophy of Justice

Aristotle’s thought on justice is notoriously intricate. This is due to its structural embeddedness with the philosopher’s other fields of expertise, such as ethics and political theory. On top of this, one must add that some important works where Aristotle expounded his views on the theme, such as the dialogue *On Justice*, are lost. It comes therefore as no surprise that Aristotle’s take on justice has been a source of scholarly curiosity and controversy since the first century BC, when the so-called Aristotelian tradition took root (Falcon, 2017). A journal article cannot possibly offer a comprehensive overview of the topic. Accordingly, this Section outlines those elements of Aristotle’s conception of justice which pertain to my argument only. As stated earlier, my argument is that the Aristotelian foundations of Benson’s conception of justice are analytically frail. To show why that is the case, what follows sets out those aspects of Aristotle’s views on justice which relate to Benson’s contract law theory, further integrating them with some additional considerations.

Owing to his thought’s extraordinary systematicity, Aristotle’s conception of justice is inextricably linked to his conception of law. Thus, any consideration of the former requires engaging with the latter. As reported by Duke (2019, 10), Aristotle defines law (*nomos*) as ‘rational speech (*logos*) derived from practical wisdom (*phronēsis*) and intellect (*nous*)’ (cf. *Nicomachean Ethics*, 1180^a21–23). Law is, therefore, a practical activity which combines the particularity and purposiveness of practical wisdom and the intellectual, universal capacities which *nous* embodies. Stated otherwise, *qua* ‘practical disposition’ (*ibid.*, 55) towards concrete objectives, law blends together the plane of the particular (*phronēsis*) and that of the universal (*nous*).

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Now, while Aristotle is rather clear about what practical wisdom is and entails, he is, as is commonly remarked, rather cryptic as to what *nous* amounts to. Yet *nous* (also referred to as ‘noetic knowledge’) is a crucial notion within Aristotle’s philosophy. Leaving all epistemological debates aside, here it suffices to notice the following: (i) noetic knowledge is one of the five intellectual virtues through which the mind achieves truth (*Nicomachean Ethics*, 1139^b15–18; the other intellectual virtues are: *tékhnē* (art, skills), *epistémē* (scientific knowledge), *phronēsis*, and *sophía* (theoretical wisdom)); (ii) it is a cognitive state; specifically, it ‘is the state we are in when we know first principles, not the faculty by which we get to know them’ (Bronstein 2016, 229; cf. *Nicomachean Ethics*, 1141^a5–7; (iii) when combined with scientific knowledge (*epistémē*), it is theoretical wisdom (*sophía*) (*Nicomachean Ethics*, 1141^a19–20, 1141^b3); (iv) it is ‘human intelligence at its most fundamental level of operation’: Groarke (undated, Sect 13); it is ‘the activity of reason itself’ (ibid.); (v) it originates in perception (*Post. Anal.*, II 99^b35; *Nicomachean Ethics*, 1098^b1–4; cf. Colli 1969, 216), ‘our lowliest cognitive ability’ (Bronstein 2016, 237; see also ibid., 8–10, 78–80); (vi) however, and finally, it ought not be confused with *phronēsis*, ‘which is concerned with action’ (*Nicomachean Ethics*, 1141^b21), deals with *both* universals and particulars (*Nicomachean Ethics*, 1141^b7ff, 1142^a14, 1143^a34), requires experience (*Nicomachean Ethics*, 1142^a15), and originates in a different type of perception, i.e., ‘not the perception of qualities peculiar to the [special sense that *nous* is], but that by which we get that the figure before us is a triangle’ (*Nicomachean Ethics*, 1142^a28).

It is by virtue of their effective combination of practical wisdom (the plane of particulars) and noetic knowledge (the plane of universals) that legislators *qua* founders of the constitutional order (a category not to be confused with that of the ‘‘mere’ law-makers’: Duke 2019, 44) can act as good political rulers. In this sense, Duke correctly refers to the constitutional founder’s ‘rational activity’ (ibid., 22; see also ibid., 29, 146–8) as being

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‘practically wise’ (ibid., 49; see also ibid., 14), further categorising the constitutional founder’s ‘legislative expertise’ (ibid., 23; ‘*nomothetikē*,’ in Greek: see ibid., 49) as being ‘charged with establishing laws which serve as rational guides to conduct in the realm of practical affairs’ (ibid.). More particularly, *qua* specific type of ‘*politikē technē*’ (ibid., 8, 41, 48–54, 63, 81), the law-giver’s expertise operates

[B]y deriving from a grasp of particulars universal proportions which serve the end of both individual and communal flourishing. The principal exercise of *nous* engaged in law-making – understood as a branch of political expertise – is thus best interpreted as involving an ascent from a grasp of particulars to universal legal propositions, which in turn govern particular actions (ibid., 23; see also ibid., 9–10, 51, 59, 67, 111).

Thus understood, law plays a crucial role towards the establishment of a virtuous life (*eudaimonia*: ibid., 4, 31, 35, 49, 54–62, Chs 3–4, 126–7, 154). It is here, in the space opened up by the ontological blending of the particular and the universal that law’s purposiveness demands, that justice enters the scene of Aristotle’s political-ethical philosophy. For, as just seen, law exerts a *political* function with clear *ethical* implications. Not coincidentally, Aristotle expounded his views on law and justice in his political and ethical works. It is indeed by living in accordance with law’s precepts—that is, in accordance with the law-giver’s wise elaborations—that the *polis* as a community can prosper virtuously and, therefore, *justly* (see e.g. *Nicomachean Ethics*, 1129^b12–15). To the extent that the *polis* is ‘a unity of order’ (Duke 2019, 88, 97, 101, 105–8), justice is, and cannot but be, a *political* objective: justice, Duke writes commenting on the *Politics* 1279^a18 and 1282^b17–18, *Eudemian Ethics* 1241^b13–15, and *Nicomachean Ethics* 1129^a7–9, 1134^a30, and 1134^b8–15, is a ‘political good’ (ibid., 85, 97) which takes the form of ‘existing in accordance with law’ (ibid., 97; see also Cambiano

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2016, 100, Chapter 9). Law's 'constitutive aim' is, indeed, 'the flourishing of the community as a whole' (Duke 2019, 97).

Aristotle's famous distinction between distributive and corrective justice ought to be inscribed within this communitarian political-ethical ideal. Not doing so may lead one to think that the latter type of justice (the corrective type) operates exclusively or for the most part for the sake of individualist, or self-referential, interests. In fact, this is a rather common conception in private law scholarship employing Aristotle's thought. Yet this understanding owes more to a modern reading (with the due caution, one could say *liberal*: cf. *ibid.*, 3) of Aristotle's views than to a faithful appraisal of his views on justice. To Aristotle, '[j]ustice is the communal virtue (*koinōnikēn aretēn*) [...] of those who freely share in a political life' (*ibid.*, 101, commenting on *Politics*, 1283^a38–39). Accordingly, rather than being solely concerned with the correction of a *private* wrong as such (think of a breach of contract causing a loss), corrective justice's 'primary object [...] is a correct allocation of benefits and burdens, considered as an external distribution of a "right"' (*ibid.*, 100). In short, rather than denoting 'a "claim-right" considered as a subjective entitlement of an individual' (*ibid.*), corrective justice is an exercise in the 'fair allocation of the benefits and harms that arise in transactions' (*ibid.*, 101). Consequently, '[p]olitical justice', including its corrective type, 'is irreducible to private interactions of individuals' (*ibid.*, 102).³

At this point, the reader might object, with good reason, that Aristotle's philosophy of justice is prone to more than one interpretation. Were it otherwise, it would not (still) be the subject of intense academic debate. Thus, in a recent, compelling study, which is not mentioned by Benson and to which we shall return below, Alain Supiot has argued, following François Ewald

³ Borrowing from Dante, who followed Aristotle, we could say that the essence of political justice is to aim at the '*bonum commune*,' or 'common good' (*De Monarchia*, II.V.2; see also *Purgatory*, XVI).

WARM THANKS TO AMICUS CURIAE FOR ALLOWING REPUBLICATION and Clarisse Herrenschmidt, that rather than presenting two models of justice (distributive and corrective), Aristotle had in fact set forth three—namely, distributive, corrective, and reciprocal justice. Quoting the *Nicomachean Ethics* V.5, where reciprocal justice is said to figure in ‘associations for exchange’ and ‘sustain the community’ (2019, 76), Supiot holds that

This type of justice—which prefigures our social justice—is [...] indispensable to exchange, which alone holds humans together, and it requires agreement on a standard which all citizens will respect when they exchange the fruits of their labour. (ibid.)

Supiot also refers to reciprocal justice as ‘[t]he justice of transactions’ (ibid., 77). In so doing, he employs the same exact terminology employed by Benson in relation to corrective justice. Inevitably, this leaves one wondering whether transactional justice as envisaged by Benson is corrective, reciprocal, both, or neither. Furthermore, the scholarly disagreement over how many types of justice Aristotle had conceived of is testament to how problematic a jurisprudential contextualisation of his philosophy of justice can be. As an indication of the impervious challenges scholars face when embarking upon this task, consider that while endorsing Aristotle’s account of human flourishing (2020, 54), McBride has suggested that ‘it would be best if no one involved in trying to explain private law used the phrase ‘corrective justice’ ever again’ (2018, 36). McBride has affirmed this after expounding the limits of yet another variant of Aristotelian corrective justice—Weinrib’s Kantian model, which he finds misleading. However, as said earlier, given Aristotle’s legacy within the Western tradition, the scholarly variety and disagreement over what his philosophy of justice amounts to should prompt one to (try to) understand it in its own terms, rather than dismissing it altogether.

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[D] Some Reflections

Are Contract Law and Contracts Really Just?

What is law, what is justice, whether they are one and the same, similar, or different are some of Western jurisprudence's primary concerns. Consequently, Benson's claim that there is justice in contractual transactions—the claim, that is, that the way contracts are conceived and dealt with by the branch of law regulating them is just—ought not be taken lightly. In fact, it calls for serious scrutiny. More particularly, given the general lack of engagement with Aristotle's thought in Anglophone legal literature, it is Benson's direct reference to Aristotle that mandates close analysis.

Now, employing Aristotle to argue for the justness of the law of contract implies the acceptance, if not the endorsement, of two views. First, that our present-day condition can be satisfactorily filtered and explained through the thought of an individual—Aristotle—who lived more than two millennia ago under socio-political and economic circumstances that in some significant respects were substantially different from those informing our society. In this sense, the sole fact that Aristotle has been playing a major—if not defining—role in the Western tradition in several fields (from biology to political theory, from metaphysics to ethics), should not lead one to uncritically assume that his views on justice can shed meaningful light on present-day's contract law's nature, aims, benefits, and operations. Put another way, we should refrain from reading and employing Aristotle's work through contemporary lenses

WARM THANKS TO AMICUS CURIAE FOR ALLOWING REPUBLICATION for purposes without, at least, having tried to understand it in his own terms (Duke 2019, 3f, 11f, 26ff, 45, 93, 114, 157).⁴

The second, more general, theoretical premise on which an Aristotelian, justice-oriented conceptualisation of contract law rests is that contract law is in effect capable of achieving justice. While this is anything but self-evident, one can be excused for thinking otherwise given how ingrained the equation of law with justice is in our jurisprudential consciousness.⁵ Not incidentally, as Émile Benveniste observed in his *Dictionary of Indo-European Concepts and Society*, ‘[i]t is necessary for law to [be] identified [...] with what is just’ (2016, 412). The widespread judicial use, in the United Kingdom, of the ‘fair, just, and reasonable’ construct is clear case in point.⁶ If a judicial decision is law, and if what is set out in the decision is ‘fair, just, and reasonable’, then one has a valid reason to think that law can indeed be just—and thus, that law and justice can in fact be one and the same (at least in relation to the dispute

⁴ Relatedly and somehow more drastically, one could question our ability to learn from the ancient world in the first place, as Friedrich Nietzsche did: see Esposito (2016, 35).

⁵ *Dig.*, 1.1.1Pr. Earlier jurisprudential examples could also be given: see Barmash (2020).

Granted, there have been numerous instances in Western jurisprudence where justice and law have been *analytically* (in more philosophical terms, one could say *ontologically*) kept apart; see e.g., Kelsen (1967, 49).

⁶ ‘Fair’, ‘just’, and ‘reasonable’ are three prominent and related terms in English private law. In case law, see e.g., *Price v Strange* [1978] 1 Ch 337; *Caparo Industries PLC v Dickman* [1990] UKHL 2; *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211; *Islington London Borough Council v University College London Hospital NHS Trust* [2005] EWCA 596; *Commissioners of Customs and Excise v Barclays Bank Plc* [2006] UKHL 28; *Mitchell (AP) and another (Original Respondents and Cross-appellants) v Glasgow City Council (Original Appellants and Cross-respondents)* [2009] UKHL 11; *Vernon Knight Associates v Cornwall County Council* [2013] EWCA Civ 950; *Various Claimants v Catholic Child Welfare Society and Others* [2013] UKSC 56; *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736. With respect to statutory law, cf. s 11(1) Unfair Contract Terms Act 1977.

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which the ruling purports to settle). Yet, there are two reasons to be wary of uncritically assuming that law and justice can be one and the same. First, as history teaches us, the mere fact that a legal authority, however legitimate, affirms that what it proclaims is just does not, per se, mean that what is being proclaimed *really* is just.⁷

The second reason to be cautious about presuming that contract law is in effect capable of achieving (or even, that it does achieve) justice has to do with the very role that both this branch of law and contracts have come to play in market societies. In the above-mentioned study, Supiot has placed the contract at the center of today's global, profit-driven logic of trade. According to Supiot, globalisation's aspiration to establish 'the total market' (2017, 5) turns law's regulatory enterprise into a '[g]overnance by numbers [which] [...] submits [laws]' contents to a *calculation* of utility designed to serve 'economic harmonies' which reputedly ensure the smooth function of human societies' (ibid., 67). On Supiot's reading, the contract is the socio-political paradigm of law's ontological transformation into a utility-driven device. For while law's ideal 'referent is [...] justice' (ibid., 1; see also 2007, xvii–xviii), the contract's referent is the harmonious (i.e., chaos-avoiding and cost-attentive) maximisation of utility. By blending together empirical research and theoretical analysis, Supiot shows that the preeminence of the contract *qua* operational mechanism for the unlimited (i.e., capitalist and neoliberal) pursue of wealth (ibid., 105, 121, 182, 209, 215; 2007, x–xii, 155) is a socio-political phenomenon of the first order linked to both the weakening of the state as the main institutional actor of our time (ibid., 3, 7ff, Ch 10; 2007, 100ff, Ch 5), and the related qualitative shift of law's regulatory prerogatives. We have reached a point where 'laws themselves become the object of calculation, treated as legislative products competing on a global market of norms' (ibid., 9–10; see also ibid., Chs 6–10; 2007). This dire process of normative quantification

⁷ More philosophically, we could say that not always, in law, *Dikē* brings to the fore *Thémis*: see Cacciari (2019).

WARM THANKS TO AMICUS CURIAE FOR ALLOWING REPUBLICATION reveals that rather than seeking justice or fostering ‘free and fair transactions’ as Benson claims (2019, 462; see also *ibid.*, 316, 368, 372, 390, 393–5, 465, 476), ‘the law of contract [...] [is] an instrument of subjection’ (Supiot 2007, 104).

Supiot’s contentions are in line with other recent accounts, such as that of Katharina Pistor. In *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), published in the same year of Benson’s *Justice in Transactions*, Pistor presents contract law as the normative framework through which capital thrives. Rather than representing an obstacle to capitalism’s expansionist logic of accumulation, law in general and contract law in particular are the very mediums through which capitalist instances, practices, and interests are fulfilled and reinforced (*ibid.*, Ch 9). Understood in these terms, the law of contract is capital’s ‘legal code’—an indispensable tool for the maximisation of utility and commodification of our socio-political existence (see also Zuboff 2019, 47ff, 64ff, 217ff). Of peculiar interest for our purposes is not only that there is little, if any, justice in the picture Pistor portrays; but also, that Pistor identifies in the Anglo-American law of contract—specifically, English and New York contract law (2019, Ch 6)—the two regulatory paradigms of this socio-legal phenomenon. Yet, Anglo-American contract law is also the subject of Benson’s theory of justice. If one combines Supiot’s, Pistor’s, and Zuboff’s accounts with Benson’s, one cannot but wonder whether there is in fact justice in contractual transactions and if so, whether the type of justice contract law embodies can be traced back to Aristotle as Benson affirms. To this interrogative I shall now turn.

Back to Aristotle

As the view that contract law is just is contested in legal literature, Benson’s argument regarding its inner justness calls for a serious examination of the reasoning he employs to

WARM THANKS TO AMICUS CURIAE FOR ALLOWING REPUBLICATION support it. For the purposes of this article, I am particularly interested in Benson relating his account to Aristotle's thought on justice. As noted, Benson explicitly hinges his theory of transactional justice on Aristotle's conception of voluntary corrective justice, further stating that his theory 'engages some fundamental themes and outstanding questions arising from Aristotle's account and subsequent theorizing about justice in transactions as a whole' (2019, 30). In what follows, I shed new light on Aristotle's conception of voluntary corrective justice to argue that Benson neither thematises the link between his theory and Aristotle's, nor engages Aristotle's philosophy of justice more generally. In fact, I show that Benson's theory is incompatible with Aristotle's views on justice.

My criticism ought not be taken as suggesting that Benson's account does not deserve our fullest attention. In fact, the opposite is the case: *Justice in Transactions* showcases a profound knowledge of, and attentiveness to, the whole of the contract law dimension. Learned yet accessible, it skillfully navigates through contract law's 'internal complexity and richness' (ibid., 22), providing readers with precious insights into contract law's complexities. Accordingly, both contract law theorists and practitioners have a lot to learn from Benson's comprehensive and detailed appraisal of contract law's intricate nature and dynamics. Yet, to the extent that the book aims to both hinge itself on Aristotle's conception of voluntary corrective justice and shed new light on Aristotle's thought on justice more broadly, it regrettably misses the mark—or so I argue.

In this sense, *Justice in Transactions*' lack of engagement with Aristotle's thought on justice can be appraised from two different, yet inter-related, analytical angles: internally, as the book does not deliver on one of its objectives; externally, as yet another instance of transposing quintessentially Aristotelian themes onto an analytical plane—that of modern political-philosophical and legal thought—which does not belong to them. Readers are provided with a hint of this analytical shortcoming right at the outset of *Justice in Transactions*, where Benson

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affirms that the book ‘provides the most appropriate moral basis for contract law in a *modern liberal democracy*’ (2019, 11; emphasis added). As a result, instead of exploring Aristotle’s philosophy of justice in its own terms and contextualising it for the purposes it pursues, Benson ends up crafting a theory of transactional justice which is incompatible with Aristotle’s views on justice. Not incidentally, as seen earlier, Benson’s main political-philosophical referents are Kant and Rawls.

To show this, let us consider one of Benson’s key-arguments, namely, that his conception of contract as transactional acquisition of ownership embodies the juridical paradigm of ‘entitlement’ (ibid., 31). Benson writes:

[...] [T]he entitlement in contract, when viewed as a transfer of ownership, represents in the most complete and explicit way the very kind of entitlement that is strictly transactional and so necessarily presupposed, even implicitly, by every instance of justice in transactions [...] It represents [...] the paradigm of entitlement that is intrinsic to corrective justice. (ibid.)

He further claims that as a result of this conceptualisation,

[His] theory of contract not only vindicates Aristotle’s original insight that there two mutually irreducible and individually self-sufficient categories of justice—corrective and distributive—but also clarifies the relation between them, suggesting how they fit together in a more complete conception of justice acceptable in a modern liberal democratic society. (ibid.)

Unfortunately, though, not only *Justice in Transactions* does not clarify the relationship between the two types of justice as Aristotle had conceived it. More fundamentally, by purporting to adapt the thinking of an ancient figure for present-day regulatory dynamics and

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juridical sensibilities, it ends up severing itself from it. Take, for instance, the very notion of ‘entitlement’, central to Benson’s account. As understood and employed by Benson, the juridical entitlement contractual transactions give rise to has clear individualistic connotations.⁸ For not only it is structurally and operationally dependent upon the *modern*, liberal conception of ownership (transferred by one party to the other by way of the contract: see e.g., *ibid.*, 335, 362, as well as above, Section B), but it also presupposes a juridical scission between the plane of the political and that of the legal. Benson is clear about this: drawing, while also departing, from Rawls, he affirms that the law of contract is the most vivid exemplification of the fact that ‘contractual and political relations are different’ (*ibid.*, 367). Accordingly, ‘so will be their justifications’ (*ibid.*). The relevance of this claim ought not be underestimated: the whole ‘moral basis’ (*ibid.*, Ch 11) of Benson’s theory rests upon the necessity to keep the legal and political dimensions apart in (and when analysing) contractual matters: if there is *justice in transactions*, it is precisely because the two planes are not (and cannot be, in Benson’s eyes) one and the same. Arguably, this emerges most clearly in Benson’s treatment of contractual remedies, where ‘the nature of [contractual] breach’ (*ibid.*, 250) is interpreted and operationalised from the individualistic standpoint of what the defendant’s ‘failure to perform’ (*ibid.*, 251) is and entails: the defendant’s nonperformance is ‘an interference,’ Benson writes, ‘with the *plaintiff’s exclusive right* to an asset—the substance of the consideration—that has already been moved to her at formation in the promissory medium of representation’ (*ibid.*; emphasis added; see also *ibid.*, 274). Not coincidentally, transactional justice is, to Benson, detached from ‘any particular comprehensive doctrine or a particular conception of [the] good’ (*ibid.*, 475). What animates it—the Archimedean point, so to speak, on which it is premised

⁸ This statement does not detract from the ethical, other-regarding spirit of Benson’s theory: see e.g., *ibid.*, 398, 408, 418.

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and without which it cannot exert its juridical function—is the parties’ ‘subjective interests and ends’ (ibid., 407) and their reciprocal need, as actors operating in an economic, transactional ‘system of exchanges’ (ibid., 426; see also ibid., 470), for each other’s ‘cooperation’ (ibid., 466).⁹ Were it otherwise, the justice contractual transactions give content and form to would not ‘represent[t] [...] a liberalism of freedom’ (ibid., 476).

A modern reader well-versed with and upholding liberal-democratic values would rightfully endorse Benson’s line of reasoning (cf. Collins 2002, 17; Campbell 2017, 2020). Yet, as we have seen, if there is a fundamental proposition animating the whole of Aristotle’s philosophy of justice is precisely that the plane of the political and that of the legal *cannot be separated*—for they mutually require and define each other. As Duke writes in his critique of present-day, de-contextualised readings of Aristotle’s political-legal thought that try to square it within a ‘liberal-democratic [conception of] order’ (2019, 3):

While Aristotle views the function of law as to provide enabling conditions, these conditions are understood in terms of what is conducive to the virtue and flourishing of both the individual and the community, rather than instrumental to the protection of a sovereign domain of individual choice and action. Indeed, Aristotle is so far from such a view of freedom that laws are asserted to be (both descriptively and normatively) determined in the ‘political’ choice for a certain kind of constitutional structure. (ibid., 3–4)

⁹ Unsurprisingly, the natural consequence of this conceptualisation is that one of contract law’s primary concerns is the crafting and implementation of rules ‘knowable and calculable’ (ibid., 425) *ex ante*, the clarity and effectiveness of which assure the juridical stability contracting parties expect. On this theme, Benson’s views are in line with mainstream contract law scholarship.

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Aristotle's conception of justice blends together the planes of the political and of the legal for the simple reason that to him, justice is the chief virtue of the political community that the *polis* is. Aristotle himself states thus at the very beginning of the *Nichomachean Ethics*: 'we may be content with securing the good of one person only; however, securing the good of the whole people, that is, of the *polis*, is nobler and more divine' (*Nichomachean Ethics*, 1094^b9-10; my translation). Unfortunately, due to its individualistic character, Benson's contract law theory misses this crucial point. As a result, the type of justification Benson places at the hearth of contractual transactions is both theoretically and practically very distant from what Aristotle had in mind when subsuming law (and justice) under *politikē technē* (see above, Section C, as well as Duke 2019, 11, 14, 17, 21–26, 37, 93, 114, 157). Owing to his ethical vision for human affairs, Aristotle's take on matters of societal ordering is entirely communitarian. Let us not forget Ancient Greek's 'social and political history' (Ober 1998, 4)—specifically, the significant fact that:

[C]ity-state politics were characterized by intermittent civil conflict and by incessant social negotiations between an elite few who sought to gain a monopoly over political affairs and a much larger class of sub-elite adult males who sought to retain the privileges of citizenship or to gain that coveted status. (ibid., 4; see also Jaeger 1965, xiii, xixf, 9, 287).

Itself an expression of, and explicitly concerned with, these social-political dynamics, Aristotle's ethics makes no room for contractual—that is, strictly legal or juridical—justice *as such*; rather, for Aristotle, there only is 'political justice' (Duke 2019, 97) understood as 'political good' (ibid., 85, 97), the attainment of which requires 'just laws' (ibid., 93) satisfying the criteria outlined above. The fact that justice is *political* simply means that it is 'irreducible to the promotion of individual interests' (ibid., 97) and 'freedom of choice' (ibid., 37). In other

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words, insofar as it is entirely geared towards human flourishing, ‘justice is a state of affairs attributable to the polis as a whole and a shared good in the sense that it belongs to the community, not just to each of the individual members’ (ibid.; see also ibid., 101, cited above, Section B). As Aristotle understands it, contractual action is reflective of, and inseparable from, this collective, political-ethical dimension.

[E] Conclusion

There is much to learn from Benson’s acute account of contract law. *Justice in Transaction* is a rich, intellectually rewarding journey through the complex rules and themes that make up what is, arguably, the most relevant branch of law in market societies (in addition to Collins 2002; Pistor 2017; Supiot 2017; and Campbell 2017, already mentioned, see Zumbansen 2007; Mitchell 2013).

Yet, insofar as Benson’s theory also aims to hinge itself on Aristotle’s account of justice and to provide readers with new insights on some key-Aristotelian themes on justice which have kept thinkers busy for over two millennia, one cannot but conclude that it regrettably misses the mark. As Werner Jaeger aptly observed (1965, 9; emphasis in original), ‘[n]owadays we must find it difficult to imagine how entirely *public* was the conscience of a Greek’. Aristotle’s conception of justice embodies this public political-ethical sentiment fully. As seen, it is precisely this public conceptualisation of, and approach to, the domain of the legal as understood by Aristotle that is absent from Benson’s account of transactional justice.

Unfortunately, insightful though it is, *Justice in Transaction* falls prey to a peril hidden in any modern reading of Aristotle’s thought. Yet, rather than being a reason not to explore and engage with a thinker who has played a central role in the formation and development of the Western tradition as we have come to know and experience it, the latter consideration should be taken as a reminder of the necessity to analyse ancient thought in its own terms.

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