

## THE PROBLEM OF NATURAL LAW IN ARISTOTLE

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In reading Aristotle's ethical, political, and jurisprudential writings we often come upon the term *physis*, which we may translate as "by the order of nature." In ancient political theory this term *physis* was often contrasted with *nomos* or "that which is by convention." I will argue in this paper that Aristotle's use of the term *physis* in certain ethical, political, and legal texts does not imply a natural law doctrine as it is usually understood. For to so interpret the term *physis* would render much of his ethical, legal, and moral philosophy incoherent.

We must now state how the term natural law will be understood in this paper. Admittedly natural law (*jus naturale*) has had a checkered and irresolute history. But I believe that I can claim for it at least the following elements: The doctrine holds that the enacted or the positive laws of a polity are suitable objects for moral evaluation. Such evaluation is conducted by reference to a "higher" or "natural law." The ethical-legal norms of this "higher law" are supposed to be universally valid and therefore natural. As such they are discoverable by reason alone. The natural law is understood as a set of precepts or rules against which positive laws can be measured for their moral validity. Because these rules or precepts are universal their proper understanding excludes conflicting moral judgments about any positive law to which they are applied. In principle, the natural law can nullify the positive laws of a state. The moral validity of positive law obtains only insofar as its content corresponds to the standards of the natural law. Finally, the doctrine usually claims that for the existence of a just social order the laws of nature must be exemplified in the positive law. With this at least tentative usage in mind we may now consider Aristotle and that which is "by nature" (*physis*) in his texts.

Aristotle's views of law are not easily determined. The sources are not uniformly located, and their meanings do not enjoy a scholarly consensus. But we can begin our quest for his views by noting the claim in the *Nicomachean Ethics* that the moral part of human behavior is understood as "reason prompted by desire." (ratiocinative desire).<sup>1</sup> While Aristotle also claims that moral virtue must involve the factor of habit, habit alone will not account for moral choice. It is also required that an intellectual virtue, or a practical wisdom be present. Indeed, this wisdom or *phronesis* is "indispensable to moral virtues and is implied by them."<sup>2</sup> Ethical wisdom as a variety of *phronesis* always involves action and choice, but its determinations are contingent and variable, or true for the most part and

adapted to particular situations. Aristotle opposes *phronesis* to theoretical wisdom (*theoria*) which is the understanding of the unchanging and necessary.<sup>3</sup> *Theoria* is assigned to the provinces of metaphysics and natural science.

Of course, Aristotle's *Nicomachean Ethics* attempts to provide a method for determining the rules of right action. But the rules which he determines never supply any absolute or unchanging norms for the evaluation of human conduct. Aristotle has excluded from the realm of *theoria* the arts and the practical study which ethics is supposed to be. Law making is a subdivision of practical wisdom, and it cannot achieve the ethical or legal determinations which enjoy the status of *theoria*. But such a status would seem to be required if Aristotle's juristic norms are to be universally unchanging as our usage of the term natural law requires. Such a province of jurisprudence would require *theoria* for its rule formation. But Aristotle excludes this possibility.

But at this point Aristotle's texts present an issue which must be addressed: The *Nicomachean Ethics* speaks of a law which is unwritten and everywhere recognized which does "not exist by people's thinking this or that."<sup>4</sup> Also, in the *Rhetoric* Aristotle speaks of a universal law, a *koinos nomos*, which is unwritten and everywhere recognized.<sup>5</sup> If these references indicate in Aristotle the presence of natural law as we have defined it, then I would argue that we must face the following consequences: (1) parts of Aristotle's jurisprudential and political theories become incoherent because they contain strong positivistic features; (2) we must strongly suggest, and leave open for discussion, the possibility that Aristotle is alluding to something other than our notion of natural law. Due to lack of space this possibility will have to remain the subject of discussion.

In facing the possibility of our first consequent I will maintain that Aristotle's jurisprudence does not entail incoherence because Aristotle does not attempt to generate a *jus naturale* theory. His crucial texts will not support such a position. In the *Politics* it is the state which calls men's rights into existence and pronounces what is just and unjust. Justice can only exist between men whose relations are governed by law. Indeed, it is the positive law which is the determining factor for justice and injustice. In the *Politics* we find:

For justice exists only between men whose mutual relations are governed by law. . . and legal justice is the determination of the just and unjust.<sup>6</sup>

Justice as a virtue is assigned ethical priority only insofar as it involves a conception of all other virtues. The positive law is not derived deductively or inferentially from the prior conception of justice.

Positive laws, too, are not to be confounded with the principles of a constitution. Laws in Aristotle are rules by which magistrates should administer the state, and by which the state proceeds against offenders. All laws must be laid down to fit the various constitutions. They are posterior to the constitution. The constitution is not made to fit the laws.<sup>7</sup> It is by reference to many kinds of constitutions, not to paradigms of natural law, that the legislator knows the best laws. It is also the case that the goodness or badness of laws is relative to the constitution for which they are made.<sup>8</sup> Aristotle even suggests that the law may be understood as the will of a particular class.

In Book V of the *Nicomachean Ethics* Aristotle presents his famous analysis of justice and its various subdivisions. Here Aristotle refers only in passing to a "natural justice" for his focus is on political justice which he divides into complete or universal and particular justice. Since complete justice is identified with the whole of virtue and complete citizenship, there is apparently no implication here for natural law. Particular justice divides into distributive and corrective justice. Distributive justice allocates rewards according to merit and by service to the state. Natural law is nowhere used as a criterion for this distribution. Corrective justice determines rewards and punishments according to a mathematical formula which prescribes what is proportional in a given case. The appeal is never to a natural law. Here again Aristotle conceives the status of the law as mere positivity.

There is, however, some further material in the *Rhetoric* and the *Nicomachean Ethics* to which we must refer briefly. In the *Rhetoric* at 1373b Aristotle refers to a universal law and a natural justice which are binding on all men. But he gives no specific analysis of their nature and he assigns to these no status regulative of the positive law. But in the *Nicomachean Ethics* Aristotle claims that this justice by *physis* is subject to change.

This however is not true in the unqualified sense, but is true in a sense; or rather with the Gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable.<sup>10</sup>

Here it is difficult if not impossible to see how a law "by *physis*" which is subject to change can serve as a stable criterion by which positive law could be either nullified or sanctified.

In conclusion I have argued that Aristotle's legal texts which are associated with *physis* do not support a doctrine of natural law. Neither can the *physis* passages act as a universal and constant set of criteria by which we judge the validity of positive law. We have seen that Aristotle recognizes

good and bad law, but good or bad positive law is nowhere denied the status of true law, as is sometimes the case in Plato. The ethical ends which law must serve are varied, and they are defined by *phronesis*. *Phronesis* is not assigned the task of revealing any unchanging criteria of natural law. Nor is *theoreia* anywhere assigned this task. Indeed, part of the relevance and validity of positive law is determined "from above" as it were. But the higher agency here is the constitution, and the constitutional form varies from polity to polity. Law has no power to command obedience aside from the constitutional power of the state (*Politics* 1269a 20). Finally, the law has no status in the Platonic forms, or in the unity of goodness doctrine. If goodness is a unity which exists separately or absolutely, said Aristotle, it clearly will not be attainable by man.<sup>11</sup>

Aristotle's actual political theory makes it necessary, then, to re-examine those passages in which he speaks of a universal law and justice "by *physis*." This paper does not propose that there are not social and even moral entities which are "by *physis*." It only cares to examine the implications of a legal order "by *physis*" when we are intending natural law doctrine. Also this paper does not claim that those passages which refer to "universal law," and "universal justice" are meaningless or that they have no systematic import. Their import can be explored in discussion if desired. Rather, I want to suggest that the "by *physis*" passages, when they are construed as an immanent of actual doctrine of *jus naturale*, render Aristotle's teaching on politics, law and ethics problematic if not incoherent.

#### Notes

1. *Nicomachean Ethics* 1139b4.
2. *Nicomachean Ethics* 1144b20.
3. *Nicomachean Ethics* VI, 1-4.
4. *Nicomachean Ethics* V, 7, 18.
5. *Rhetorics* 1368b9.
6. *Politics* 1283a.
7. *Politics* 1289a15.
8. *Politics* 1309b35.
9. *Politics* 1296b35.
10. *Nicomachean Ethics* 1134b 25-29.
11. *Nicomachean Ethics* 1096b.

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And this activity alone would seem to be loved for its own sake; for nothing arises from it apart from the contemplating, while from practical activities we gain more or less apart from the action.<sup>2</sup>

To say that the state of contemplation of truth is an end in itself is not, however, to say that it is not a good. Quite the contrary, it is the highest good, conferring upon man all those goods which he is seeking in his practical activity. Contemplation is not discontinuous with practical activity; rather it is the culmination of practical activity, being that state of active being in which the good no longer remains a goal sought but is actualized.

The activity of pure contemplation of truth (i.e., the exercise of theoretical reason for its own sake) has, in Aristotle's view, intrinsic value. And yet knowledge of truth is also of high instrumental value in practical activity. The highest good to which our practical reason can aspire is the purely contemplative state. This state in turn yields that true knowledge which most perfectly guides our practical pursuits. It is in this latter sense that *sophia* is *above* *phronesis*; and yet, paradoxically, it also *serves* *phronesis* and may be thus viewed as subordinate to it. *Sophia* and *phronesis* are dialectically related for Aristotle: they may be distinguishable but they are certainly not separable.

We have been focusing on the ancient doctrine of truth versus goodness. The analogous question which has been raised in recent times concerns whether or not factual propositions are value free. Many have wished to entirely separate the sphere of fact from that of value in such a way as to make the factual realm the sphere of objectivity and the valuational realm a quite subjective sphere. For instance, it may be held that something either is or is not a chair: this is fact. But whether this chair has or has not value is viewed as dependent on whether some subject takes an interest in it. Value, then, is viewed as not being intrinsic to objects but as arising only in the interaction of objects with subjects. The subjective interest in an object, as it were, *casts* value upon the object. If that subjective interest is withdrawn the value of the object also disappears.

Can we distinguish the realm of value from that of fact by the criterion of subjective interest? Before we attempt to answer this question let us state succinctly the position itself that is in question. A thing is factually what it is regardless of whether or not any sentient being takes an interest in it. A thing acquires value when and only when a sentient being takes an interest in it.

To illustrate this view and to facilitate the answering of our question let us imagine the following situation. A race of intelligent sentient beings residing on planet X discover that their star is about to nova and destroy

their solar system. Hoping to escape destruction and migrate elsewhere in the universe they build a space vehicle capable of indefinitely supporting their lives and of carrying them enormous distances through the universe. They set off in search of another habitable planet.

Our Space Emigrants are now approaching planet Y, a planet before this time unknown to any sentient being in the cosmos. Planet Y is, however, a planet. This is a fact independent of its being known by any sentient being. As yet it has no value. Suddenly the instruments in the space vehicle register the existence of planet Y. Our Space Emigrants lean forward eagerly over their instruments. They train their radio telescopes and visual telescopes and all their other long distance sensing devices on this planet. As their interest beams toward planet Y the planet begins to glow with a newly acquired property—value!

As data begins to collect regarding planet Y the Space Emigrants are disappointed to see no indications of the planet's being habitable. Their interest in the planet begins to wane. They make further investigations into the nature of the planet to see if it might serve them in some other way, perhaps for the replenishment of supplies. Further data reveals the planet destitute of anything of use. The Space Emigrant's interest in planet Y has been steadily waning; it now ceases altogether. They withdraw the focus of their instruments from planet Y and continue on their course through space. Planet Y ceases to glow with value and returns to its previous state of being a valueless planet, a valueless fact.

Planet Y had been valueless; it then acquired value for the short while the interest of the Space Emigrants was directed toward it; it then lost its value again when that interest was withdrawn. Its factual nature as a planet, however, never changed in any way during this acquisition and loss of value.

Our Space Emigrants are now approaching another heretofore unknown planet, planet Z. They aim their instruments with great interest at planet Z. Planet Z begins to glow with value. As data comes in the Space Emigrants are excited to note that planet Z gives signs of being habitable. Their interest in planet Z increases, and planet Z begins to acquire greater value. It becomes obvious that planet Z will provide certain needed supplies. Interest grows further and planet Z acquires still more value. Finally all the data is in: planet Z is perfectly habitable, a veritable paradise, a haven for our Space Emigrants. The Space Emigrants could not be more interested. Planet Z acquires enormous value now, the value of a home.

If we analyze the above story we will find several stages of developing interest and several types of value present. On approaching anything that presented itself as a celestial body the Space Emigrants displayed interest.

A celestial body is potentially a planet. When they had ascertained that a celestial body was a planet their interest increased somewhat: being a planet it is potentially habitable. At both of these stages interest is generated not by the *presence* of the value sought but by its *potential* presence. If it turned out that the valuable property sought (namely, habitability) was not actually present in the planet (as in the case of planet Y) interest waned. If it turned out that the valuable property was actually present (as in the case of planet Z) then interest became very great. Interest, then, is correlated both with the *actual* presence of value and with its *possible* presence. To determine whether or not an object of possible value possesses actual value it is necessary to ascertain the factual nature of the object. If the object is discovered in fact to have the properties sought, it is then actually valuable and its value depends upon its possessing these particular factual properties.

It would appear from the above that whether or not something is valuable is far from being independent of its factual nature. The fact that interest is taken in an object does not make it actually valuable. Quite the contrary, despite the fact that interest is taken in an object that object may in fact be valueless. Rather than saying that interest generates value it would be more proper to say that the actual or possible presence of value generates interest. Further, only the *actual presence* of value *sustains* interest: if potential value turns out not to be actual interest wanes and disappears.

In the situation of the Space Emigrants as we have pictured it the possible presence of value stimulates a theoretical interest in determining the factual properties of the object. This theoretical interest generates cognitive activity. What is sought is a knowledge of the factual nature of the thing, a knowledge which will reveal whether the thing has or does not have the properties which will make it actually valuable. This cognitive or theoretical interest may certainly be a very lively form of interest yet it does not *make* the object valuable. Theoretical interest does not *cast* value *upon* the object, rather it looks to see if there is value *in* the object. Thus we see that behind the theoretical interest which seeks the factual nature of anything there lies a practical interest which concerns value.

Theoretical interest exists if and only if the object of which factual knowledge is sought is seen as having possible value. If this analysis is correct it confirms the Platonic-Aristotelian view that the theoretical search for Truth (fact) is motivated by a prior concern for a search for the Good (value). The pursuit of value gives rise to the pursuit of fact and it is in fact that value is discovered.

We have often heard in recent axiological debates that terrible difficulties are encountered when we try to reduce propositions concerning values to factual propositions. We have heard that it is just not possible to derive valuational propositions from factual propositions, nor to derive "ought" from "is" and so forth. The foregoing analysis raises the possibility that this entire enterprise which aims to reduce values to facts has put the cart before the horse. It may well be that propositions concerning values are primitive and that factual propositions are derivative upon valuational propositions. The problem would then be to show not how "ought" is derived from "is" but how "is" is derived from "ought"; how, in other words, facts are derived from values. This alternative approach to the problem certainly seems worth exploring in face of our failure to date to reduce values to facts.

#### NOTES

1. Aristotle, *Nicomachean Ethics* in *The Basic Works of Aristotle*, ed. McKeon (Random, 1941) p. 935.
2. Aristotle, *Op. Cit.*, p. 1104.

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